IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

LABOUR REVISION NO. 90 OF 2021

(Originating from Labour Dispute No. CMA/ARS/ARB/654/2019/10/2020)

JUSTINIAN HERMAN BASHANGE .....APPLICANT

VERSUS

KENYA KAZI SECURITY (T) LIMITED .....RESPONDENT

JUDGMENT

08/09/2022 & 17/11/2022

KAMUZORA, J.

The Applicant herein was also the complainant before the Commission for Mediation and Arbitration (CMA) where he filed a dispute against the Respondent for unfair termination of his employment contract. The decision of the CMA was in favour of the Respondent. The Applicant being aggrieved by such decision preferred this revision under sections 91(1), (a)(2)(b) and (c), and 94(1) (b) (i) of the Employment and Labour Relations Act No. 6 of 2004, Rules 24(1) & (2) (a) (b) (c) (d) (e) (f) and (3) (a) (b) (c)(d) and 28(1) (b)(c)(d) and (e) of the Labour Court Rules GN No 106 of 2007. The Applicant prays this Court be pleased to revise and set aside the Arbitration proceedings and Award of

the CMA dated 27th August 2021 in Employment Labour Dispute No. CMA/ARS/ARB/ 654/2019/10/2020.

Briefly, the Applicant was employed by the Respondent as Operations Manager in 2012. On 13/04/2016 he was suspended by the Respondent pending investigation on his conduct at work place. The disciplinary committee convened and after found the Applicant guilty of allegations the finding that was made on 01/07/2016. The Respondent was then terminated for gross misconduct associated with acts of incompatibility and gross insubordination of the employer. The Applicant filed a complaint at the CMA which held in favour of the Respondent that there were valid reasons to terminate the Applicant from his employment and that the procedures for termination were followed by the Respondent. It is from that decision the Applicant preferred this revision application on the following grounds: -

i) *That, the award was tainted and riddled with fundamental misdirection and non-direction in law and fact, thus occasioned miscarriage of justice to the Applicant.*
ii) *That, the Hon. Arbitrator erred in law and fact for failing to properly analyse and evaluate the evidence adduced by both parties, particularly the Applicants evidence.*
iii) *That, the Hon. Arbitrator erred in law and fact for failing to consider issues that were not disputed by both parties.*

iv) *That, the Hon. Arbitrator erred in law and fact for reaching to a conclusion based on matters that were never raised nor disputed by both parties and without a proper proof to that effect.*

v) *That, the Hon. Arbitrator erred in law and fact for failure to properly construe the law established authorities.*

vi) *That, the Hon. Arbitrator erred in law and fact for failure to properly consider the most disputable concern and the Applicant's pleadings in CMA F1.*

vii) *That, the Hon. Arbitrator erred in law and fact by taking into account extraneous matters and failed to demonstrate and advance for departure and or not to be bound by the High Court of Tanzania decisions on defective affidavits and unlawful suspension.*

viii) *That, the Hon. Arbitrator erred in law and fact by not considering the principle established by the Higher courts.*

When the application came for hearing the Applicant appeared in person while the Respondent enjoyed the services of Mr. Kennedy Mapima, learned advocate. Parties opted to argued the application by way ofwritten submission and they filed the submissions as scheduled.

In his long and detailed submission, the Applicant consolidated all grounds of revision and argued them jointly. He adopted the affidavit in support of the application and submitted that under the CMA F1 the Applicant claimed for unfair termination based on both substantive

issues and procedural unfairness against the allegations laid before him. That the issues before the CMA were whether there were valid reasons for termination and whether the Respondent followed proper procedures for termination.

Arguing on the substantive aspect the Applicant submitted that pursuant to the provision of section 37(2), of the Employment and Labour relations Act Cap 366 [R.E 2018] ELRA and section 60(1) of the Labour Institutions Act 2004, termination is fair if the reasons for termination are valid and the employer shall prove that the termination is fair. That, in referring exhibit D2, D9 and DW1's testimony the Arbitrator made a determination that the Applicant's working performance was below the required standard after the Respondent's appraisal. He however contended that his evidence was not considered which proved that no evidence was presented proving poor performance. He insisted that no investigation report was tendered by the Respondent to prove the same.

The Applicant also submitted that even his closing submission was not regarded by the Arbitrator as he pointed out that exhibit D14 was incurably defective in both the jurat of attestation and the verification clause for contravening the provision of section 7 of the Notaries Public

and Commissioner for Oaths Act Cap 12 R.E 2002. He cemented his submission by referring the cases of **Samwel Kimaro Vs. Hiday Didas**, Civil Application No. 20 of 2012 CAT at Mwanza (Unreported) and **Paul Mwakyuse Vs. Ntukusya Kagwema** and 8 others, Misc. Land Application No. 75 of 2019 (unreported). He added that exhibit D4 contained extraneous matter which the deponent is unable on his own knowledge to prove. That, DW3 was sworn by an advocate who prepared exhibit D14 hence there was conflict of interest.

Pointing at exhibits D2 and D4 the Applicant submitted that the claim of misconduct and incompatibility is nowhere mentioned as one of the reasons for the Applicant's suspension nor for the conduct of the disciplinary hearing. The Applicant prayed this court to adopt the finding of this court in the cases of **Tiscan Limited Vs. Revocatus Simba,** Rev No 8 of 2009 [Tanzlii] and **Chacha Nsenga Wanka Vs. UN Lodge En Afrique**, Labour Revision No. 96 of 2020. He added that the transaction which the Applicant was required to give explanation were quite different from those indicated in the termination letter hence the Arbitrator conclusion with regard to incompatibility misconduct lacks merit in absence of material evidence hence occasioned miscarriage of justice.

The Applicant explained that pursuant to exhibit D4 the Applicant was charged with five allegations. That, the first allegation was that the Applicant raised false allegation against the General manager by writing a letter to the Arusha Regional Commissioner (D6). That, the Arbitrator based the decision on D2, D9 and DW1's testimony without referring to D6. It was the Applicant's submission that pursuant to D7 he was never summoned and warned.

The second allegation is that the Applicant intentionally refused to comply with country Director directives on 31st March 2016. That, before the disciplinary hearing committee and the CMA, there was no any single witness or evidence tendered to prove the said allegation thus failed to prove the allegation. To cement on this, he relied on the case of **Hemed Said Vs. Mohamed Mbilu** [1984] TLR 113.

That, the third allegation is related to disclosing the company's sensitive internal information without permission from the board of Directors of the Respondent. On this, the Applicant submitted that there was no provision of the code of conduct or the employer's policy that was contravened by the Applicant hence the allegation was not proved.

That, the 4th allegation was that the Applicant breached the terms of his notice of suspension. The Applicant submitted that there was no

any witness who testified on that fact and no material evidence was tendered to prove the same.

That, the 5th allegation is that the Applicant was working contrary to the company working procedure by intervening with the works of other departments without involving the managers of those departments. The Applicant claimed that such allegation was not proved by the Respondent.

In summing up the substantive part, the Applicant referred various cases including; **Abdul Karim Haji Vs. Raymond Nchimbi Alois and Joseph Sit Joseph** [2006] TLR, **Hamid Mfaume Ibrahim Vs. KBC Tanzania Ltd,** Lab Div. DSM Misc. Labour Application No. 245 of 2013 [2014] LCCD and insisted that the Respondent has failed to discharge his duty that the termination was fair.

Submitting on the procedural aspect, it was the Applicant's argument that the Respondent contravened the provisions of section 37(2) of the ELRA, Rules 13(1) and 27 (1) & (2) of GN. No. 42 of 2007 as the investigation was not conducted before the conduct of the disciplinary hearing. In support of this argument the Applicant relied on the decision in **Mic. Tanzania PLC Vs. Sinai Mwakisisisle,** Labour Revision No. 387/2019 [Tanzlii], **Jimson Security Service Vs. Joseph**

Mdegele, Civil Appeal No 152/2019 [Unreported], **W. Stores Ltd Vs. George Wandimba and 2 others,** Labour Revision No. 26/2007 (Unreported) and **The Parastal Pension Fund Vs. Shiriel Mchembe,** Rev No 389/2013 [2014] LCCD 1 at page 105.

Other procedural defect pointed out by the Applicant is that the Applicant was not paid his full remuneration. He cited the case of **Chai Bora limited Vs. Allan Telly Mtukula,** Arusha Labour Revision No. 38 of 2017 (Unreported) to insist that, suspension based on half pay was unlawful.

Citing guideline 4(2) of the Employment and labour Relations (Code of Good Practice) Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedure GN No 42 of 2017 the Applicant stated that the whole panel of the disciplinary committee was composed of the Respondent's employees and there was no any senior member from a different office. That, Guideline 4(9) was also violated as the Applicant was informed of the outcome of the hearing after the lapse of 5 working days and terminated without being accorded the right to be heard.

The Applicant while referring to the issues framed at the CMA for determination submitted that the arbitrator never Responded to the

issue on the reliefs entitled to the parties. Reference was made in the case of Sosthenes **Bruno & Diana Rose Bruno Vs. Flora Shauri,** Civil Appeal No 81 of 2016 (unreported). It is the Applicant's prayer that this court evaluate and consider the evidence and testimony and award the Applicant his terminal benefits.

Contesting the Application Mr. Mapima, counsel for the Respondent adopted the counter affidavit filed in opposing the application and submitted that the Respondent proved valid reasons for termination of the Applicant's employment. Responding to the issue of investigation, the Respondent's counsel submitted that an investigation was conducted in compliance with Rule 13(1) of the Employment and Labour Relations (Code of Good Practice) GN No 42 of 2007 and that the investigation report was not necessary. He referred the case of **Khamis Shaban Bandrew Vs. Kenya Kazi Security,** Labour Revision No 61 of 2020(Unreported).

Regarding the mode of communication, the Respondent's counsel stated that pursuant to Exhibit D3 collectively communication was either personally or through his advocate and according to the evidence of DW3 and Exhibit D14, the Respondent effected service which was rejected. On the fact that exhibit D14 was defective the Respondent

stated that the same was not objected at the CMA while it was tendered hence raising it at this stage is a new issue.

Regarding the issue of representation of the management at the hearing (Exhibit D7), the Respondent submitted that the management was represented by Mr. Amon Ndeki. On the argument that the Applicant was denied the right to be heard, the counsel for the Respondent referring the evidence of DW3 submitted that the Applicant was given the right but he refused.

Responding to the argument that the issues on the reliefs entitled to the parties was not determined by CMA, the counsel for the Respondent submitted that since the application was dismissed then the reliefs could not be determined. That, the Applicant acknowledged that he was paid his terminal benefits through bank account and the evidence by DW2 proved so.

Regarding the issue of repatriation and the certificate of service, the Respondent's counsel submitted that the same was not among claims according to the CMA F1 and that Exhibit D1 proved that the Applicant was hired and terminated in Arusha. The Respondent prays that the application be dismissed.

The Applicant's lengthy rejoinder reiterated the submission in chief therefore, I do not intend to reproduce the same rather I will point out additional points from that submission. The Applicant added that the Respondent's counter affidavit should not be adopted to form part of the Respondent's submission as it was filed out of time.

Before I go to the merit of the application it is very important to deliberate on the point raised by the Applicant in his rejoinder submission that the counter affidavit was filed out of time hence should be disregarded for contravening Rule 24(4) of the Labour Court Rules GN No 106 of 2007. It must be noted that this is a point of law which affect the rights of the parties but, it was not properly brought before this court thus, I refrain from entertaining the same. The Applicant was aware of the existence of this document but did not raise any objection or even address the same in his submission in chief. Raising the same during rejoinder is an absurd process which is likely to deny the other party the right to respond or defend the objection. Thus, whether the counter affidavit was filed on time or out of time is not a matter that can be entertained at this stage. I therefore disregard this point and proceed on determining the merit of the application.

After a thorough reading of the records of the CMA, the present application, affidavit, counter affidavit and the submissions by the parties, the issue that need court determination is whether the CMA was correct to conclude that there were valid reasons for termination of the Applicant's employment and the procedures for termination were followed. This court is alive of the fact that in labour disputes, the burden of proof lies upon the employer to prove that the employee was fairly terminated and the procedures for termination were followed. In determining the fairness of employment termination, it is important to consider the provision of section 37(2) (a) (b) and (c) of the Employment and Labour Relations Act, 2004 which requires employer to prove that the reason for termination is valid and fair and the termination is in accordance with fair procedures.

Starting with the validity and fairness of the reasons, the Applicant claimed that the misconduct and incompatibility claimed by the Respondent were not mentioned as the reasons for the Applicant's suspension nor for the conduct of the disciplinary hearing. He also claimed that his evidence and closing submission were not considered by the CMA and no evidence was adduced to prove poor work performance.

The record shows that the Applicant was first suspended before he was terminated. The notice of suspension, exhibit D2 indicate that the Applicant was suspended pending investigation on the issues associated with his conduct at work. Since the Applicant was being investigated on his conduct at work place, the claim that the misconduct or incompatibility was not mentioned in the suspension is irrelevant.

Again, as per the disciplinary hearing form, exhibit DE6 the allegations against the Applicant were the misconducts associated with *i) raising false allegation against the General Manager, ii) intentional refusal to comply with the country Director's directives, iii) Disclosure of company internal information without permission from company's Board of Directors or order from CMA, iv) breach of the terms of the notice of the suspension and v) working contrary to the company procedures by intervening with other departments without involving department managers.*

In my view, raising false allegation against the General Manager, intentional refusal to comply with the country Director's directives, Disclosure of company internal information without permission from company's Board of Directors or order from CMA, breach of the terms of the notice of suspension and working contrary to the company procedures by intervening with other departments without involving

department managers all fall within gross misconduct associated with incompatibility and gross insubordination to the employer.

The hearing form (exhibit D7) indicates that the disciplinary committee made a recommendation for the Applicant to be terminated after they were satisfied that the allegations laid against him were proved. As per the termination letter (Exhibit D9), the Applicant was terminated from his employment contract due to gross misconduct associated with incompatibility and gross insubordination to the employer.

Rule 12(3) of Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 and guideline 9(2) of Guideline for Disciplinary, Incapacity and Incompatibility Policy and Procedures GN. No 42/2007 lays down the misconducts which may justify termination and it includes gross insubordination. Also, under Rule 22(1) of Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 and Guideline 8(1) of Guideline for Disciplinary, Incapacity and Incompatibility policy and procedure GN No 42/2007 it states that incompatibility constitutes a fair reason for termination of employment contract.

During the hearing at the CMA, DW1 who is the Human Resource Officer testified that the Applicant was terminated due to incompatibility and insubordination. He explained that the Applicant was working as operation manager and he was responsible with the supervision of all activities related to his department. However, that, the Applicant failed to perform and he had incompatible relationship at work. That, the Applicant complained to the Regional Commissioner and to the District Commissioner thus, he was terminated for breach of confidentiality and for interfering with other matters not related to his duties as he associated himself with the case of Isaya who was complaining against the Respondent. That, he was suspended pending investigation and directed not to deal with any matter related to the Respondent until the finding of the investigation is issued to him but he disobeyed.

Exhibit DE6 which is the hearing form indicates that the Applicant raised false allegations against the general manager Claude David Herssens by writing a letter to Arusha Regional Commissioner on 21st March 2016 and forwarded the same to the country manager through email. The said letter and email are also part of evidence as the letter was admitted as exhibit DE10 and the email as part of exhibit DE8. The contents of the latter reveal that the Applicant was complaining of

Claude's conduct which are contrary to the law and dignity of any Tanzanian citizen.

The complaint form also reveal that the Applicant refused to comply with the directives of the country director as he was asked to retract the letter directed to Arusha Regional Commissioner but instead, he opted to insubordinate the country director by opting to make the communication through emails that were also copied to CM, CHRM GM and HRM. It was also claimed that the Applicant disclosed internal information which were internal email communications in the matters between the Respondent and his employee Isaya Mathayo Laizer. That, the Applicant tendered those documents in the case without permission of his employer thus contravening his duty to confidentiality. That, the same were also tendered during the time the Applicant was under suspension thus contravened the suspension conditions which required him not to associate himself with any activities of his employer pending the investigation outcome. That, by using the employer's documents without being authorised and by testifying against his employer, the Applicant was sabotaging the interest of his employer

In his evidence, the Applicant did not deny having misunderstanding with his boss and he did not dispute complaining to

the country manager and to Arusha Regional Commissioner. He also did not deny disclosing the emails but claimed that the emails referred were not confidential information. His witness PW1 claimed that the Applicant assisted in revealing the truth regarding the case of Isaya that resulted into determination of the case in favour of Isaya but he was terminated because he gave the confidential documents. She however added that the emails contained no confidential information.

The CMA was satisfied that the Applicant was not in good relationship with his employer as he disobeyed directives of his superior thus an insubordination to his officer amounting to misconduct. The CMA made a conclusion that the misconduct was proved and the employer had a good reason for termination.

While I agree that the CMA in its finding did not take into consideration the Applicant's evidence, my conclusion to this issue is similar to that of the CMA. From the above referred evidence, it is clear that the Applicant was incompatible with the management, the fact which he, himself admitted. It is also in evidence that he raised serious allegations which were unproved against the General Manager as per the letters to the Arusha Regional Commissioner and emails sent to the country manager. He also used official document in a case without being

authorised by the employer. The referred email even if not stamped with confidential stamp were official communications which could not be used without permission of the responsible officer. That was also done while he was on suspension while knowing that he was barred from dealing with any issue related to his employer. In that regard, I find that there were valid reasons for termination of the Applicant's employment contract.

The claim by the Applicant that his submission was disregarded is baseless. The CMA was not bound to consider the submission in making its decision but bound to consider the evidence as a whole. Closing submission intend to assist the court by directing it to the relevant issues but does not form part of evidence. It is the duty of the Court, CMA or Tribunal to make decision and not the parties. Thus, where the Court opts not to be assisted by the parties through their submissions, it can still make its decision based on evidence in record. I therefore find nothing fatal committed by CMA for failure to refer the Applicant's closing submissions.

Regarding the fairness of the procedures for termination, the same is guided by Rule 13 of the Employment and Labour Relations (Code of Good practice) GN No. 42/2007. The rule requires the investigation to be

conducted before terminating the employee and in this matter, pursuant to Exhibit D2 the Applicant was suspended from his employment pending investigation against him. Pursuant to exhibit D6 a complaint letter from the Applicant to the Regional Commissioner in one way or the other was one of the investigational bases that led to the conduct of the disciplinary hearing against the Applicant (Exhibit D7) which was again done in the absence of the Applicant. Whereas reading under item 9.2 one Amon Aggrey Ndeki tendered the letter before the disciplinary hearing as well as various letters and other exhibits obtained during the suspension period concerning the Applicant's insubordination conducts to the employer, violation of the terms of the suspension, working contrary to the working procedure, dealing with other department issues and the like acts. The Respondent after collecting all those pieces of evidence went further and issued notice (exhibit D4) to the Applicant requiring him to attend to the disciplinary hearing and as per Exhibit D7, disciplinary hearing was conducted. The claim by the Applicant that no any investigation was done prior to the conduct of the disciplinary hearing is wanting as the record proves otherwise.

Again, the Applicant contended that the arbitrator erred by not considering that his suspension was for unspecified period of time and

the Applicant was not paid full remuneration. The law under Rule 27 of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 covers the whole issue of suspension of an employee pending investigation. However, the law directs that the period of the suspension must be reasonable. Exhibit D2 a notice of suspension was issued to the Applicant on 13/04/2016 and Exhibit D4 a notice to attend the disciplinary hearing was issued to the Applicant on 27/6/2016 almost two months later. To me, the interval of the suspension period and the period to attend the disciplinary hearing was reasonable.

It is however the requirement of the law that during the suspension period the employer is to pay the employee his remuneration and for this the Applicant contends that full remuneration was not paid to him. Exhibit D2 did clearly inform the Applicant that he is entitled during the suspension period to be paid full remuneration. Reading page 46 of the typed CMA proceedings the Applicant while under cross examination admitted to have been paid while under suspension. He was terminated on 29th August 2016 as per exhibit DE7 and the Applicant admitted that he was paid his full salary for that month. Exhibit DE4 reveal that the Applicant was paid his entitlements.

On the claim of the composition of the disciplinary hearing the Applicant stated that a senior manager should be the chairperson of the disciplinary hearing. Guideline 4(2) of the Guidelines for Disciplinary, Incapacity and incompatibility Policy and Procedures requires that a chairperson to be impartial and not to have been involved in the issues giving rise to the hearing and a senior manager from a different office may serve as a chairperson. Since the Applicant has not been able to state that the Chairman was one of the senior members of the employer then the claim is unfounded.

The Applicant complains that he was informed of the outcome of the disciplinary hearing after the lapse of 5 working days contrary to the requirement of guideline 4(9). The evidence on record is to the effect that, the Applicant was summoned to appear before the disciplinary hearing and he deliberately refused to appear and hearing was conducted in his absence. However, as exhibit D8 entails, the Applicant was aware of the hearing that was conducted in his absence but opted not to take action.

Regarding to the Applicant's claim that he was not given the right to be heard, pursuant to exhibit D4 and D7 the Applicant was summoned so that he could exercise his constitutional right of being heard but

refused. Since all allegations were discussed and dealt with by the disciplinary committee, I find that all the issues related to the Applicant's misconduct were proved and the procedures for termination were followed.

From the above arguments and reasons thereto, I find that there is no reason strong enough to make this Court temper with the decision of the CMA. The Applicant was lawfully and fairly terminated from his employment and paid the requisite entitlements. This application is therefore devoid of merits and it is hereby dismissed. In considering that this is a labour matter, I make no order as to costs.

DATED at **ARUSHA** this 17th day of November, 2022.

D.C. KAMUZORA

JUDGE