IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

LABOUR REVISION NO. 69 OF 2020

(C/f Original Dispute No. CMA/ARS/MNR/ARB/232/19/149/2019)

UN LODGE EN AFRIQUE LTD .....APPLICANT

VERSUS

SALEHE SHARIF BURHANI ..... RESPONDENT

JUDGMENT

04/11/2021 & 27/01/2022

KAMUZORA, J

Before the Commission for Mediation and Arbitration of Arusha (the CMA) Salehe Sharif Burhani (the respondent herein) lodged a claim for unfair termination of his employment vide CMA/ARS/MNR/ARB/232/19/149/2019 against his employer UN LODGE EN AFRIQUE LTD (the applicant herein). The CMA made an award in favour of the respondent hence the applicant preferred the present revision application under the provision of section 91 (1)(a) and (2)(a)(b) and (c) of the Employment and Labour Relations Act no 6 of 2004, Rules 24 (1), (2)(a)(b)(c)(d)(e) and (f), (3)(a)(b)(c) and (d) and Rule 28 (1)(1)(c)(d) and (e) of the Labour Court Rules, GN No. 106 of 2007. The application is supported by an affidavit sworn by Mr. Qamara Aloyce

Petter, the applicant's advocate and it is strongly opposed by a counter affidavit sworn by the respondent himself.

In course of composing the judgment I realised that while responding to the application, the respondent accompanied to his counter affidavit a notice of opposition containing objections to the application. It is unfortunate that the same were not addressed or argued by the parties. Since all parties were represented and their representatives were present at the time the matter was scheduled for hearing, it my assumption that they did not intend to argue the objection and that is why they opted to straight argue the application. For that reason, they waived their right over determination of the objections.

Before delving into what was argued by the parties in respect of the revision application, it is paramount in brief to give the background of the matter leading to this application.

The respondent was employed by the applicant as a driver on 25/07/2014 and on the course of his employment he was given money (Tshs 225,000/=) to pay for water bills to one Mesiaki Levala and was then condemned for not paying the said water bills leading to the conduct of a disciplinary hearing against him as per Exhibits D6 and D7. Thereafter, to his employment was terminated on 30/02/2019. When the

matter was referred to the CMA, having considered the evidence and exhibits tendered before it, the CMA issued its award to the effect that there was unfair termination of the respondent's employment and it awarded the respondent. In considering Section 40 (1) and 44 (1) (a), (e) of the Employment and Labour Relations Act the CMA concluded that the respondent was entitled to be paid 12 months salaries as compensation to the tune of Tshs. 5,370,817.92/=, severance pay for 5 years to the tune of Tshs. 602,495.6/=, unpaid salary for the month of March, 2019 to the tune of Tshs. 447,568.16/= as well as the deducted salary to the tune of Tshs. 225,000/= and the certificate of service. Being dissatisfied by the CMA award, the applicant preferred this application on the following reasons:

1) *That, the award of the arbitrator was unlawful, illogical, irrational and irregular for the Arbitrator to make finding that, the employer failed to prove that the investigation was not done before the complainant was called before the hearing of the committee.*
2) *That, the award of the arbitrator was unlawful, illogical, irrational and irregular for the Arbitrator to make finding and stated that the respondent's failure to have a proper procedure of payment lead to the complainant's termination.*
3) *That, the award of the arbitrator was unlawful, illogical and irrational and full of irregularities for finding that the respondent was not supposed to terminate the complainant for the offence.*

4) *That, the award of the arbitrator was unlawful, illogical, irrational and irregular for the Arbitrator to make the finding that the complainant was not paid his March 2019 salary benefits and order the refund of deducted unpaid amount of money to supplier.*
5) *That, the award of the arbitrator was unlawful, illogical, irrational and irregular for the Arbitrator's failure to consider the evidence, testimonies and exhibits tendered during the hearing proceedings, thus arriving to unjust and unfair termination.*

The major issue calling for the determination of this court is whether the arbitrator was correct to having treated the respondent as being unfairly terminated.

Arguing in support of the application, Mr. Qamara submitted for the first ground that, Rule 13 (1) of GN. N0. 42 of 2007 Employment and Labour Relations Act requires the employer to conduct an investigation to ascertain whether there are grounds for a hearing to be conducted. He insisted that the applicant complied with Rule 13 (1) as per exhibits D1, D2, D3 and D4 which are documents collected by the applicant to ascertain whether there was a need to conduct hearing. That, the same documents were presented at the hearing and issued to the complainant before the hearing and were presented before the CMA. He insisted that, the fact that an investigation was not conducted was not true and urged

the court to differentiate between the meaning of Rule 13 (1) on investigation and inquiry under Item 9 (4) of the same GN.

Submitting on the 2nd ground concerning handling of money, he argued that, pursuant to exhibit D4 the respondent admitted to have taken money to pay to the supplier. That, on 17th March 2019 Mesiaki Levala made an official letter (exhibit D1) complaining for his August 2018 payment. That, it is also in evidence under CMA form No. 1, part B, the respondent was employed in the same position as a driver from July 25th, 2014 to the date when he was terminated on March 2019. That, this proves that he was aware and acquainted to the procedure of payment for the whole period of his employment. That, this justifies the fairness of the reason of termination under rule 12 (1)(a)(b)(i)(ii)(iii)(vi)(v) and 12 (3)(a).

On the 3rd ground, Mr. Qamar referring Rule 12 (1)(a)(b)(i)(ii)(iii)(vi)(v) and 12 (3)(a) he submitted that, the applicant justified that the dishonest was gross. That, under exhibit D7 which is the hearing form it reveals that from 30th August 2018 to the date of the water supply which is 17th of March 2019 there was ample time for the complainant to settle peacefully by paying the water supply but he refused. Mr Qamara was of the view that this can be counted as per rule

12 (3)(a) as gross dishonest. On that ground, he submitted that it is only the employer who is endowed with the power according to the conduct of the employee to make findings that the termination was the only option.

Submitting for the 4th ground Mr. Qamar argued that the respondent was properly paid his dues including his March 2019 salary as per exhibit D10 and payment was done through bank. That, exhibit D8 proves other payments including his notice and leave and he also signed the payment voucher for that payment. That, what was not mentioned in the award of CMA is the document containing the signature of the respondent which the respondent refused to have his signature. Mr. Qamara however insisted that exhibit 3 which is a notice to attend hearing, exhibit 4 which is his letter in reply, suspension letter exhibit D5 and notice to attend hearing among other documents, prove that the contested signature is the respondent's signature. Regarding the deduction of money paid to the supplier by the company Mr. Qamara submitted that the same was justified under section 28(2) (a) (b) (c) (d) and (e) and section 28(3) and (4) of the Employment and Labour Relations Act Cap 266 R. E 2019.

As for the 5th ground Mr. Qamar argued that, unfair termination is governed by section 37(1) (2) (a) (b) and (c) of the Employment and Labour Relations Act while Rule 12(1) (a) (b) (i) to (v) and (3) (a) deals

with substance of termination and Rule 13 deals with the procedures. That, for the termination to be fair, the substance and procedures must be followed. That, as per Rule 12 (1) (a) (b) (i) to (v) the employee was terminated after contravening a rule or standard regulating conducts relating to employment. Regarding the procedure under Rule 13 (1) he submitted that, the procedure was properly followed as the investigation was properly done and the respondent was notified and he replied to the allegation. Mr Qamar thus prayed for this court to quash the decision made by the CMA.

In contesting the application, the respondent's personal representative Mr. Maganga submitted on the 1st ground that, there was no any document presented by the applicant before the CMA showing that investigation was conducted as per the requirement of the laws. He argued that, failure to conduct the investigation rendered the whole process nullity and referred this court to the case of **Tanzania International Container Terminal Services (TICTS) vs. Flugence Steven Kalikumtima and Others**, Revision No. 471 of 2016 HC (Unreported). That, by failure to conduct the investigation the employer contravened Rule 13 (1) of GN 42 OF 2007, Code of Good Practice as no

proof that the investigation was conducted and the respondent was involved.

On the 2nd ground, Mr. Maganga submitted that, the applicant refused to issue receipts after every payment and that resulted to the missing of records for payments done. That, it was not disputed that the respondent requested for the receipts upon payment of water bills but the applicant did not produce receipts thus resulting to this conflict as the supplier was claiming for non-payment while he was paid. He insisted that, the unprocedural payment resulted to this dispute as the supplier himself did not have the receipts for the payment done. For him, this justify the CMA findings as there were bad procedures in payment resulting to the missing of records for the payment.

Regarding the 3rd ground he submitted that, section 37 (2) (a) (b) (c) of The Employment and Labour relations Act defines unfair termination of employment. He stated that where no valid and fair reasons for termination the termination will not be justified thus fair termination must be justified by the substantive and procedural issues. Regarding exhibit D1 he stated that the supplier did not testify at the CMA thus the content of the said document was not proved hence could not be relied upon.

Contesting the 4th ground, Mr. Maganga submitted that, the employer failed to prove the payment of salary and there was nowhere the salary for March was shown to be paid. Regarding the deduction used to pay the supplier he stated that, it was supposed to be proved first that no payment was done to the supplier. He stated that the record shows that there was a time the supplier was forgetting as to when the payment was done. For the 5th ground he submitted that, the CMA considered the evidence for both parties and that is why it reached to a just decision. He thus prayed that this revision to be dismissed.

Upon a brief rejoinder, Mr. Qamar stated that exhibit D1 to D5 proves that investigation was done and the respondent was given time to pay. Regarding the process of payment, he stated that at the CMA the respondent did not complain of the process of handling money between him and the supplier. Regarding the validity of the reason for termination he rejoinder that, hearing form which is part of exhibit D7 shows that there was a valid reason for termination thus the procedure was well followed. On the 4th ground he insisted that exhibit 10 proves the payment of salary for month of March. On the 5th ground Qamar reiterated that, there was a fair reason for termination and the procedure was followed. He thus prayed for the decision of CMA to be quashed.

From the analysis of the submissions and the records in this matter, there is no dispute that the respondent was an employee of the applicant and his employment was terminated on the allegation of misconduct. What is disputed is the fairness of the reasons for termination and fairness of the procedures for termination. Thus, in determining this application, the following will be the guiding issues: -

1) Whether the arbitrator was right to hold that there was unfair termination of the respondent's employment.
2) Whether the Arbitrator was right to make the finding that the complainant was not paid his March 2019 salary benefits and in making an order for refund of deducted unpaid amount of money to supplier.
3) Whether the arbitrator failed to consider the evidence and exhibits tendered during the hearing proceedings.

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 a fair procedure.

Starting with the validity and fairness of the reasons, Rule 12 of GN No. 42 of 2007 provides for the reason considered fair to terminate the employment. It must be established that the employee contravened the rule standard regulating conduct relating to employment and those standards must be reasonable, clear and unambiguous. The law also requires the proof that, the employee was aware of those standards and have consistently applied the same. Other reasons to be considered are that, the employee must have done the acts of gross dishonest or wilful damage to property or acts endangering the safety of others or gross negligence or assault to any other person associated with the employment and or gross insubordination.

In the present matter the respondent was charged for gross dishonest and that is featured in exhibit D5 to which the respondent's employment was suspended for seven days. In itself, failure to deliver the money to the intended party as directed by the employer was a great deception which in my view fall within the meaning of great dishonest warranting termination of employment. It was alleged by the applicant's side that for not paying the money, the respondent destroyed the applicant's image to its supplier and in meaning of Rule 12, that warrant a good reason for termination. I agree with the counsel for the applicant

that by not adhering to the rules of the employer of paying the money intrusted to him to the third party is the act of gross dishonest that may warrant to termination of employment.

However, it was contended by the respondent's representative that, the allegation was not investigated to warrant a proof of misconduct. In my understanding, the investigation referred to under Rule 13 does not intend to prove misconduct rather to ascertain if there are good grounds for a hearing to be held. Referring exhibit D1, to D4 the counsel for the applicant insisted that the investigation was conducted. I have visited the said exhibit D1 to D4 and my observation is that exhibit D1 is the letter from Mesiaki Levara dated 13/03/2019 complaining for not being paid by Swalehe the amount of Tshs. 225,000/= for water. Swalehe was served with a letter (exhibit D3) dated 19/03/2019 to defend himself as to why disciplinary action should not be taken against him for failure to pay for water. He defended himself through exhibit D4, a letter dated 20/03/2019 that he paid for the alleged money and he was not liable to the allegations. With his response, the employer formed a view that there was a need for disciplinary hearing thus on 21/03/2019, the respondent was issued with suspension letter waiting for hearing of the disciplinary proceedings. The hearing form was then filled on 28/03/2019 and the notice of hearing

issued the same date. In my understanding the requirement of Rule 13 (1) of GN No. 42/2007 was not met as the said rule requires the investigation to be conducted to ascertain if there was good reason for hearing. There is no report indicating that after the respondent was suspended, the employer conducted the actual investigation on the matter. After issuing a suspension letter, the employer was responsible to conduct investigation and ascertain whether there was a good reason for disciplinary hearing. I therefore agree with the respondent's representative and the CMA that the investigation was not conducted. In considering the unreported decisions of this court in the case of **Tanzania International Container Terminal services (TICTS) Vs Fulgence Steven Klikumtima and others, Revision No 471 of 2016** and the case of **Fredrick Mzimbwa Vs Tanzania Ports Authority, Revision No. 220 of 2013**, it is my considered view that in the absence of investigation report, there is no justification that the investigation was conducted. The exhibits D1 to D4 referred to by the counsel for the applicant does not justify that the investigation was conducted. In that regard, it is my conclusion that as the investigation was not conducted it rendered the whole process illegal.

Regarding the fairness of the procedure the records shows that, the respondent was first suspended from work for seven days as per the employer's letter, exhibit D5. The reason for suspension was mentioned as great deception after he had received the money from the employer to pay the water bill but failed to do so. Through that letter the respondent was informed to report to the HR on 28th March 2018 for disciplinary hearing. Exhibit D6 reveal that on 28th March 2019, the respondent was served with a notice of hearing of the disciplinary proceedings and exhibit D7 is the hearing form containing all particulars of the allegations against the respondent but the same was neither filled and signed by the employer, the applicant nor the employee (the respondent). The hearing form is accompanied with the hearing proceedings which does not indicate if the respondent was present at the time of hearing and he signed the proceedings. The proceedings only reveal the names of other members who attended in exclusion of the respondent. Exhibit D8 and D9 reveal that the respondent contract of employment was terminated by the applicant as of 30th March 2019.

With the above observation, one would suggest that the respondent did not attend the disciplinary hearing. However, page 7 of the typed proceedings reveals that when the respondent was cross examined on his

participation in the disciplinary hearing, he confirmed that he attended the disciplinary hearing but denied to have been informed on his right to appeal. With that observation although the hearing form was not signed by the respondent, there is no doubt that he was summoned and he appeared during the disciplinary hearing. However, since no investigation was conducted prior to disciplinary hearing it rendered the procedures for termination illegal and contrary to the provision of Rule 13 of GN No. 42 of 2007. That being said it is my view that although gross dishonest is a fair reason justifying termination of employment, its fairness is justified upon compliance to the procedures for termination including investigating the complaint before holding the disciplinary hearing. It is therefore my conclusion that the termination of the respondent's employment was unfair.

Having determined that there was unfair termination of the respondent's employment, it takes me to the second issue on whether the Arbitrator was right to make the finding that the complainant was not paid his March 2019 salary and other benefits. The counsel for applicant claimed that the respondent was properly paid his dues including his March 2019 salary as per exhibit D10 and payment was done through bank. That, exhibit D8 proves other payments including his notice and

leave and he also signed the payment voucher for that payment. On the other hand, the respondent's representative insisted that there was no proof that the employer paid the salary for March.

Exhibit D10 referred to by the counsel for the applicant are the payment confirmation of salary payment. It is issued by the applicant indicating the respondent's entitlement. However, there is no proof that such amount was deposited to the respondents account as alleged by the counsel for the applicant. No evidence was presented before the CMA indicating that the respondent was paid his salary and other entitlements.

The counsel for the applicant insisted that the salary was paid in cash and the respondent signed to receive the same referring exhibit D10. He urged this court to compare the respondent's signature on the payment voucher with the signatures on exhibit D3 which is a notice to attend hearing, exhibit D4 which is his letter in reply, suspension letter exhibit D5 and notice to attend hearing among other documents and see that the contested signature is the respondent's signature.

Upon a thorough perusal to exhibit D10, it indicates the account number of the respondent meaning that the said payment was done vide bank account. As a matter of practice, the respondent being an employee his salary and other benefits were to be paid through bank account. No

pay in slip was submitted before the CMA proving that any amount was deposited in the respondent account be it salary or other benefit. As there is no proof that any of the amount was deposited to his bank account, the voucher or payment proof from the applicant's office whether signed or not signed by the respondent cannot prove that the respondent was paid his entitlements. Signing the document is one thing and receiving the actual pay is another thing. The applicant was supposed to present tangible evidence proving that the respondent was paid all his entitlements and in this I refer the bank pay in slip proving that the amount claimed was deposited to the respondent's bank account. I therefore hold the same view as the CMA that there was no proof that the salary for the month of March 2019 or any other entitlements were paid by the applicant to the respondent.

Regarding the deduction of money paid to the supplier by the company Mr. Qamara submitted that the same was justified under section 28(2) (a) (b) (c) (d) and (e) and section 28(3) and (4) of the Employment and Labour Relations Act Cap 266 R. E 2019. In my view, the deduction could only be justifiable upon proof that the termination was fair. I therefore agree with the CMA order for refund of deducted unpaid amount of money to supplier.

On the third issue on whether the arbitrator failed to consider the evidence and exhibits tendered during the hearing proceedings Mr. Qamara reiterated the submission that the procedure under Rule 13 (1) was properly followed as the investigation was properly done and the respondent was notified and he replied to the allegation. He did not point out the evidence that was disregarded by the CMA in its award. The respondent's representative insisted that the CMA considered the evidence for both parties and that is why it reached to a just decision. I have reviewed the decision by the CMA and it is without doubt that the evidence for the parties were considered before issuing an award. From page 5 to page 10 of the CMA ruling there is analysis of evidence before reaching to a conclusion which is found at page 11. That being the case, the applicant's argument is baseless.

In the final analysis, I do not see any reason to interfere with the CMA award. This application is therefore devoid of merit and is hereby dismissed with no order of cost considering the nature of dispute being a labour dispute.

DATED at **ARUSHA** this 27th Day of January 2022

HIGH COURT OF TANZANIA

D. C. KAMUZORA

JUDGE