IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT ARUSHA

REVISION APPLICATION NO. 124 OF 2021

(C/F Labour Dispute No. CMA/ARS/ARS/39/2020)

TANALEC LIMITED.....APPLICANT

VERSUS

GILBERT ALFRED SAGALI.....RESPONDENT

JUDGMENT

07/09/2022 & 09/11/2022

MWASEBA, J.

The applicant, TANALEC Limited, being aggrieved by the decision of the Commission in Labour Dispute No. CMA/ARS/ARS/39/2020 which was decided in favour of the respondent on 10/11/2021, filed this application seeking for revision of the award. It was supported by an affidavit of Mr Aggrey Cosmas Kamazima, counsel for the applicant and opposed by a counter affidavit sworn by the respondent himself.

Briefly, the relevant facts leading to this application are such that: the respondent was employed by the applicant on 1st day of April, 2005 as an Assembler repair technician until 27th day of November, 2019 when he

was terminated for the allegation of gross misconduct. It was the applicant's allegation that on 23/09/2019 the respondent deliberately destroyed built core belonging to the applicant by re-applying the glue to a dried built core which was ready for a next stage of electrical Assembly as a delaying tactic for the reasons best known to himself. At the disciplinary hearing the respondent argued that he applied the glue in order to get a good quality output. However, the said replies did not please the Disciplinary Committee which at the end opted to terminate the respondent from his employment. Aggrieved by the decision of the Committee, he referred the dispute to the Commission for Mediation and Arbitration (herein will be referred as CMA). At CMA, upon hearing both parties, it was decided that the termination was both substantively and procedurally unfair and proceeded to order the applicant to reinstate the respondent to his position without loss of remuneration, from the date of termination to the date of reinstatement. Being dissatisfied with the said decision, the applicant is now before this court seeking for revision of the said decision.

In his affidavit supporting the application the applicant raised two legal issues as depicted from paragraph 11 and 12 as follows:

a) That, it is from the proceedings of Commission for Mediation and Arbitration of Arusha that the Applicant is wholly aggrieved by the said award due to failure of the Commission to properly analyze, evaluate and consider the strong evidence adduced by Applicant herein especially exhibits D1 and D2 which evidenced the said offences.

b) That, the Applicant is further aggrieved by the failure of the Commission to properly deal with the issues framed for determination of the complaint hence reaching on unjustified findings which bring doubts to the legality of the award procured.

This application was disposed of by way of written submissions where both parties filed their respective submissions accordingly. The applicant enjoyed representation from Mr Aggrey Kamazima, Learned Counsel while the respondent was under the representation of Mr Alex Michael, Personal Representative (PR).

After considering both parties' submissions, court records as well as relevant applicable laws and case laws I find the following issues to guide my determination of this revision:

i) Whether the CMA's decision that the termination was substantively fair was justifiable in law.

ii) Whether the CMA's decision that the termination was procedurally unfair was justifiable in law.

iii) Whether the relief awarded was justifiable.

Starting with the first issue, the records reveal that the reason for termination of the applicant's employment as per exhibit D4 (termination letter) is gross misconduct. The records are such that the purported accident caused by the respondent occurred on 23/09/2019 when he was captured by the CCTV footage pulling, pushing and damaging another built core. They submitted the CCTV footage (exhibit D1) the folder marked as MAIM a footage with description ch14-20190923223300 which shows the respondent applying glue on a dried build core which was already applied by another employee of a day shift. They submitted further that the said act damaged the reputation of the applicant who is the most popular manufacturer of transformers in Tanzania. Thus, the respondent failed to act in good faith contrary to **Rule 12 (3) of the Labour Court Rules**, GN No. 42 of 2007.

The defence raised by the respondent that he was instructed by his supervisor was not pleaded during the disciplinary hearing or on a notice to show cause (exhibit D3). Therefore, introduction of a new facts could not be admitted. To support his argument, he cited the case of **Astepro Investment Co. Ltd vs Javinga Co. Ltd**, Civil Appeal No. 08 of 2015 (CAT-Unreported). Thus, if the arbitrator could have well analysed the

evidence it could have reached to a different decision other than that; a termination was substantively unfair.

Responding to this issue, Personal Representative of the respondent argued that, first of all the affidavit supporting the application does not contain statement of legal issues contrary to **Rule 24 (3) (c) of the Labour Court Rules** GN 106 of 2007. As for the issue of fairness reason, it was his submission that no evidence was submitted at the Commission to justify that the termination was fair. He submitted further that, the CCTV footage tendered and admitted as exhibit D1 alone does not suffice to prove that the respondent was damaging the built core as it was also one of his duties as an electrical assembler and the same was done following the instruction of his supervisor. Thus, the applicant failed to discharge his duties of proving that the termination was fair as required by **Rule 9 (3) of GN 42** of 2007. More to that, the alleged built core cannot be destroyed easily even after reapplying the glue.

Having gone through the CCTV camera this court saw the respondent applying what is alleged to be a glue in built core. However, throughout his evidence at the Disciplinary hearing and at the Commission the respondent stated that he did that in good faith with no intention to damage the built core as alleged by the applicant. Regarding the

termination based on misconduct, **Rule 12 (1) of GN 42 of 2007** provides that any employer, arbitrator or judge who is required to decide as to 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 a rule or standard was contravened, whether or not*
    1. *It is reasonable;*
    2. *It is clear and unambiguous;*
    3. *The employee was aware of it, or could reasonably be expected to have been aware of it;*
    4. *It has been consistently applied by the employer; and*
    5. *Termination is an appropriate sanction for contravening it.*

In our present application it might be true that the respondent applied glue on dried built core without knowing it was already applied by another person and caused the delay of the work for six hours, the question here is whether the said act amount to gross misconduct. As provided under **Rule 12 (3) (a) of the GN. No. 42 of 2007**, gross dishonest is a fair ground for termination of employment. However, the employer must prove that the act of the employee amounted to gross misconduct. Basing on the facts adduced at the trial court it is crystal clear that the applicant failed to prove any damages purported to have been done by the respondent herein and further to that the act of delaying the production

alone does not suffice to the sanction of termination since no records were submitted regarding the bad behaviour and warnings given to the respondent on previous days.

Coming to the second issue of whether the CMA's decision that the termination was procedurally unfair was justifiable in law. It was the applicant's submission that all the procedures needed to be conducted prior to the termination of the respondent was adhered to by the applicant as required by Rule 13 of GN No. 42 of 2007.

In his reply, personal representative (PR) for the respondent argued that, the investigation was not conducted as per **Rule 13 of the Labour Court Rules,** GN No. 42 of 2007. He submitted so for the reason that; the investigation was not conducted since no investigation report was tendered as required by **Rule 13 (1) of GN No. 42** of 2007. More to that the respondent was not given a chance to cross examine witnesses as evidenced by exhibit D4 (Disciplinary Form) which is **Rule 13 (5) of GN 42** of 2007. He added further that, the applicant also contravened **Rule 13 (5) of the rules**, by the act of the Chief Executive to sign a notice to show cause (exhibit D3) and a termination letter (exhibit D5) since he was the one who instituted the case and terminated the respondent which is contrary to the law. He supported his point by citing the case of **NBC Ltd**

Mwanza vs Justa B. Kyaruzi, Revision Application No. 79 of 2009. He also claimed that he was repatriated two years after his termination which is contrary to **Section 43 (1) (a) (b) and (c) of the Employment and Labour Relations Act**, Cap 366 R.E 2019 which is contrary to the labour laws and prayed for the application to be dismissed.

In a brief rejoinder, apart from reiterating what was submitted in his submission in chief, counsel for the applicant added that, the legal issues are found under paragraph 9,10, 11 and 12 thus, the argument that affidavit supporting the application lacks legal issue is baseless. As for the issue of late transportation of the respondent to his place of domicile, the counsel for the applicant submitted that it was the respondent who was late to give them the information regarding his place of domicile that is why they delayed in repatriating him.

The fair procedure for termination for misconduct is provided under **Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules**, G.N. No. 42 of 2007. The rule provides that:

> *"13(1) The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held.*
>
> *(5) Evidence in support of the allegation against the employee shall be presented at hearing. The employee shall be given a proper opportunity at hearing to respondent to allegations,*

questions any witness called by the employer and to call witness if necessary.

In the present application, the Applicant alleges that the procedure for termination was fair. On the other hand, the Respondent submitted that the procedure was not fair. The evidence available in record shows that at the CMA, Hon. Arbitrator found that the provision of **Rule 13 (1) and (5)** of GN 42 of 2007 was not complied with hence led to unfair procedure. He decided that no investigation was conducted and a person who signed a show cause letter (Exhibit D3) was the same person who signed a termination letter. **Rule 13 (1)** of G.N No.42 of 2007 requires the employer to conduct an investigation to ascertain whether there are grounds to charge the employee concerned and thereafter conduct disciplinary hearing. In our present application the employer submitted before CMA a report dated 23/09/2019 (Exhibit D2) under the first paragraph, 8th paragraph stated that:

"Ni vizuri tufanye uchunguzi kuhusiana na kilichotokea"

However, no report was submitted on what they found after their investigation as required by **Rule 13 (1)** of GN 42 of 2007. As it was held in the case of **MIC Tanzania PLC Vs Sinai Mwakisisile**, Revision No. 387 of 2019 (Reported at Tanzlii) that:

> *"Therefore, it was the duty of the applicant to prove that the requirement of rule 13 (1) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007 that the employer shall conduct investigation to ascertain whether there are grounds for hearing to be held. The applicant submitted that the testimony of DW1 and DW2. However, I am of the opinion that the testimonies of witnesses without proof of document to show the finding or the report of the alleged investigation cannot prove that the investigation was conducted."*

See also the cases of **Fredrick Mizambwa vs. Tanzania Port Authority**, Revision No. 220 of 2013, (HC-Unreported) and **Tanzania Revenue Authority vs Andrew Mapunda**, Revision No. 104 od 2014, (HC-Unreported).

Thus, being persuaded with the cited authority this court is of the firm view that **Rule 13 (1) of GN 42 of 2007** was not complied with by the applicant.

As for the issue of the Chief Executive signing a notice to show cause and a termination letter, he initiated investigation and then proceeded to terminate the employee basing on his recommendation. The said act is sufficient to draw an inference that he had influence in the decision, the fact which proves that he was not an impartial person, which vitiate the whole proceedings.

As for the issue of an affidavit lacking legal issues the same is pleaded under paragraph 11 and 12 of the affidavit supporting the application, therefore, the respondent's allegation is baseless.

Coming to the last issue of whether the relief provided by CMA is justified, at CMA the Arbitrator ordered for the respondent to be reinstated according to **Section 40 (1) (a) of ELRA**. As I have already decided above that the termination was both substantively and procedurally unfair, the decision of reinstatement as ordered by Hon. Arbitrator is left undisturbed and in case the applicant do not wish to reinstate the respondent, he shall pay him compensation of twelve months wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment as required by **Section 40 (3)** of ELRA.

For the forestated reasons, I uphold the CMA Award and the Revision Application is hereby dismissed.

Ordered Accordingly.

DATED at **ARUSHA** this 9th day of November, 2022.

N.R. MWASEBA

JUDGE

09/11/2022