IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

REVISION APPLICATION NO. 72 OF 2020

(Arising from the CMA at Arusha, Labour Dispute No. CMA/ARS/ARB/208/2015)

NGORONGORO CONSERVATION AREA

AUTHORITY (NCAA)..... APPLICANT

VERSUS

VENERANDA BARAZA..... RESPONDENT

JUDGMENT

9/2/2022 & 11/5/2022

ROBERT, J:-

This is an application for revision against an award of the Commission for Mediation and Arbitration (CMA) at Arusha delivered in favour of the respondent herein, Veneranda Baraza, in Labour Dispute No. CMA/ARS/ARB/208/215. At the CMA, the respondent, an erstwhile employee of the applicant, Ngorongoro Conservation Area Authority

(NCAA) filed a complaint against the applicant herein claiming payment of statutory compensation and terminal benefits for unfair termination.

The CMA decided that the applicant's termination was both substantially and procedurally unfair. Substantially, the alleged termination lacked tangible and sufficient evidence to validate termination. Procedurally, the CMA pointed out four major non-compliances which in terms of rule 13 of G.N. No.42/2007 rendered the entire procedure unfair. The non-compliances were lack of investigation, lack of sufficient evidence, and the engagement of practicing advocate in the entire process which prejudiced employees' rights and denial of a chance to mitigate. The impugned CMA award issued an order for reinstatement of the respondent to her job and position without loss of remuneration. Aggrieved, the applicant moved this Court to revise the CMA award on the grounds set forth at paragraph 11 of the affidavit sworn by Dr. Freddy Safieli Manongi, principal officer of the applicant, as follows:-

i. *THAT, the Arbitrator erred in law in entertaining the dispute on issues and prayers arising from the Collective Bargain Agreement/ Voluntary Agreement while it had no Jurisdiction to do so.*

ii. *THAT, the Arbitrator erred in law and in fact in finding that the termination was substantively unfair while there were ample*

documentary evidence and testimonies of witness coupled with the Respondent's own admission proving the charges against her.

iii. *THAT, the Arbitrator erred in law in finding that the hearing was procedurally unfair while there is ample evidence on record proving that the hearing was procedurally fair.*

iv. *THAT, the Arbitrator erred in law in finding that the hearing was procedurally unfair for want of investigation report while the applicants/ complaints were availed with all necessary requisite documents extracted from the report which were relevant to the Disciplinary charges.*

v. *THAT, the Arbitrator erred in law in ordering the Respondent's benefits to be paid in accordance with the new salary while the same started when the respondent had been terminated and without there being any proof increasing the respondent salary.*

vi. *THAT, the arbitrator erred in law in ordering the respondent to be paid her benefits at a new salary of Tshs. 4,397,411 which became effective on 1st September, 2015.*

vii. *THAT, the Arbitrator erred in law in ordering the reinstatement of the respondent at a new salary of Tshs. 4,397,411 which became effective on 1st September, 2015.*

viii. *THAT, the Arbitrator erred in law in his evaluation of evidence and testimonies of the parties and arrived at a wrong conclusion that the termination was both substantively and procedurally unfair.*

The application was stoutly opposed by the respondent through her counter-affidavit filed on 2nd October, 2020.

At the request of parties, the application was argued by filing written submissions as ordered by the Court. Parties in this application enjoyed legal representation from Messrs Odhiambo Kobas and Asubuhi John Yoyo, learned counsel for the applicant and respondent respectively.

Starting with the first ground, the question for determination is whether claims before the Arbitrator were based on the Collective Bargain Agreement (CBA)/Voluntary Agreement and whether the Arbitrator was not vested with competent jurisdiction to arbitrate over the dispute.

Mr. Kobas argued that the respondent's claims contained in the amended CMA Form No. 1 and its annexures particularly claims arising from the terminal benefits and other incidental damages (annexure 1) are based on the Collective Bargain Agreement (CBA) which the Arbitrator does not have jurisdiction to adjudicate on according to section 74(a) of the Employment and Labour Relations Act, 2004.

He maintained that, the mandate of the CMA on matters related to application and interpretation of the CBA is limited to mediation only. Thus, the competent Court to try the said disputes immediately after mediation is declared failed is the High Court, Labour Division according to section 74(a) and (b) of the Act.

In response, Mr. Yoyo agreed that the CMA does not have jurisdiction to entertain disputes concerning application, interpretation or implementation of the collective bargain agreement. However, he refuted the contention that the case at hand was related to application, interpretation or implementation of the collective agreement. He maintained that, the dispute preferred by the respondent at the CMA, according to CMA Form No. 1, was unfair termination of employment.

He argued that a contention that the dispute at hand is a dispute under section 74 of the Act is a misdirection due to the reasons that; one, a prayer for payment of terminal benefit pursuant to the CBA did not and could not have altered, modified or took away the core dispute pleaded under item 3 of the CMA form No. 1 which was unfair termination. Secondly, there was no dispute concerning application, interpretation or implementation that was pleaded in form No. 1 worth of compelling the commission to apply the provisions of section 74 of the Act as alluded to by the learned counsel for the applicant.

He argued further that, even if it is assumed that the prayer for terminal benefits as per the CBA could have defined a dispute at hand the Court needs to consider first, that the trial commission never granted any relief as prayed under the CBA capable of vitiating the entire proceedings.

To support his argument he made reference to the case of **Ngorongoro Conservation Area Authority vs Veronica John Ufunguo Revision Application No. 74/2019**. He submitted further that, almost all matters related to terminal benefits as per the CBA were mediated upon and comprehensively settled at mediation which means there was no terminal benefit payable under the CBA which was carried forward before the Arbitrator.

Lastly, he maintained that section 74 of the Act does not impose a mandatory obligation but provides an option although in the present case it was not applicable at all.

This Court is aware that, a collective agreement refers to a written agreement concluded by a registered trade union and an employer or registered employers' association on any labour matter (see section 4 of the Labour Relations Act, Cap. 366 (R.E.2019)). Once parties agrees on a collective agreement it is expected that they are fully aware of their rights and responsibilities under the agreement. Thus, in the event of cessation or termination of employment both the employer and employee must expect to be bound by the terms of the agreement unless there is a dispute concerning the application, interpretation or implementation of the collective agreement.

Where there is a dispute concerning the application, interpretation or implementation of a collective agreement such a dispute is required to be referred to the Commission for mediation and, if mediation fails, any party may refer the dispute to the Labour Court for a decision under section 74 of the Employment and Labour Relations Act, Cap. 366 (R.E.2019).

Where a dispute referred to the CMA is not related to the application, interpretation or implementation of a collective agreement, the Mediator shall strive to resolve the dispute. If he fails to resolve a dispute within the prescribed time, a party to the dispute may, if the dispute is a complaint, refer the complaint to arbitration or to the Labour Court under section 86 of Cap. 366 (R.E.2019).

In the present case, having examined the CMA Form No. 1 used to lodge a dispute at the CMA and the proceedings at the CMA, this court is in agreement with the learned counsel for the respondent that the dispute before the Arbitrator was unlawful termination of employment and not a dispute concerning the application, interpretation or implementation of a collective agreement. There was nothing to be resolved in respect of the terms of the collective agreement. Thus, the respondent's complaint on unlawful termination of employment cannot be classified as a dispute

concerning application, interpretation or implementation of a collective agreement under section 74 of the Act simply because payment of terminal benefits and other incidental damages payable as a consequence of unlawful termination of employment are provided for in the collective agreement even if there is no actual dispute concerning the agreement itself. Further to this, the arbitrator's decision did not touch on any terms of the collective agreement. That said, I find no merit in this ground.

Coming to the second ground, the question for determination is whether the Arbitrator was wrong for holding that the respondent's termination was substantively unfair. Counsel for the applicant submitted that, out of the 32 counts of disciplinary charges filed against the respondent, she was found guilty of 11 counts and therefore the reasons for termination were fair and justified in respect of the said 11 counts. He argued that, there were sufficient evidence on record to prove all eleven counts preferred against the respondent. However, the trial commission ignored the evidence on record thereby arriving to a wrong decision.

To prove that termination was fair as required under section 39 of the Employment and Labour Relations Act, Mr. Kobas took this Court through each of the eleven counts proved against the respondent as a

reason for fair termination and how the trial commission, in his view, failed to appreciate the evidence on record in support of the said eleven counts.

With regards to allegations on failure to uphold financial policies and fraudulently misusing authority's fund for personal gain (counts No.4, 5 and 6), Mr. Kobas argued that, the respondent took the applicant's money without written authorization from the beneficiaries contrary to the Authority's Regulations which requires payment to be made only to the person named in the payment voucher. Further to that, he maintained that, evidence regarding such violation was watertight and was made available both at the disciplinary hearing, and before the CMA by DW2 FLORA MSAMI. The evidence was corroborated by the joint letter of defence dated 28th July, 2015 admitted before the trial commission as Exhibit D4.

He submitted further that, the respondent admitted to have diverted the money collected to other uses yet he failed to supply the Board resolution proving that there was any administrative action that authorized the changes in the use of that fund from the originally designated purposes.

The other charges were filed in respect of fraud and deliberately misappropriating Authority's fund contrary to item 10 of the schedule of

offences under the Guidelines for Disciplinary, Incapacity and Incompatibility Procedure under the Employment and Labour Relations (Code of Good Practice) Rules, 2007 (counts 8,10,11,14,15 and 16). It was alleged that, the respondent while knowing that she was travelling outside the country for official purpose applied for payment of per diem, signed and collected the money and used it for her personal gain thereby occasioning loss to the Authority.

As to the issue of misuse of the authority funds in fictitious trips, Mr. Kobas maintained that the applicant supplied sufficient evidence at the disciplinary hearing through PW2, Flora Msami who demonstrated in detail through payment voucher how the respondent took money for fictitious trips. He added that the evidence in that regard was amplified before the CMA and the Respondent failed to dispute the allegation by concrete evidence that she had travelled to the respective destinations. He maintained that the allegations were confirmed by the respondent's admission made through the joint letter of defence, Exhibit D4, which proved on the balance of probabilities that the violation was real.

Mr. Kobas maintained further that, the applicant called before the CMA the individuals who were alleged to have travelled to various destinations and they denied to have travelled to the alleged destinations

which implies that the trips were fictitious. He cited the case of **Ngorongoro Conservation Area Authority vs Elinipendo Mbwambo**, Labour Revision No.188/2017, where this Court overturned the CMA findings and concluded ardently that the trial commission was at fault in holding that there was no sufficient evidence.

In response, counsel for the respondent refuted arguments by the applicant's counsel and maintained that the CMA's findings were valid, fair verifiable and in accordance to the law because the evidence adduced by the applicant, before trial commission did not meet the validity and fairness test required under section 37 (2) and (b) of the employment and Labour relation Act cap 366 RE 2019.

He clarified that, the applicant failed to supply sufficient evidence before the disciplinary hearing held on 15th July, 2015 hence, he failed to validate the alleged violations against the respondent. He highlighted the evidential gaps identified in the arbitral award that exposes the reasons for termination as unfair. He pointed out that, out of the nine witnesses called by employer before the CMA, none of them had real and direct evidence capable of implicating the respondent with allegations of signing payment voucher, forging immigration stamps or being involved in fictitious trips. He maintained further that, save for the so called FLORA

MSAMI (DW2) none of the other witnesses at the CMA were available at the disciplinary hearing to give evidence when the respondent's termination was being determined. Thus, no evidence whatsoever was tabled against the respondent on the specific date of hearing for him to contest, even the said FLORA MSAMI (DW2) did not have any tangible evidence/audit report capable of implicating the respondent with the alleged violations.

He made reference to rule 13(5) of the GN 42/2007 which requires that evidence in support of allegations must be presented at the disciplinary hearing to establish the culpability of an employee before a decision is made. He maintained that, since at the disciplinary hearing there was no sufficient evidence to establishing if the respondent signed the alleged vouchers, forged immigration stamps, involved in fictitious trips, then no way could such violation have been validated without evidence.

He argued that PW2, Flora Msami did not present sufficient evidence at the disciplinary hearing to implicate the respondent since the proceedings and award of the CMA indicates that the said witness did not have any documentary evidence proving the alleged falsification of signatures, forgery of immigration stamps and involvement in fictitious

trips. He also challenged the joint letter of defence, exhibit P4, and considered it as an afterthought as it didn't form part of the evidence that determined the respondent's fate on the date of hearing

Responding to the alleged misuse of the applicant's fund through fictitious trips and the alleged stamping of immigration stamps, Mr. Yoyo reiterate in considerable detail every aspect of trial commission's findings and pointed out that lack of investigation and investigation report had watered down the reliability and truthfulness of the alleged violations. He supported the findings of the trial commission in each of the alleged allegations and observed that the commission was justified in making adverse inference against the applicant for failure to adduce sufficient evidence at the disciplinary hearing. He referred the Court to the case of **Youth Dynamix vs Fatuma Lwambo**, Revision No.427/2013 where this Court emphasized on the requirement to terminate the employment on valid reasons only.

Further to that, he challenged and distinguished the cited case of **Hamisi Jonathan Mayage vs Board of External Trade**, and brought to the attention of this court that the said decision was appealed against vide civil appeal No.37/2009 where the court of appeal of Tanzania

overturned the High Court decision. Thus, the previous decision is not an authority on the issue.

From the submissions and records of this matter, it is obvious that evidence presented at the disciplinary hearing held on 15th July, 2015 which was used by the employer to justify both the validity and fairness of reasons for termination as required by section 37(2)(b) of the Employment and Labour Relations Act was not sufficient to validate her termination as the applicant tried to do at the CMA. The law requires the employer to prove the validity and fairness of the reasons for termination in terms of section 39 and (2) (a) and (b) of the Act. The sections provides that;

Section 37 (2) (a) and (b)

> *"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-*
>
> *(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.*

Further to that, section 39 of the Act provides that:-

"In any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair."

As correctly held by the trial commission, the employer's witness called at the disciplinary hearing did not have direct evidence over all allegations levelled against the respondent, she equally lacked basic evidence like investigation report which could have supplemented all direct evidence that were lacking. This court noted that the employer made efforts to validate reasons for termination not before the termination was carried out but after filing the CMA case, this is indicated through the act of supplying evidence before the CMA which was not available during the disciplinary hearing at the time of determining the fate of the respondent's employment.

Considering the evidential gaps highlighted at pages 12 to 16 of the Arbitral Award, this Court is convinced that there is lack of concrete evidence pointing to the respondent as the person who signed the vouchers in question without authorization and against the policy. The admission from PW6, immigration officer, that he was never called at the disciplinary hearing and his affirmation that the report supplied by him was not a conclusive proof that there was a fictitious trip is yet another reason to doubt the evidential value of what was relied upon to implicate the respondent for the offence.

In the circumstances, this Court find no reason to disturb the findings made by the trial commission regarding failure of the applicant to execute her burden of proof by availing sufficient evidence to validate the reason for termination before the decision was taken.

Coming to the issue whether the trial commission was at fault in holding that the Respondent's termination was procedurally unfair, Counsel for the applicant argued that there was sufficient evidence on record validating the fairness of procedure and that the trial commission ignored such watertight and strong evidence. He submitted that in determining the fairness of procedure each case has to be decided on its own merit. He maintained that, in the case at hand records reveal that the investigation was thoroughly conducted through audit exercise and the evidence of such edit exercise was comprehensively availed to trial commission through the testimony adduced by the DW2 which was never controverted.

He added that, the applicant's failure to adduce audit report before trial commission was not a conclusion that the audit exercise was never conducted. He emphasised on the distinction between conducting audit exercise and tendering the audit report. He contended that in the circumstance of this case the applicant fully complied with the

requirement of the law by conducting audit report. He contented further that, failure to tender the audit report in the case under consideration was justified and the rationale behind such failure was demonstrated before the trial commission through the testimony of DW9, Fred Manongi.

To support his argument, he referred this court to the case of **Hamisi Jonathan John Mayage vs Board of External Trade**, Labour Revison No. 8/2008 where he maintained that the audit exercise was considered to be a sufficient substitute for investigation required under rule 13 (1) and (2) GN 42 /2007. He concluded that by conducting audit exercise the applicant fully complied with the requirement of the law and that it was very wrong to consider it as failure to conduct investigation. He referred this Court to the case of **Ngorongoro Area Conservation Authority vs Elinipendo Mbwambo** (supra) where this court made reference to the case of **Hamisi Jonathan** (supra) and affirmed that conducting audit exercise was a sufficient substitute for investigation required under rule 13 GN 42/2007.

On the other hand, the applicant's counsel challenge each and every aspect of trial commission findings where he pointed out, among other things, that the amendment of charges made by the applicant was justified and that there was no law restraining the employer from making

such amendments. He further responded against the involvement of the advocate who was engaged by the applicant at the disciplinary proceedings. He contended that there is no law barring the employer from inviting the advocate to assist the disciplinary committee and further that that the respondent was never prejudiced by his involvement in the disciplinary proceedings.

In response, counsel for the respondent maintained that the findings made by trial commission specifically, the five areas of procedural irregularity made by the employer, as reflected under page 16 to 21 of the arbitral award were correct and justifiable.

With regards to substituting the requirement for investigation with the audit exercise, he argued that, it was clumsy to substitute investigation with audit which was comprehensively done at the time the respondent was suspended to give room for investigation. Further to that, he maintained that violations in question such as falsification of signature and forgery of immigration stamps required investigation beyond what the audit had covered.

As to the High court case of **Hamisi Jonathan (supra)** cited by the applicant's counsel, he maintained that, it has no legal effect since the same was overturned by the Court of Appeal in Civil Appeal No. 37/2009.

He emphasized on the significance of affording an employee a fair hearing before an adverse decision is made which was the procedural issue in this case.

Amplifying on the significance of investigation and the investigation report, he demonstrated the special circumstances of this case which required the employer to investigate and establish by evidence the alleged forgery of signature, alleged stamping of immigration stamps and the alleged failure to attend foreign trips. He referred this court to a case of **Tanzania Revenue Authority vs Andrew Mapunda**, Revision No.104/2014 where labour court affirmed that lack of investigation report was a fatal irregularity.

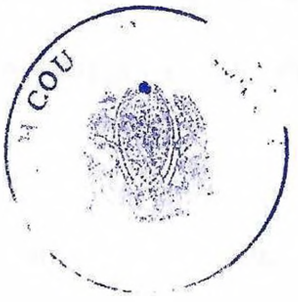
Having considered the records of this matter, this Court is in agreement with the findings of the trial commission on procedural errors noted at pages 17 to 20 of the impugned arbitral award and agrees that the noted errors infringed the Respondent's right to a fair hearing which caused the respondent's termination procedurally unfair.

With regards to the reliefs awarded by the CMA, since this court has satisfied itself that the Respondent's termination was both substantively and procedurally unfair, it follows therefore that the order for re-

instatement of the Respondent without loss of remuneration awarded by the trial commission is valid, fair and in accordance with the law.

As a consequence, this court finds no reason to disturb the decision of the trial Tribunal. Hence, this application is dismissed for want of merit.

It is so ordered.



K.N.ROBERT
JUDGE
11/5/2022