IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

LABOUR REVISION APPLICATION NO. 79 OF 2020

(Originating from Employment Dispute No. CMA/ ARB/110 /2017)

ADAM MAULID MATUMLA ..... APPLICANT

Versus

MOBISOL UK LIMITED ..... RESPONDENT

JUDGMENT

Date of last order: 15-2-2022

Date of ruling: 23-2-2022

B.K. PHILLIP, J

The applicant herein lodged this application under the provisions of sections 91 (1) (a) and (2) (c) and 94 (1) (b) (i) of the Employment and Labour Relations Act, Section 56 (c) of Labour Institution Act read together with Rules 43 (1) (a) and (b) 24(1), (2) (a) (b) (c) (d) (e) (f), and (3) (a) (b) (c) (d) and 28 (1) (c) (d) and (e) of the Labour Court Rules, G.N. No. 106 of 2007, moving this Court to revise and set aside the award made by the Commission for Mediation and Arbitration ("CMA") at Arusha, delivered on 15th July, 2020 in Employment Dispute No. CMA /ARB/2110/2017.The application is supported by an affidavit sworn by the learned advocate Mohamed N. Mhinda who appeared for

the applicant . The Respondent filed a notice of opposition supported by a counter affidavit affirmed by Sheck Mfinanga, the learned Advocate for the respondent.

I ordered the application to be disposed of by way of written submissions. Both Advocates filed their written submission as ordered by the Court.

A brief background to this matter is as follows. That the applicant herein worked with the respondent from 9th November 2016 as marketing officer letter on, he was promoted and became the Mbeya Regional Marketing Manager. Basing on that promotion he was given one year contract which commenced on 1st April 2017 to 31st March 2019. On 2nd March 2018 his employment was terminated. The reason behind the termination of his employment is that he was charged with, misconducts and major breach of trust, and gross negligence after being accused of tempering with the respondent's system by editing details of customer. He was prosecuted before the disciplinary Committee and found guilty, and consequently , terminated from employment. He appealed before the Appellate Committee. His appeal did not sail through. The Appellate Committee upheld the decision of Disciplinary Committee. Being aggrieved by the decision leading to

termination of his employment he lodged his complaints before Commission for Mediation and Arbitration ("CMA") at Arusha. The issues before CMA were; one, whether the complainant was fairly terminated, two, what reliefs parties are entitled to. On issue first issu, the Arbitrator ruled that there were fair reasons for termination of applicant's employment but procedurally the termination was unfair as the order for the termination of his employment was made the disciplinary committee. On the second issue, the Arbitrator exercised hisdiscretion by deciding not to award any compensation to the applicant . The Applicant was aggrieved by the Arbitrator's decision, thus he lodged this application for revision on the following grounds:

i) That the trial arbitrator failed to award appropriate relief after finding the termination of employment was procedurally unfair.
ii) That the trial arbitrator improperly evaluates the applicant's evidence.
iii) That, the trial arbitrator centred her decision on reasons for termination basing on unproved and hearsay evidence.
iv) That the trial arbitrator misdirected herself on fact and issues outside the record of proceedings.

Submitting on the 1st ground , Mr Mhinda argued that despite making a finding that the procedure for the termination of the applicant's employment was unfair the Arbitrator failed to award compensation for unfair termination contrary to labour laws. He cited Rule 32 (1) of the Labour Institutions (Mediation and Arbitration Guidelines) GN. No. 67 of 2007, Section 40 (1) of the ELRA and the case of **Magnus K. Laurean Vs Tanzania Breweries Limited Civil Appeal No. 25 of 2018** (unreported) to strengthen his arguments.

With regard to the 2nd ground, Mr. Mhinda argued that Arbitrator did not evaluate the evidence properly as a result he arrived at wrong findings which resulted into wrong conclusions. The Arbitrator relied on investigation report which was not tendered before disciplinary committee neither it was tendered before CMA during the trial, contended Mr. Mhinda. To cement his argument he cited the case of **Adam Lengai Masangwa and Another Vs Mount Meru Hotel Labour Revision No. 1 of 2018.** (unreported).

With regard to the 3rd ground, Mr. Mhinda's arguments were as follows; That the Arbitrator based her decision on unproved and hearsay evidence by considering what disciplinary committee found instead of determining and evaluating matters according to evidence

and facts presented before him. He maintained that the arbitrator erred in law and fact by misdirecting herself and ended into a wrong conclusion. The arbitrator misconstrued the submissions made by the applicant's advocate and editing customers' detail is not an offence as per the conditions and terms of the applicant's employment contract, formal employers' instruction or company policy.

In rebuttal counsel for the respondent argued that applicant was terminated on basis of his own admission of gross negligence which is among the offences falling under the category of serious misconduct which justifies termination of employment as per the schedule to the Employment and Labour Relations (Code of Good Practice) Rules GN. No. 42 of 2007 and section 14 (2) of Mobisol's Human Resource Handbook.

Furthermore, he argued that the compliance of the procedures is irrelevant where there is an admission of the offence charged. To strength his argument he cited the case of **Namyalo Dorothy Vs Stanbic Bank Labour Dispute Claim No. 166 of 2014,** (unreported). He was of the view that since termination of applicant's employment was based on his own admission, the arguments raised by the applicant's counsel that the respondent's failure to tender the

investigation report before the disciplinary committee or the CMA, rendered the termination of the applicant's employment substantive unfair is misconceived.

In addition to the above the counsel for the respondent raised points preliminary objections. Let me say out right here that I will not entertain the points of preliminary objection since the position of the law is very clear that submission made by parties are not part of pleadings and parties are bound by their pleadings.[see the case of **Yara Tanzania Limtied Vs Charles Aloyce Msemwa t/a Msemwa Junior Agrovet, and another, Commercial case No.5 of 2013** (unreported)] .This application was fixed for hearing in the presence of the advocate for the respondent and he did not raise any point of preliminary objection. It is obvious that the points of preliminary objections raised in the submissions are pure after thoughts which cannot be entertained at this stage.

In rejoinder counsel for the applicant reiterated his submission in chief and added that the applicant did not admit any offence as there was no provision under the company policy that prohibited correcting or editing customer's details. That the alleged admission made by the applicant was not admission to the offence. What he admitted is that , in

performance of his daily duties he could not avoid editing the customers details/ particulars.

Having analysed the rival submissions made by learned advocates and perused the Court records in my opinion the issue to be determined by this Court are as follows:

i) Whether there was fair reason for the termination of applicant's employment.

ii) What reliefs if any parties are entitled to.

With regard to the 1st issue that is, *Whether there was fair reason for the termination of applicant's employment*, upon perusing the Court's records, I have noted that, the Arbitrator's decision is not based on the alleged investigation report as contended by Advocate Mahinda, but it is based on the evidence adduced at the hearing. The Arbitrator's findings are based on the applicant's testimony in which he admitted that he changed details of a customer in the system on the reason that he wanted to assist his customers to ger the solar system. The offence of gross dishonest and major breach of trust which the applicant was charged with has its roots from the allegations levelled against him by respondent that he used to change the names of approved customers and insert his own names so that he could reach his target and was

doing so the without permission from headquarter. The applicant did not deny the said allegation. When responding to questions posed to him during cross examination at the CMA, the applicant admitted that he changed customer's detail. For clarity let me reproduce part of the responses made by the applicant during the hearing of this matter at the CMA hereunder;

> *"Question:Is it true that you edited the approved clients details*
> *Answer: (by the Applicant)-it is true*
> *Question:If the Head quarter has already approved "A" any you edit the detail to "B",then detail will read "B"*
> *Answer (by the Applicant) Its true"*

(See page 25 and 26 of typed proceedings). The main argument raised by the advocate for the applicant was that the applicant did not commit the offence charged against him but admitted that he changed the details of customers in the system because that was part of his responsibility and the respondent is the one who gave him the access to the system , and had powers to deny him the access to the system, if he wished to do so. Thus, he cannot be heard now, blaming the applicant for accessing the system. With due respect the applicant's advocate, I think he has missed the gist of the respondent's complaint and the charge against his client. To my understanding the problem was not only accessing the system or changing the details of the customer but was

also the type of the changes he was doing in the system in respect of the customer's particulars /details. As alluded earlier herein above, the respondent's concern was that the applicant was changing the details of approved customers and insert his own names and information. So , the question here would be ,was the applicant allowed to do so? The applicant failed to substantiate before the CMA that the changes he made were justifiable and was allowed to effect the same. In other words he had no power to change the details of customers in manner he did. So, the fact that no investigation report was tendered at the CMA or the disciplinary hearing cannot change the admission made by the applicant in respect of the charged levelled against him. In fact , where there is admission the need of tendering the investigation report becomes redundant.

As correctly argued by the Hon. Arbitrator, the applicant was found guilty of the offences of gross dishonest and major breach of trust which are major offences that justify termination of employment [See rule 12 (3) (a) of Employment and Labour Relations (code of good practice) GN No. 42 of 2007]. So, by the evidence adduced at the CMA, it is clear that the applicant's termination of employment was based on fair reasons.

Coming to the second issue, The major concern raised by Mr. Mhinda is that upon the arbitrator's finding that the procedure for the termination of applicant was unfair , he failed to award compensation to the applicant as provided in the Labour Laws.

I have perused the provisions of section 13 (1) (2) of the ELRA which provides for the procedure for conducting the disciplinary hearing, which basically protects the employee's rights to fair hearing before being terminated. In my understanding, when it comes to the determination on whether the procedure for termination of employment is fair, what is important is the employee's right to a fair hearing. That is the fundamental procedural rule which has to be complied with. And there are some rules of procedure which do not go to the root of the matter or their none compliance do not prejudice or cause injustice to the parties. To my understanding, that is the reason behind the position held by Lady justice Rweyemamu, J as she then was, in the case of in the case of **Felician Rutwaza Vs. World Vision Tanzania Civil Appeal No. 213 of 2019**, (unreported) in which she cited the case of **Sodetra (SPRL) ltd Vs Meza and Another, Labour Revision No.207 of 2008** (unreported) when she was, interpreting the provisions of section 40 (1) (c) and she had this to say;

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

Back to the instant case, the procedural irregularity pointed out by the applicant's advocate did not caused any injustice to the applicant bearing in mind that the applicant was accorded the right to be heard and admitted the offence he was charged with. In fact the applicant's counsel did not submit any thing to show that the fault complained of caused any injustice or prejudice to the applicant in any way. It has to be noted that the facts of this case are different from cases involving procedural irregularity, where there is no admission of the offence charged against the employee.

In the upshot , I entirely agree with the way the Arbitrator exercised his discretion by refraining from awarding the applicant any compensation. Exercising discretion judiciously entails considering the circumstances of the case as the Arbitrator did. Thus, I do not see any plausible reasons to vary the Arbitrator's Award. In fine, this application is dismissed.

Dated this 23rd day of February 2022.

B. K. PHILLIP

JUDGE.