IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

REVISION APPLICATION NO.19 OF 2021

(*C/F Labour Dispute No. CMA/ARS/ARB/83/20)*

BETWEEN

TOURISM PROMOTION

SERVICES (TANZANIA) LTD...APPLICANT

AND

LIVINGSTONE URIO...RESPONDENT

JUDGMENT

14th July & 18th August 2022.

TIGANGA, J.

This is an application for revision of the award by the Commission for Mediation and Arbitration for Arusha, at Arusha, Labour Dispute No. CMA/ARS/ARS/83/20. In this application the applicant moved this court by way of notice of application, chamber summons and an affidavit sworn by one John Mwamakula an employee of the applicant in the position of Manager dully authorised to swear the affidavit and file the same.

The same was made under section 91(1)(a) and (b) and 91(2)(b), (c) and 91(4), (a) and 94(1)(b)(i) of the Employment and Labour Relations Act, [cap 366 R: E 2019], as well as Rules 24(1), (2)(a), (b), (c), (e), and (f) (3) (a)(b)(c) and (d) as well as rule 28(1), (c), (d) and (e) of the Labour Court Rules G/N No.106/2007) seeking for revision of an award by the

CMA and the orders that emanated therefrom which required the applicant to pay the respondent the total of Tsh 8,785,272 within the period of 30 days.

This application is a result of dissatisfaction by the applicant. In his bid to challenge the award, he made the following prayers as presented in his chamber summons supported with an affidavit:

i. That, this Honourable Court be pleased to call for and examine the records of the CMA award made on the 16th February 2021 in Labour Dispute No. CMA/ARS/ARS/83/20 by the Honourable Arbitrator, Mourice Egbert Sekabila for the purpose of satisfying itself as to the correctness, legality or propriety of the proceedings and orders made therein and revise and set aside the same.
ii. That, this Honourable Court be pleased to determine the matter in the manner it considers appropriate.
iii. Any other relief(s) this Honourable Court may deem fit and just to grant.

The Applicant applied for this revision under grounds stated in his affidavit as follows;

i. That, the Honourable Arbitrator failed immensely to reasonable asses the applicant's evidence proving the fairness of the

termination and erroneously concluded in favour of the respondent herein.

ii. That, the Honourable Arbitrator grossly erred in law and in fact by ordering the applicant herein to compensate the complainant, a 24 months' salary compensation of Tsh 8,785,272.00 while in fact the reasons and procedure for termination were fair and the respondent herein had already been paid all his terminal benefits.

iii. That, the Honourable Arbitrator erred in law and in fact for procedural irregularities in admissibility of electronic evidence i.e., there was no authenticity in the email tendered by the respondent herein, exhibit D5 as per the requirement of the Electronic Transactions Act No. 13/2015.

iv. That, the Honourable Arbitrator erred in law and in fact for failure to properly analyse the evidence adduced and documents tendered before him by the applicant herein and failure to reach a proper and fair conclusion. He ignored the evidence adduced by PW2 a medical officer from Kaloleni Health Centre, evidence which proved that the ED's submitted by the respondent herein were forged and not from Kaloleni Health Centre as claimed by respondent.

v. That, the Honourable Arbitrator erred in law and in fact by the ruling that the reason for termination was unfair. He relied only on the

evidence adduced by the respondent herein while the evidence adduced by the applicant's witnesses show clearly that the applicant had valid reasons to terminate the respondent.

vi. That, the Honourable Arbitrator erred in law and in fact by ignoring the closing submission of the applicant herein in his decision making.

vii. That, the Honourable Arbitrator erred in law and in fact by ignoring many pertinent facts and evidence and misconstrued the oral and documentary evidence produced at the Commission for Mediation and Arbitration.

The application was opposed by the respondent, who filed the counter affidavit sworn by Mr. Frank Wilbert Makishe, learned Advocate. With leave of the court, parties argued this application by way of written submissions. At the hearing, the Applicant was represented by Ms. Salvasia N. Kimario, learned Counsel while the respondent was represented by Mr. Frank Wilbert Makishe, learned Advocate. In the submission in-chief, Ms. Kimario submitted that it is the duty of the employer to prove that he had sufficient and fair reasons for termination of the Employee's employment contract. She said that, in the case before the CMA, the Employer produced both oral and documentary evidence

proving that, he had fair reasons for terminating the employee basing on his despicable conducts.

Therefore, the respondent was terminated fairly and the reasons for termination were dishonesty, breach of trust and unauthorized absence from work.

She further submitted that, the respondent is not entitled to any compensation since he dodged from work, forged the sick sheets, all these made him untrustworthy person and dishonest, the Honourable Arbitrator erred in law and in fact by not taking these claims into consideration and unfairly awarding the Respondent the sum of 24 months' salary compensation which he does not deserve.

Exhibit P6 shows clearly how the disciplinary hearing was conducted by the applicant and how the respondent was found guilty of the disciplinary offence against him, leading to his termination.

It is his further submission that, the Honourable Arbitrator admitted and relied on exhibit D5 without considering the accuracy of the said information and the proper procedure in tendering electronic evidence, despite the fact that the applicant objected the admission of the same. Apart from the emails there was no any other document such as an affidavit to prove the authenticity of the email.

He further submitted that, with regard to the sick sheets claimed by the respondent to have been issued by Kaloleni healthy centre, the applicant managed to call PW2 who is the medical officer working at the said health centre, who stated before the CMA that, the respondent did not attend that hospital, since there was no record showing his name in the system or the MTUHA book and the ED's was not issued by the healthy centre alleged by the respondent. He submitted that, had the CMA been keen enough, then it would not have found that the termination was unfair.

In reply submissions, the Learned Counsel for the respondent submitted that, it is upon records that, DW2 Doctor Anna Kimaro testified that the respondent went to Kaloleni healthy centre and was attended by a medical intern who is not allowed to use the healthy centre stamp hence, the sick sheets were invalid.

He further stated that, it is upon records that the respondent is the registered member of NHIF and on the material date he used the NHIF services at Kaloleni healthy centre as indicated in exhibit D3, this service can not be used without retrieving authorization number from the system. He also submitted that, exhibits P1 and P2 were not forged they were obtained innocently and without malice.

On that point, he further submitted that, the respondent was not given the right to be heard since the moment he was served with the notice to attend the hearing while he had a 10 days ED and he referred exhibit D6, the respondent wrote a letter requesting the applicant to adjourn the hearing as evidenced by exhibit D5 but the applicant refused.

He further replied that, exhibit D5 which is the print out was taken from the original source and the examination to its authenticity was called upon. He further stated that, the device having the original data (laptop) was taken before the CMA for it to confirm the authenticity. He also stated that, the applicant was supposed to object the same before the CMA but not rising it at this stage.

The learned Counsel also submitted that, the MTUHA book which was supposed to have the names of the sick persons was not presented before the CMA hence it is unjustifiable to say that, the applicant did not attend at Kaloleni Healthy Centre on the material date.

The fact that the medical officer who attended the respondent was a medical intern holds no water since those are internal matters of Kaloleni health centre which have enough details as to the work arrangements of their medical officers.

In rejoinder the applicant reiterated by way of insistence what she submitted in her submission in chief.

The issue for determination before this court is whether this application has merit.

In deliberation of both parties' submissions, this Court found it prudent to be guided by the relevant law. In law the matter relating to termination of employment is regulated by section 37 of the Employment and Labour Relations Act (supra). For easy reference the same is hereby reproduced hereunder.

> *"(1) It shall be unlawful for an employer to terminate the employment of an employee unfairly.*
>
> *(2) A termination of employment by an employer is unfair if the employer fails to prove-*
>
> *(a) that the reason for the termination is valid;*
>
> *(b) that the reason is a fair reason if it-*
>
> *(i) related to the employee's conduct, capacity or compatibility; or*
>
> *(ii) based on the operational requirements of the employer, and*
>
> *(c) that the employment was terminated in accordance with a fair procedure.*
>
> *(3) N/A*

*(4) In deciding whether a termination by an employer is fair, an employer, arbitrator or Labour Court shall take into account any **Code of Good Practice published under section 99.***

(5) N/A" [emphasis supplied]

These are the conditions for the court to find that the termination of employment of the employee by the employer is fair. The code of good practice referred to by subsection 4 of section 37 is the **Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007** and the relevant provision which is required to be relied upon by the arbitrator or the Court is Rule 12-(1) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007 which provides that;

> *"Any employer, arbitrator or judge who is required to decide as to whether termination for misconduct is unfair shall consider-*
>
> *(a) whether or not the employee contravened a rule or standard regulating conduct relating to employment;*
>
> *(b) if the rule or standard was contravened, whether or not*
>
> *(i) it is reasonable;*
>
> *(ii) it is clear and unambiguous;*
>
> *(iii) the employee was aware of it, or could reasonably be expected to have been aware of it;*
>
> *(iv) it has been consistently applied by the employer; and*

(v) termination is an appropriate sanction for contravening it.

The law continues to provide for limits of the employer in terminating the employee, under subrule (2), (3), (4) and (5) as follows;

(2) First offence of an employee shall not justify termination unless it is proved that ***the misconduct is so serious that it makes a continued employment relationship intolerable****.*

(3) The acts which may justify termination are;

(a) gross dishonesty;

(b) willful damage to property;

(c) willful endangering the safety of others;

(d) gross negligence;

(e) assault on a co-employee, supplier, customer or a member of the family of, and any person associated with, the employer; and

(4) In determining whether or not termination is the appropriate sanction, the employer should consider: -

(a) the seriousness of the misconduct in the light of the nature of the job and the circumstances in which it occurred, health and safety, and the likelihood of repetition; or

(b) the circumstances of the employee such as the employee's employment record, length of service, previous disciplinary record and personal circumstances.

(5) The employer shall apply the sanction of termination consistently with the way in which it has been applied to the

same and other employees in the past, and consistently as between two or more employees who commit same misconduct."

From these provisions, it is glaringly clear that, section 37 of the Employment and Labour Relations Act, (supra), must be read together with the Code of Good Practice made under section 99 of the Employment and Labour Relations Act. These two laws read together, the following are the clear directives to be complied with, before the verdict of termination is imposed by the employer and upheld by Arbitrator or the Court;

(i) The first offence/misconduct of an employee shall not justify termination,

(ii) The termination may only base on the first offence/misconduct if it is proved that the misconduct is so serious that it makes a continued employment relationship intolerable.

(iii) If that offence/misconduct relates to damage to the property of employer, then it must be established that the act was done willfully.

(iv) Taking into account the nature of the job and the circumstances in which it occurred that misconduct is so

serious to endanger health and safety, and there is a likelihood of repetition;

(v) Looking at the circumstances of the employee such as the employee's employment record, length of service, previous disciplinary record and personal circumstances the misconducts merits termination.

This provision has already received judicial interpretation in a number of cases. One of them is the case of **Stamili M. Emmanuel v. Omega Nitro (T) Ltd,** Lab. Div., DSM, Revision No. 213 of 2014, 10/04/2015, Aboud, J. held that:

> *"It is the established principle that for the termination of employment to be considered fair it should be based on valid reason and fair procedure. In other words, there must be substantive fairness and procedural fairness of termination of employment."*

The fairness of the reason should be seen on the record.

In line with the above position, the applicant was charged with dishonest, absenteeism and forgery. He was accused to have forged the ED's which was seemingly issued by Kaloleni Health Centre. It is on that, pretext of forgery, the respondent was found to be dishonest to his employer, and since the alleged ED which exempted him from duties was

disowned by the medical officer in charge of the health centre which issued it then, he was taken to be absent, therefore charged for absenteeism.

As it can be deciphered from the record, the employer received the ED from the respondent but doubted it, it inquired from the centre wherefrom the alleged ED were issued. Having so asked PW2 who was the doctor in charge of the centre responded to them after she has investigated the record and the system used in service delivery at the centre and found that, the said patient was not registered in the system, called GOT – HOMIS but the name of the respondent was not registered. He also checked MTUHA a register in which all patient is recorded, but the name of the respondent was not there. However, the PW2 pointed out the shortfall in the alleged ED forms one being given by unauthorised persons as those who attended him were not a doctor but an internee. That even the stamp used was no longer in use and that the form exempted the respondent from duties for 5 days beyond the capacity of the health centre which can give ED for not more than three days. It is on the bases of these findings the employer believed that the two documents were forged.

The CMA basing on the evidence of PW2 actually believed that, the respondent was attended by Kaloleni health centre, if the person who attended him was unauthorised, then it was not his duty, it was an internal arrangement of the health centre which was in the opinion of the learned Arbitrator lack of internal control which was bend control of the respondent, but the evidence is clear that he attended at the heath centre and was given an ED. It is the Arbitrators view that, the fact that the respondent was attended by a medical intern is illogical since it does not vitiate the fact that he was attended by the medical intern he was sick.

However, the Hon. Arbitrator did not address the issue of the genuiness of the said ED. From the evidence of PW2, reading the same between line, it meant that the ED issued to the applicant was not genuine. I hold so because, it is her evidence that the capacity of the centre is to issue ED for not more than three days, and that it is herself who stamp the ED forms.

PW2 went as far as telling the court that, looking at the type of disease and the medication prescribed to the respondent. The same was not suiting the ED at all. Her evidence was the evidence from the authoritative person in as far as the functionability of Kaloleni health centre is concern. It was not supposed to be taken lightly. For any

employer, he would really be ready to release the employee to rest and exempt him from duties only if he real deserves it. This is for the obvious reasons that employees are hired for work.

Therefore, the employer has the right to get from the employee the maximum he is entitled from him. He therefore has the right to investigate on the genuiness of the document exempting the employer from duty as did by the respondent and is entitled to exempt the employee from duty only when the reasons and the authority directing him to do so is genuine. On the other hand, if the exemption is not genuine, then the employee is entitled to refuse it.

In my view, from what PW2 said in her testimony, the ED was not genuine. Therefore, absent from duty of the respondent on the pretext of the ingenuine ED is nothing but absenteeism something which contains dishonest as well.

With regards to the claims of forgery raised by the applicant, this needs not detain me much. Forgery is a criminal offence and it must be proved by evidence. Since there is no evidence lead to prove forgery then I hold that, the CMA was justified to hold that forgery was not proved as required.

Furthermore, for an allegation of forgery to stand, it was proper for the applicant to report the matter to the Police station and allow investigative machinery to investigate and if satisfied that there is evidence to that effect to take the suspect of that forgery to court and prosecute him something which was not done. It is my considered view that, the applicant has failed to substantiate the allegation of forgery.

In sum, having proved absenteeism and dishonest on the part of the respondent, but found forgery to have been not proved, then it is instructive to find that, the applicant had genuine and fair reasons to charge the respondent. I find absenteeism and dishonest although are first offence/misconduct of the respondent, they are so serious that it makes a continued employment relationship intolerable.

Also taking into account the nature of the job and the circumstances in which the absenteeism and dishonest so serious to endanger behavior of other employee of the employer and if left there is a likelihood of repetition. Last, in my considered view, and taking into account all other factors, including the length of service, and personal circumstances the misconducts merits termination.

With regard to the fairness of the procedures for termination, it is a trite law that right to be heard is a fundamental principle to be observed

before determination of a person's rights and duties by any organ of the United Republic of Tanzania, at page 7 of the CMA award, paragraph 2, it is clearly shown that the applicant summoned the respondent for the disciplinary hearing which was scheduled on the 29th October 2019. It is also evident that, the respondent was informed of the hearing but he informed the applicant that since he was still sick, requested for the adjournment of the disciplinary hearing as exhibited by exhibit D5 which is the letter tendered before the CMA as evidence.

It is also evident that, having received that letter from the respondent asking for adjournment, the applicant ignored it and proceeded with the disciplinary hearing in the absence of the respondent. From the record of the disciplinary hearing, I find that, there was no concrete reasons, as to why the disciplinary hearing ignored or refused the request for adjournment. There was no reason of hurry, as on this I tend to find inline with the cerebrated principle of justice, that, justice hurried is justice buried and that however good the speed may be, justice is still better. That said, I find in the same way as found by the CMA on the procedural fairness that, the respondent was condemned without being given opportunity to be heard. The application is partly granted and partly refused.

As earlier on pointed out, for the termination to stand, it must be proved that, the same based on valid reasons, and fair procedure as provided under section 37 of the Employment and Labour Relations Act. Now what is to be done in the circumstances where the reasons for termination are valid and fair but the procedure was flouted. The Court of Appeal of Tanzania, in the case of **Felician Rutwaza vs World Vision Tanzania**, Civil Appeal No. 213 of 2019, CAT-Bukoba. While faced with the similar circumstances quoted with approval the decision of Labour Court in **Sadetra SPRL Ltd vs Mezza & Another**,Labour Revison No. 207 of 2008, (Rweyemamu, J) enterpreted section 40(1)(c) of the Act that,

> *"....a reading of other sections of the Act gives a distinct impression that the law abhors substantive unfairness more than procedural unfairness, the remedy for the former attracts a heavier penalty than the later."*

The court went on and held which accepting what the trial judge decided in that case and held *inter alia* that;

> *"Were respectively subscribe to the above interpretation, for we think it is founded on logic and common sense; it reflects a correct interpretation of the law. Under the circumstance since the leaned judge found the reasons for the appellant termination were valid and fair she was right in exercising her discretion in ordering lesser*

compensation than that awarded by the CMA. We sustain the award."

In this case, I find that the disciplinary hearing was conducted in the absence of the respondent after refusing his prayer for adjournment without giving concrete reasons for refusal, thus leading to unfairness in the procedure.

However, that unfairness can not invalidate good reasons for termination. That said, I find the applicant to be deserving to compensation, but since the reasons for termination was reasonably fair, he, in terms of the authority in **Felician Rutwaza vs World Vision Tanzania**, (supra) deserves lesser that the one awarded by the CMA and actually bellow the minimum compensation prescribed by section 40(1)(c) of the Act. Having assessed the circumstances of this case, I order for compensation of ten (10) months only which is equal to Tsh. 366,053 X 10 =Tsh. 3,660530/=.

It is accordingly ordered

DATED at **MWANZA** this 18st day of August 2022

J. C. TIGANGA

JUDGE