IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LABOUR REVISION NO. 16 OF 2021

(Originating from Labour Dispute No. CMA/ARS/57/2020)

MOSES LEMONGI MOLLEL..APPLICANT

VERSUS

JUAPOLE INVESTMENT & SAFARIS LIMITED............................RESPONDENT

JUDGMENT

25/10/2021 & 28/01/2022

GWAE, J

This revision application was filed in this court by the applicant Moses Lemongi Mollel against the decision of the Commission for Mediation and Arbitration (CMA) which was delivered in favour of the respondent. Juapole Investment and Safaris Limited. In the application the applicant is praying for the following orders;

1. That, this court be pleased to revise and set aside the Arbitrator's Award of the Commission for Mediation and

Arbitration of Arusha at Arusha dated on the 26th February 2021 in Dispute No. CMA/ARS/ARB/57/2021.

2. Any other relief(s) this court may deem fit and just to grant.

The application is supported by an affidavit of the applicant's counsel Mr. Peter Kuyoga Nyamwero, the respondent on the other hand, seriously challenged the application through her counter affidavit sworn by the respondent's General Manager one Jelle Kramer who maintained that the applicant's termination was both substantive and procedural fair as per the impugned arbitral award.

Aggrieved by the termination from the respondent, the applicant referred the matter to the CMA claiming that he was unfairly terminated in terms of substantive and procedural aspect. The CMA gave its award in favour of the respondent stating that the evidence sufficiently established that, the applicant was fairly terminated, consequently the complaint was dismissed for lack of merit.

The applicant was dissatisfied with the award and has filed the present application praying for its revision on a total of seven (7) grounds, which are: -

1. That, the Commission erred in law and fact in holding that the respondent proved the allegation which the applicant stood charged in the disciplinary hearing.
2. That, the Commission erred in law and fact in holding that there was a log book tendered in the disciplinary hearing which the applicant denied to justify after being given by the chairman of the disciplinary hearing.
3. That, the Commission erred in law and facts for failure to properly evaluate the evidence on record.
4. That, the Commission erred in law and in fact in holding that there was fair reason preceding the termination of employment of the applicant and erred to hold that the punishment for stealing and bribery was fair.
5. That, the Commission erred in law and facts in holding that investigation report is not necessary to prove that there was investigation conducted before scheduling disciplinary hearing.

6. That, the Commission erred in law and fact in concluding that there was no procedural irregularity while the applicant was not afforded right to appeal and right to mitigate after conviction.
7. That, the Commission erred in law and in facts in concluding that the law abhors substantive unfairness more than procedural unfairness.

At the hearing of this application the applicant was represented by the learned counsel Mr. Peter Kuyoga Nyamwero while the respondent enjoyed legal services from advocate Stephen Mushi from Aymak Attorneys. With leave of this Court, hearing of the application was by way of written submissions which I shall consider while determining the grounds of the application.

Before embarking to the determination of this application, it is pertinent to look at the issues that were framed at the Commission which are as follows;

1. Whether the applicant was terminated on fair reasons.
2. Whether fair procedures were complied with.
3. What are the reliefs to both parties.

Looking at the issues framed at the Commission together with the grounds of this revision as stated in the applicant's affidavit, this court is of the view that the issues to be determined by this court are;

1. Whether the Commission was justified to hold that the applicant was terminated on fair reasons.
2. Whether the Commission was justified to hold that the applicant was terminated on fair procedures.
3. What are the reliefs of the parties.

On the **first issue,** it is the complaint of the applicant that the respondent did not give sufficient reasons to justify fair reasons for his termination. Expounding this issue, the applicant in his submission argued that there was no any document that was tendered at the disciplinary hearing to prove that he had committed the offences charged. Furthermore the applicant also complained that there was no evidence to prove that there was communication between himself and one Rumashael whom he is alleged to have bribed by offering him 20 bags of cement from their supplier nor was there evidence to show that the said Rumishael collected the cement from the supplier as testified at the Disciplinary hearing that he was offered 20 bags of cement by the applicant as bribe and that he indeed went to

collect them from the supplier and after collection he reported the incident to the senior management. It was therefore his view that he was terminated on unfair reasons as there was no proof of fraud or theft.

In line with the issue of fair reasons it was also the complaint of the applicant that during the disciplinary hearing and even on termination he was charged with the offences of (i) Accusations of gross misconduct, namely; fraud or misappropriation of company materials / funds and (ii) Dishonest and gross misconduct, namely; theft and unauthorized possession of company materials and or properties. However, at the CMA the award was to the effect that the applicant had committed the offence of stealing and bribery however according to the arbitrator, the applicant's misconducts were not the offences to which led to his termination.

On the other hand, the respondent vigorously submitted that, the allegations against the applicant were proved through exhibits PE6 and PE7 which was a log book that showed the difference in number of cements that were collected from the supplier, the used ones and those which remained in the stock. The respondent went on to state that at the disciplinary hearing the applicant was also given the right to investigate the log book but he refused and even when he was asked to respond to the allegations, he did

not give any reasonable explanations, the respondent concluded that even if the disciplinary hearing proceedings do not show that such evidence was tendered but that alone it does not mean that, there was no documentary evidence at all.

As to the award of the learned arbitrator, the respondent commented that, it is possible to have an alternative verdict and that, the applicant had suffered no prejudice due to the alternative verdict found by the arbitrator who substituted the offences charged against the applicant in the disciplinary hearing form with bribery and stealing.

In the instant case the alleged reasons for termination were on accusation of gross misconduct, namely; fraud or misappropriation of Company materials/funds and Dishonesty and gross misconduct, that is theft and authorized possession of company materials and or properties. The question that follows is whether the respondent adduced evidence in proving the allegations leveled against the respondent.

Having gone through the records in particular on the proceedings of the disciplinary hearing, I hasten to join hands with the applicant in that, in proving fair reasons for his termination, a lot had been left out by the

respondent to justly and fairly justify a holding that, there were fair reasons for the termination. Examining and looking at the nature of the allegations charged against the applicant were nothing but serious offences by their nature which needs strict proof than that of a balance of probability. In the first allegation the applicant was charged with gross misconduct as earlier explained. In proving allegations involving fraud, the standard of proof is a bit higher than other misconducts as was correctly emphasized by the Court of Appeal of Tanzania when facing the similar situation in the case of **City Coffee Ltd vs. The Registered Trustee of Ilolo Coffee Group,** Civil Appeal NO. 94 of 2018 (Unreported) when it had the following to say;

> "It is clear that regarding allegations of fraud in civil cases, the particulars of fraud, being a very serious allegation, must be specifically pleaded and the burden of proof thereof, although not that which is required in criminal cases; of proving a case beyond reasonable doubt, it is heavier than a balance of probabilities generally applied in civil cases."

Being guided by the above position of the law in relation to the matter at hand, it is vividly clear that, the respondent's evidence is insufficiently to hold that there were fair reasons for the termination on the following reasons that; from the disciplinary hearing it is clear that it was only oral testimony

that was adduced by the applicant through one Jelle Kramer and Rumishaeli to prove the allegations. From their oral testimonies, this court would have expected further prove such as tendering of a report or rather a log book as referred by the respondent to prove on the fraud or misappropriation of the respondent's funds.

More so, as rightly submitted by the applicant's advocate, this court finds that there was also lack of enough evidence to substantiate that one Rumishaeli collected 20 bags of cement from the supplier as bribe from the applicant. It has to be noted that in this case the log books which showed the differences in purchasing of the cement were tendered at the CMA and not during the disciplinary hearing. This court finds it improper as the basis of the applicant's termination is not founded at the CMA but rather during the disciplinary hearing where the fate of the employee's employment contract is determined. Thus, every proof to substantiate termination had to be adduced by the employer at the disciplinary hearing. The respondent has alleged that, it was the applicant who refused to go through the report book, of course this might be true but all the same this court is of the considered view, as admitted by the respondent, the evidence as to the log books ought

to be reflected in the proceedings of the disciplinary hearing even if the applicant refused to go through them as contended by the respondent.

As to the complaint of the offences referred by the Arbitrator in his award, this court has observed that, the learned arbitrator in his finding wrongly substituted the offences of bribery and stealing (reference is made to page 8 of the typed judgment). Although this court finds that the Arbitrator misdirected himself to offences other than those found in the notice of disciplinary hearing, disciplinary hearing form or in the termination letter but yet this court finds out another irregularity that appears in the notice of hearing and disciplinary hearing. The applicant was charged with two offences of accusation of gross misconduct, to wit; fraud or misappropriation of Company materials/funds and Dishonesty and gross misconduct, these were; theft and authorized possession of company materials and or properties.

However, in the termination letter it appears that the applicant was terminated on unrepairable breach of trust between employer and employee. This again is another anomaly, much as the offences charged in the disciplinary hearing involve breach of trust but the termination letter ought to have reflected the offences as charged in the disciplinary hearing.

Having explained as above, this court is of the view that the applicant was substantively unfairly terminated.

As to the second issue, whether the Hon. Arbitrator was justified to hold that the applicant was terminated of fair procedures.

The applicant's complaint on this issue is as follows; **firstly,** that, an investigation was not conducted and that due to the nature of the allegation an investigation report ought to have been tendered, **secondly,** that, he was not given an opportunity to mitigate, **thirdly,** that, he was terminated before exercising his right to appeal and **lastly**, that, the chairman of the disciplinary hearing was impartial as he was an advocate of the respondent and not in a senior managerial level.

The respondent strongly resisted and stated that, an internal audit was conducted amounting to an investigation and that investigation is not mandatory in every case, the log books alone was enough to establish the allegations. As to the impartiality of the chairman of the Committee which conducted disciplinary hearing, the respondent submitted that the chairman was not an advocate of the respondent and that he was a senior manager. The respondent further argued that the applicant was given his right to

appeal and also his right to mitigation was not recorded but is a minor defect which does not override the fact that the offence was committed.

This court is aware that every step mentioned under Rule 13 of GN 42/2007 may be adhered to but the same should not be applied in a checklist fashion; meaning that the process used must be nearly adhered to basics of a fair hearing in the labour context depending on circumstances of the parties, so as to ensure that termination is not reached arbitrarily (See the case of **NBC Ltd v. Justa B. Kyaruzi,** Revision No. 79/2009 Mwanza Sub Registry (Unreported).

In the matter at hand, it is apparent from the records that, the termination was procedurally unfair because the respondent faulted the mandatory procedure indicated under Rule 13 (1) of the GN 42/2007 which required an employer to conduct an investigation to ascertain on whether there are grounds for hearing to be held. Indeed, I agreed with the applicant that the respondent did not conduct an investigation and no report was tendered at the disciplinary hearing. Much as I am aware that not in all cases where investigation is mandatory however as correctly submitted by the applicant, this court is of the firm view that the nature of the allegations levied against the applicant needed an investigation and a report thereto.

The respondent in defending his case has established that investigation report was not important as the log books collectively tendered as exhibits PE6 and PE7 were enough. With due respect I find this to be a misconception of the meaning of Rule 13 (1) of the Code on reasons that in the first place the log books by themselves cannot be termed as a report, secondly, even if the said log books are substituted to be the report the same were not tendered at the disciplinary hearing, third, PW1 on cross examination when asked on the purpose of the administrative leave he stated that was to do more investigation/to be on suspension. With this piece of evidence, it is apparent that the applicant was suspended pending an investigation and thus it was expected the respondent to tendered the investigation report at the disciplinary hearing.

Another procedural irregularity complained by the applicant is that the applicant was not accorded with the right to mitigate. This is a requirement provided under Rule 13 (7) of the Code, I need not labour much on this irregularity as the respondent has also conceded on this irregularity that the disciplinary hearing proceedings shows that the applicant was not accorded the right to mitigation.

On the issue of impartiality of the chairman the applicant alleged that the chairman of the disciplinary hearing one Abraham Moshi was an advocate working with the respondent and he was not a senior manager, therefore he was not impartial. The applicant referred this court to the testimony of PW1 when cross examined stated as follows and I quote;

> "Q: Who was the chairman of the hearing
>
> A: Abraham Mosha
>
> Q: Is he among managerial level of the respondent
>
> A: No
>
> Q: Is he on managerial level to other organization
>
> A: I have no idea
>
> Q: where does he work
>
> A: A lawyer at Maeda Advocates
>
> Q: Was advocate Timothy Maeda before hearing
>
> A: Yes
>
> Q: Does advocate Timothy Maeda represent your company
>
> A: Yes"

From the testimony of PW1 as summarized above it is apparent that, the chairman was an advocate working from the law firm which the respondent was enjoying legal services. More so, it was also established that the chairman was not holding a senior managerial level position in either the respondent nor in any other organization. From the outlooking, it suffices to

say that the said Abraham Mosha did not fit to sit as a chairman of the disciplinary hearing on reasons that he also had interest in the respondent's affairs by being an advocate from the office which offers its services to the respondent but also contravened the requirement of rule 13 (4) of the Code which requires the chairman to be a sufficiently senior management representative.

As to the issue of right to appeal, it was the complaint of the applicant that he was not given an opportunity to exercise his right to appeal as the outcome of the disciplinary hearing was issued on 13th January 2020 and the termination letter was also issued on the same day. From the disciplinary hearing proceeding is shown that the applicant was given the right to appeal against the disciplinary hearing to a higher authority in the management within five days of receiving the document. The document further reveals that, the applicant received the document on the 14th January 2020, thus his right to appeal was to expire on 19th January 2020. However, the termination letter on the other hand appears to have been written on the 13th January 2020 the same date of the issuance of the disciplinary hearing proceedings. Undoubtedly, this was improper and it is as good as to say that the applicant was given his right on one hand and the same was taken away from the

other hand. With respect, one would ask how could the applicant exercise his right to appeal if the termination letter had already been issued? In any way under these circumstances the applicant was prevented from exercising his right to appeal by the fact that before he appealed, he was already issued with a termination letter. Following the above discussed irregularities, this court is equally justified to hold that the applicant was unfairly terminated in terms of procedural aspect.

Having found to the effect that, the applicant was unfairly terminated in substantive and unprocedural aspect, the next question determination is **on the reliefs thereto**.

It has been the position of the law that where the termination is adjudged substantively and procedurally unfair the appropriate remedy is reinstatement unless there are justifiable grounds such as those enumerated under rule 32 (2) (a) to (d) of the GN 67/2007. Reference is made to the case of **MIC Tanzania Limited v. Chris Stratham,** Lab. Div., DSM, Revision No. 271 of 2014 Reported in the Labour Court Cases Digest 2015.

Given the fact that, the parties' contract of employment was initially under a fixed term contract for three (3) months renewable however it is not

clear as to the period of the last contract for an obvious reason that none of the parties managed to prove the length of the period that the applicant would serve if he were not terminated on the 13th January 2020. Remedy in this situation, in my view, is to remit the matter for arbitration only on the period of service in the last contract.

Consequently, this application is granted to the extent that the termination was unfair. However, I direct that, the parties' dispute be heard and determined only on the duration of the parties' last contract of employment so that the applicant can be paid compensation for the remaining period, if any. This being a labour dispute, I refrain from ordering the respondent to bear the costs of this application.

It is so ordered.

M. R. GWAE
JUDGE
28/01/2022