IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MWANZA

AT MWANZA

LABOUR REVISION NO. 11 OF 2021

(Arising from Mediation and Arbitration Award by Hon. Doris A. Wandiba (Arbitrator/Mediator) in Employment Dispute No. CMA/MZ/NYAM/339/2020/24/2021)

THERESIA KIBAO DIKU.....APPLICANT

VERSUS

BUGANDO MEDICAL CENTRE.....RESPONDENT

JUDGMENT

7th June & 12th Sept., 2022

DYANSOBERA, J.:

The applicant was employed by the respondent on 26th day of May, 2014 as a nursing officer II at an initial salary of Tshs. 1,267,000/= and on 26th day of May, 2015 she was confirmed in her employment.

On 28th July, 2020 Editha Mgaya (not in court) was arrested at the respondent's gate with the property which allegedly implicated the applicant. Both Editha Mgaya and the applicant were, on the following day, that is on 29th July, 2020 interrogated. A disciplinary hearing was conducted and ultimately, criminal charges were opened in Nyamagana District Court vide Criminal Case No. 175 of 2020. While the Disciplinary Committee found the applicant guilty, the District Court acquitted her.

On 21st day of October, 2020, the applicant's contract of employment was terminated on the allegations of dishonest and gross dishonest to the

employer and causing loss/damage to the employer by involving herself and aiding to steal employer's property (medicine) in collaboration with Editha Mgaya who is not an employee of Bugando Medical Centre, an act that caused loss to the employer of Tshs. 83,500/= being an actual price of the medicine. Translated in Kiswahili, *kukosa uaminifu kufanya udanganyifu mkubwa kwa kushirikiana na Bi. Editha Mgaya ambaye si mtumishi wa Bugando Medical Centre na kumsababishia mwajiri wako hasara ya Tshs. 83,500/= ikiwa ni gharama halisi ya dawa*. Her appeal to the Appellate Authority was dismissed. It would appear that at the time of the termination of her services, the applicant was an assistant nurse in charge at Bugando Medical Centre and was earning a monthly salary of TZS 1,587,000/=.

Believing that justice was not her triumph, the applicant, on 9th day of November, 2020, referred the employment dispute to the Commission for Mediation and Arbitration vide Labour Dispute No. CMA/MZA/NYAM/339/2020 /24/2021 so that the dispute was resolved through mediation process. The matter, however, failed to be resolved through mediation and as a result, an arbitration was resorted to. The applicant lost as her complaint was dismissed.

In dismissing the applicant's complaint, the Commission for Mediation and Arbitration in its Award dated 15th day of November, 2021, found that there a was valid reason for termination and the termination was procedurally fair.

The applicant was aggrieved by that Award and came to this court in further pursuit of her legal rights. At the hearing of this labour revision, she was represented by Mr. Davis Muzahula, learned Counsel, in the time, learned Advocate Mr. Cornelius Ntungweli, stood for the respondent.

Arguing in support of the application, Counsel for the applicant made the following submission.

With regard to the 1st and 4th grounds in the statement of legal issues arising from material facts, that is whether it was proper for the arbitrator to rule that the termination of the applicant was substantively fair while the burden of proof was shifted to the applicant during the said disciplinary hearing and during the hearing at the CMA and whether it was proper for the arbitrator to rule out that the termination was fair substantively while the party whose confessions were relied upon was never called as a witness. It was his submission that the burden of proof was shifted to the applicant and the evidence was not analysed. According to him, he who alleges must prove. This court was referred to the Evidence Act and Government Notice No. 42 of 2007, rule 9 (3) in particular. Counsel for the applicant contended that the verdict of the Disciplinary Committee was based on the CCTV camera footage, the security guard at the gate and the statement of the accused employee as well as the statement of Bi Hilda Zinga at the Disciplinary Committee. He stressed that the footage of CCTV proceedings at

both the Disciplinary proceedings and the CMA could not prove the incident of theft. Further that the CCTV camera footage did not show where the said person fetched the container and that the said medicines were not tendered at the Disciplinary Committee hearing, they were not mentioned at both the Disciplinary Committee hearing and CMA and that there were no prior allegations of theft.

Respecting the evidence of the applicant, Counsel for the applicant pointed out the applicant was consistently denying having committed the offence and that her confession was unduly obtained. Furthermore, it was argued on part of the applicant that there was nothing showing that the said medicines were kept in the ICU nor was there a prior complaint that the said drugs had been stolen. He was of the view that the evidence given by the respondent was too weak to prove the allegations against the applicant.

With regard to the 2nd ground, Counsel for the applicant submitted that the Arbitrator failed to analyse the evidence before her and this occasioned injustice as there were inconsistencies in the testimonies of the respondent's witnesses.

The decision of the Arbitrator was attacked on another front. It was the argument of Counsel for the applicant that section 37 (5) of the ELRA was contravened. The section, in his view, makes prohibition for any disciplinary action to lie against any employee who has been charged with the criminal

offence which is substantially the same until final determination by the court and any appeal thereto.

On the impropriety of the procedure, Counsel for the applicant submitted that at the time the offence was alleged to have been committed, the employer engaged the police and the applicant was thereby arrested and taken to the police and this explains why she is alleged to have confessed. He emphasized that there was Disciplinary Committee hearing going on while the police were waiting for the applicant at the door. This court was told that there was double jeopardy in that there were criminal proceedings taking place and at the same time disciplinary proceedings were going on. Counsel urged the court to give the position of the status of employee facing a criminal charge while at the same time facing disciplinary proceedings. It was his view that the Arbitrator adopted a narrow and wrong interpretation of section 37 (5) of the ELRA. As to when criminal proceedings start, Counsel for the applicant told this court that it starts when an accused person is arrested and the court has to find an equal stand with the employee if any proceedings should arise.

In resisting the application, Counsel for the respondent, after adopting the respondent's counter affidavit, submitted that the disciplinary charge the applicant was facing was not on theft but *kukosa uaminifu na udanganyifu*.

With respect to the complaint that the termination was unfair, Counsel for the respondent maintained that the respondent based her case on the applicant's admission (SU 1) who did not disown the document both at the Disciplinary Committee and before the CMA and did not cross examine Editha Mgaya when she was testifying at the Disciplinary Committee. The same applied to the evidence on CCTV Camera and that failure to cross-examine means consent and reinforces the case of the opposite party.

In fine, Counsel for the respondent contended that the nature of the business between the respondent and the appellant was about life and the applicant had to be much extra careful. Further that in health business, trust and confidence are of paramount importance. Counsel for the respondent refuted the claims of there being any inconsistent statement and stressed that the witness was testifying on what the CCTV Camera had captured and not what the contents were.

With regard to the application of Section 37 (5) of the ELRA, it was argued for the respondent that when the termination was done, there was no case in any court of law and emphasized that the section is applicable when the matter is in court and not before the police, hence the phrase, 'court proceedings. This court was referred to various case laws on the proper interpretation of Section 37 (5) of the ELRA and Counsel for the respondent insisted that there was no double jeopardy. On there being a valid reason for

termination and the procedure being followed, Mr. Cornelius Ntungweli was emphatic that the termination was substantively valid and the respondent followed fair procedure. In his rejoinder, Counsel for the applicant reiterated what he had submitted in chief.

According to statement of legal issues made under Rule 24 (3) (c) of the Labour Court Rules, the application is based on the five legal issues arising from material facts, namely:

(i) Whether it was proper for the Arbitrator to rule that the termination of the applicant was substantively fair while the burden of proof was shifted to the applicant during the said disciplinary hearing and during the hearing before the CMA.

(ii) Whether it was proper for the arbitrator to draw the conclusion without analysing the evidence adduced before her.

(iii) Whether it was proper for the arbitrator to rule that the termination was procedurally fair while it is on record that the applicant was terminated while at the same time facing criminal case.

(iv) Whether it was proper for the arbitrator to rule out that the termination was fair substantively while the party whose confessions were relied upon was never called as a witness.

(v) Whether it was proper for the arbitrator to rule out that the termination was fair procedurally while the applicant was never given an opportunity of mitigation.

With these legal issues, the applicant prays that the findings of the Arbitrator that termination was substantively and procedurally fair be

quashed and set aside and the court orders reinstatement as prayed in the CMA Form number 1.

In expounding the said legal issues, Counsel for the applicant dropped the fifth issue and argued the remaining four legal issues.

Having given an introduction on what the court is called upon to do and the brief factual background of the matter and having summarized the submissions of both learned counsel, I am now in a position to deliberate on the grounds for revision raised by the applicants.

In resolving this revision, I undertake to be guided by the following factors. One, established legal principle is that for termination of employment to be considered fair it should be based on valid reason and fair procedure. This is the import of section 37 (2) of the Employment and Labour Relations Act No. 6 of 2004.

Besides, Article 4 of the International Labour Organization Convention (ILO) 158 of 1982 provides that:

> *"The employment of a worker shall not be terminated unless there is. a valid reason for such termination connected with the capacity or conduct of the worker or based on operational requirements of the undertaking establishment or service."*

This position was confirmed by this court in the case of **Tanzania Railways Limited v. Mwinjuma Said Semkiwa**, Lab. Div. DSM, Rev. No. 239 of 2014.

Two, it is trite that the employer bears the burden of proving that the termination of the employee was for valid and fair reason. In the case of **Othman R. Ntarru v. Baraza Kuu la Waislamu (BAKWATA)**, Revision No. 323 of 2013 this court observed:

> *"The law puts burden of proof to the employer to prove that he had sufficient reasons and followed the required procedure in terminating the services of the employee".*

The first issue for determination is whether the respondent proved the allegations against the applicant on balance of probabilities.

It is on record that before the Disciplinary Committee the charge levelled against the applicant was the following: -

> *'Dishonest and gross dishonest to the employer and causing loss/damage to the employer by involving herself and aiding to steal employer's property (medicine) in collaboration with Editha Mgaya who is not an employee of Bugando Medical Centre, an act that caused loss to the employer of Tshs. 83,500/= being an actual price of the medicine'*

In order to ascertain whether or not the respondent proved the charge against the applicant, a revisit of the evidence unfurled at the Disciplinary Committee is apothegmatic.

At the Disciplinary Committee, four witnesses testified for the respondent. Peter K. Sayi, the respondent's first witness testified as follows:

Tarehe 28.7.2020 nilikuwa geti la kuingilia magari mida ya saa mbili asubuhi. Nilikagua gari lililokuwa linaingia ndani walikuwemo wadada wawili. Nilikagua hakukuwa na mzigo wowote nikamuuliza dereva kama ana mzigo wowote wa kuandikisha akasema hana. Nikamuuliza unaelekea wapi akasema wanaenda kumwona mgonjwa na kupata matibabu, nikafungua geti wakaingia ndani'.

It is clear that through this witness, there was no evidence that implicated the applicant.

The second respondent's witness was Fidel Nyaonge Mgeta. His testimony was the following: -

'Siku hiyo ya tarehe 28.7.2020 nilikuwa nafanya kazi geti la kutokea magari mida ya saa tano asubuhi. Wadada wawili walikuwa kwenye gari ndogo wanatoka getini. Nikakagua gari kama desturi yetu nikakuta mikasi Nikamuuliza ameitoa wapi mikasi hiyo akajibu ni ya kwake amekuja nayo, nikamuomba risiti hakuwa nayo, Nikamuuliza kama aliandikisha wakati wa kuingia akasema hapana. Ndiyo nikampeleka ofisi ya utawala'

With this evidence, apart from the fact that the witness did not mention the names of those 'wadada', there was nothing, in his evidence, implicating the applicant.

The next witness was Peru Ibrahim Samy who testified as follows: -

'Tarehe 28.7.2020 mida ya saa tisa mchana niliambiwa na kiongozi wangu nikague gari la mteja lililokuwa na wadada wawili, nikakagua nikakuta mfuko wa Bugando wenye dawa zilizofichwa karibu na siti ya dereva na nyingine ambazo

hazikuwa kwenye mfuko. Nilipomuuliza kuhusu hizo dawa, akasema sina cha kujibu, akasema atoe hela mambo yaishe. Tukakataa dawa zikapelekwa ofisini kwa katibu wa hospitali kwa ajili ya kuendelea na taratibu zingine baada ya hapo mimi nikaondoka kuendelea na kazi zangu.'

This witness, apart from failing to mention which those medicines were, did not name the applicant to be the one found in possession of the said medicines which the witness impounded.

The last witness testified on CCTV Camera clips. He is Mr. Timothy Kaka John. His evidence was to the following effect that those video clips showed Bi. Editha Mgaya sitting outside the Adult Intensive Care Unit (AICU). Few minutes later she entered the AICU and went out with a white container (mfuko mweupe) and put it inside her handbag and went on sitting at that area. Later, she entered the AICU and remained there shortly. She then went out accompanied by the applicant who was carrying an envelope which she handed it over to Bi. Editha Mgaya assisting to put it properly inside the handbag. The other video clip showed the applicant and Bi. Editha Mgaya walking together towards outside the said building. The said witness, however did before the Commission for Mediation and Arbitration, admit that one cannot zoom and identify the property. He further admitted that at the ICU, there is no CCTV Camera and it is forbidden to install them there. This evidence contradicts the witness

version at the Disciplinary Committee. Besides, the witness did not identify what the applicant gave to Bi. Editha Mgaya in that envelope.

In her defence, the applicant told the Disciplinary Committee as follows:-

> *'Mnamo tarehe 29.7.2020 niliitwa na uongozi wa hospitali nilipofika nikamkuta Editha na ndugu yake wakanihoji wakaniandikisha maelezo ambapo nilikiri kwamba nilitoa dawa. Nilikiri kwa sababu walinitisha na nilikuwa na hofu ya kupelekwa polisi. Lakini ukweli ni kwamba dawa sikutoa nilimpa vitabu vya hisa ambavyo vilikuwa kwenye bahasha na unga wa lishe. Nimefanya kazi ICU kwa miaka sita sijawahi kutoa dawa, nilimpa Editha unga wa lishe ambao nauza'.*

During cross-examination, the applicant reiterated that, *nilikiri kwa sababu ya presha, niliogopa kupelekwa polisi.*

When she was asked whether she had any witness, the applicant stated that she had none but that what she stated in her defence was her truth.

In its decision, the Disciplinary Committee at item 14 in the Hearing Form made the following finding: -

> *'14. baada ya Kamati ya Nidhamu kusikiliza tuhuma, kupitia maelezo ya maandishi Ushahidi uliotolewa na mwajiri, Kamati imejiridhisha pasipo shaka kuwa Bi. Theresia Kabao Diku ana hatia kama alivyotuhumiwa wala hajutii kosa lake. Hivyo,* ***Kamati iliamua mtumishi huyu afukuzwe kazi.*** *(Emphasis mine)'.*

With respect, the Disciplinary Committee went off tangent in its finding and the CMA fell in the same quandary when it observed that: -.

> *'Baada ya kupitia Ushahidi wa pande zote mbili, vielelezo vyao na mawasilisho yao ya mwisho napenda kuchambua kiini cha kwanza cha iwapo mlalamikiwa alikuwa na sababu za msingi za kumwachisha kazi mlalamikaji. Ushahidi uliotolewa unaonyesha wazi kuwa kulikuwa na wizi na jaribio la utoroshwaji wa dawa na vifaa tiba ambayo inavunja haki zake na shauri iliendeshwa kwa misingi ya haki. Misingi hii ni pamoja na mtuhumiwa kuambiwa kinagaubaga tuhuma zinazomkabili, apewe muda wa kutosha kuandaa utetezi wake na kuuliza maswali, apewe nafasi ya kuleta mwakilishi wake wakati wa usikilizwaji wa shauri dhidi yake, kuleta mashahidi wake na kuulizwa maswali mashahidi wa upande mwingine na mwisho kukata rufaa endapo hajaridhishwa na maamuzi yaliyofanywa dhidi yake.*
>
> *Baada ya kupitia Ushahidi na vielelezo kama nilivyoainisha hapo juu sina shaka kuwa mlalamikiwa alizingatia taratibu zote hizo... hivyo Tume imeridhika pia kuwa mlalamikiwa alifuata utaratibu stahiki kabla ya kumwachisha kazi mlalamikiwa.*
>
> *Ni dhahiri mgogoro huu hauna mashiko na nautupilia mbali'.*

In my evaluation as indicated above, I am of the firm but considered view that the respondent failed to discharge her evidentiary burden, albeit on balance of probabilities. In other words, there was no evidence to connect the applicant with the offence she was facing before the

Disciplinary Committee. finding the applicant guilty of the alleged misconduct had neither any evidential nor legal justification.

As to the argument that the applicant confessed to have committed the offence, I have taken pains to peruse the records of both the Disciplinary Committee and the CMA but could not find anywhere the applicant made unqualified and unambiguous admissions of her alleged misconduct which could justify her termination.

Even if, for the sake of argument, the applicant was guilty of the alleged misconduct, I am far from being convinced that the termination of employment was the appropriate sanction in the circumstances of the case. Termination of contract of employment for misconduct is expected to be a measure of last resort, reserved for serious misconduct or for repeated misconduct where the employee has not heeded corrective disciplinary action such as warnings. The fundamental question to be asked is whether the misconduct committed by the employee renders the continuation of employment relationship intolerable. There is nothing on record showing that the misconduct, if at all existed, rendered the continuation of employment relationship intolerable. That aside, the Arbitrator was, before arriving at the finding that the termination by the applicant as fair and appropriate, duty bound to consider the other factors such as the lengthy of service of the applicant, her previous disciplinary

records, her personal circumstances, the nature of her job and circumstances leading to the infringement itself.

With this analysis, I am satisfied that the applicant's complaints in paragraphs (i), (ii) and (iv) in the Statement of Legal Issues Arising from Material Facts have legal merit.

It is also provided under section 37 (2) (c) of the Employment and Labour Relations Act that a termination of employment by an employer is unfair if the employer fails to prove that the employment was terminated in accordance with a fair procedure. In that spirit, Rule 13 of the Code of Good Practice provides a clear and detailed procedure for termination of employment. The issue is whether applicant's termination by the respondent was carried out in accordance with the prescribed procedure.

I think the applicant's complaint that the procedure was not followed is not without merit. As will be apparent later in this judgment, the disciplinary committee did not properly conduct the dispute, the dispute was not given weight it deserved and rule 13 of GN No. 42 of 2007 was not adhered to.

According to the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures made under the Code of Good Practice, a brief procedure is as follows. A Disciplinary Authority makes preliminary investigation by framing charges specifying offences,

attaching documents and then serve them to the employee concerned requiring them to respond in not less than 48 hrs.

Thereafter, the Disciplinary Authority receives and considers the employee's response. If the Authority thinks that the employee is in breach and needs to impose a penalty, a Disciplinary Committee is formed to conduct hearing. It has to be given the charge or charges, responses and all evidence. The Disciplinary Committee then notifies the accused employees of the day, date, time and place of hearing. The letter summoning the accused employee has to inform them the right to select any other employees to accompany them.

The number of members of the Disciplinary Committee has to be between three to seven. During the hearing, there will be employer's representative who is NOT a member of the Disciplinary Authority and the employee with his/ her accompanying representative.

The hearing of by the Disciplinary Committee has to be in two phases. In the first hearing phase, the charge is read over to the accused employee, witnesses are called and documentary evidence tendered. This must be in the presence of the accused employee who is to ask questions to each witness.

The second hearing phases relates to the employer's defence which starts with reading the responses submitted to the employee. Going

through evidence submitted and asking questions to the employee regarding his/her response and evidence. The employee should be allowed to bring witnesses if they so wish.

At the end of the hearing the representative of the employer, if any, who is not a member of the Disciplinary Authority and the employee should be asked to leave so that the Committee remains alone to discuss what transpired at the hearing and then make recommendations which should state whether charges have been proved or not, the reasons, any facts which mitigates the gravity of the offence and any fact which in the opinion of the committee is relevant.

The Report of the disciplinary committee and the Hearing Form are submitted: one copy to the Disciplinary Authority for action and one copy to the accused employee.

After receiving the Report of the Disciplinary Committee and the Hearing Form, the Disciplinary Authority shall study the recommendations and take appropriate action such as imposition of penalty or not. In case of imposition of the penalty, the charged employee must be given a chance to mitigate. It should not be forgotten that the Disciplinary Committee is governed by the rules of natural justice.

According to the records, that procedure is not indicated to have been followed. Besides, it would appear that the Disciplinary Committee

and not the Disciplinary Authority imposed the penalty by terminating the employment contract of the applicant. This is clear from Exhibit SU 6 where at p. 11 of Fomu ya Kusikiliza Shauri, the Disciplinary Committee is indicated to have stated:

> **Hivyo Kamati [Disciplinary Committee] iliamua Mtumishi huyu afukuzwe kazi.**

Under the law, the Disciplinary Committee lacked that mandate. What it was required to do was to only make recommendations stating whether charges had been proved or not, stating the reason and any facts which mitigated the gravity of the offence and then state any fact which in the opinion of the committee was relevant.

After receiving the Report of the Disciplinary Committee and the Hearing Form, the Disciplinary Authority had to study the recommendations and take appropriate action such as imposition of penalty or not. In case of imposition of the penalty, the charged employee had to be given a chance to mitigate.

It is without doubt that this procedure was not followed and this led to the violation of the law. In other words, applicant's termination by the respondent was not carried out in accordance with the prescribed procedure. In view of the fact that the respondent failed to prove that the

employment was terminated in accordance with a fair procedure then the termination was unfair.

With respect to the applicant's complaint under paragraph (iii) above, the law is clear. Section 37 (5) of the Employment and Labour Relations Act, No. 6 of 2004 provides that:

> *"No 'disciplinary' action in form of penalty, termination or dismissal shall lie upon an employee who has been charged with a criminal offence which is substantially the same until final determination by the court and any appeal thereto."*

As the law stands, what is prohibited by section 37(5) is taking disciplinary action like suspension, termination etc., where the employee is already facing a criminal charge. On the facts of this case, disciplinary action was taken on 29th September, 2020 as evidenced by exhibit SU 2 before the criminal charge which occurred later whereby the charge sheet reveals that it was signed and presented to the District Court on 10th November, 2020.

Furthermore, disciplinary charge against the applicant at the Disciplinary Committee was *'Dishonest and gross dishonest to the employer and causing loss/damage to the employer by involving herself and aiding to steal employer's property (medicine) in collaboration with Editha Mgaya who is not an employee of Bugando Medical Centre, an act that caused loss to the employer of Tshs. 83,500/= being an actual price of the medicine'* while the charge in Criminal Case No. 175 of 2020, the

applicant was charged with stealing by servant contrary to Sections 258 (1) and 271 of the Penal Code. This means that the applicant had been charged with a criminal offence which is not substantially the same with the disciplinary charge she was facing at the Disciplinary Committee.

I agree with both the Arbitrator and the learned Counsel for the respondent that the provisions of Section 37 (5) of the Employment and Labour Relations Act were not contravened. This court took the same position in the case of **Super Mills Ltd v. Peter Magali**, Revision No. 316 of 2019. I find the applicant's complaint under paragraph (iii) without any legal merit.

That notwithstanding, I find as established that the termination of the applicant was without a valid reason and did not follow the laid down procedures.

Invoking the powers vested in this court under the provisions of section 91 (2) and (b) of the Employment and Labour Relations Act No. 6 of 2004 read together with rule 28 (1) (c) and (e) of the Labour Court Rules, GN No. 106 of 2007, I quash and set aside the CMA Award and order the applicant to be reinstated and be paid her remuneration in accordance with sections 40 and 44 (1) and (2) of the Employment and Labour Relations Act, No. 6 of 2004.

Due to the nature of the matter under consideration, no order for costs is made.

W.P. Dyansobera
Judge
12.9.2022

This judgment is delivered under my hand and the seal of this Court on this 12th day of September, 2022 in the presence of the applicant but in the absence of respondent.

Rights of appeal to the Court of Appeal explained.

W.P. Dyansobera
Judge