IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

REVISION NO. 96 OF 2020

(Arising from the CMA in Labour Dispute CMA/MNR/BBT/12/2019 at BABATI)

CHACHA NSENGA WANKA ..... APPLICANT

VERSUS

UN LODGE EN AFRIQUE LTD ..... RESPONDENT

JUDGMENT

31/03/2022 & 19/05/2022

KAMUZORA, J.

This application was brought under the provision of section 91(1)(a) (b), 91 (2)(a)(b) and section 94(1)(b)(i) of the Employment and Labour Relations Act, No 6 of 2004 and Rule 24(2)(a)(b)(c)(d)(e) and (f), 24(3)(a)(b)(c)(d), and Rule 28(1)(c)(d)(e) of the Labour Court Rules, 2007 G.N No. 106 of 2007. The Applicant in this application is seeking for the revision of the proceedings of the Commission for Mediation and Arbitration (CMA) in CMA/MNR/BBT/12/2019 dated 28/09/2020.

The brief background of the matter as may be depicted from CMA record is such that, the Applicant lodged a complaint for unfair

termination at the CMA against the respondent and the CMA reached its decision to the effect that there was no unfair termination of the applicant's employment. The applicant was aggrieved by the said decision hence preferred this current application on grounds that,

i) The commission erred in law and fact by upholding the unfair termination to the applicant which was neither procedural and nor fairly made.

ii) The commission erred in law and fact by failure to consider and see the existence of improper service of the calling of the applicant herein above to the disciplinary committee.

iii) The commission erred in law and in fact for being bias against the applicant ending up favouring the respondent during the hearing up to the delivering of the decision.

Hearing of the revision application was by way of written submissions to which both parties complied to the scheduling order. As a matter of legal representation, the applicant was represented by Ms.Farida Juma and Mr.Wilson Kasarot, personal representatives from Labour for Community Development Organisation and the respondent enjoyed the service of Mr. Qamara Aloyce Peter, learned advocate.

Submitting in support of the Application through his representatives the applicant opted to submit jointly for all grounds. The applicant argued that, he was aggrieved by the Arbitration award which

uphold the decision that the termination was fair and procedurally instead of unfair termination he was also aggrieved by failure of CMA to consider the evidence of both parties proving that the applicant was terminated from his service by the respondent unfairly which contravene section 37(2)(a)(b)(i)(ii) and(c) of the Employment and labour relations Act No 6 of 2004.

The applicant also submitted that, during the hearing the arbitrator erred in law for not considering the evidence adduced by the parties that the applicant employee was terminated unfairly. That, exhibit D6 which is the hearing form shows that there is no any documentary evidence tendered by any witness during the hearing of the committee.

That the hearing was conducted without any witness signature which suggests to appear before the disciplinary committee, the fact which he argues was enough to suggest that there was no any disciplinary hearing conducted by the employer thus in contravention of Rule 13(5) of the Employment and Labour Relations (Code of Good practise) GN 42 of 2007. That, exhibit D1 collectively are complaints letters which were not tendered before the disciplinary hearing committee as directed by Rule 13 (5) above. That, under Exhibit D6

which are hearing forms, only the names appear without the questions for the witness appearing before the disciplinary hearing committee a fact which suggests that the disciplinary hearing was not conducted. Reference was made to the case of **The Arusha Hotel Vs Focus Mlacha,** Revision No. 104/2018 HC at Arusha (Unreported).

On Exhibit D3 which is the notice of attending hearing the applicant submitted that, the claim by the HR and Administration Officer one Evarist Massawe that the applicant refused to sign the document was not true as no affidavit was sworn or affirmed by the serving person no any official explanation from the village chairman of the applicant or any witness proving that the applicant refused to sign exhibit D3. While citing the case of **Gymkhana Club Vs. Diana Johnes and 2others,** Revision No. 50 of 2017 (Unreported) the applicant pointed out that the language used in exhibit D3 which is a notice to attend the hearing is English language which is unfamiliar to the applicant the fact which contravenes Rule 13(2) of the Employment and Labour Relations (Code of good practice) GN 42/2007.

The applicant went on and submitted that, the respondent had no any reason to terminate his employment as the termination was due to the misunderstanding with the core employees which those employees

failed to prove at the disciplinary hearing. That, the termination according to him must be for a valid reason and to buttress his submission he cited the case of **Arusha Hotel Vs Focus Mlacha,** Revision No 104/2018.

Basing on the above submissions, the applicant prayed that the arbitrators award be revised and set aside and the applicant be paid his terminal benefits according to section 40 (1) (c) of the Employment and Labour Relations Act.

Contesting the application Mr Qamara submitted that, in order to prove fairness of the procedures for termination, it is a matter of evidence by the employer before the CMA which show how the hearing was conducted at the place of work in considering the provision of Rule 13(1) (2) (3) (4) (5) (6) (7) (8) (9) (10) (11) (12) and (13) of the Employment and Labour Relations (Code of Good practice) GN 42 of 2007. On the requirement under Rule 13(1) on whether the investigation was conducted to ascertain if there were grounds to conduct hearing Mr. Qamara submitted that, as per exhibit D1 collectively, after the complaint letters from different departments the employer wrote a letter to the applicant requesting him to respond to the allegations and the letter was admitted as exhibit D2. Mr. Qamara is

of the view that, there is the evidence that Rule 13(1) was complied with though the applicant refused the service of the letter.

On the requirement under Rule 13(2) regarding notification to attend the hearing Mr. Qamara submitted that, notice to attend the hearing was issued and served to the applicant on 9/08/2019 who refused and the said notice and the same was tendered and admitted as exhibit D3. That, the charge was also prepared and served to the applicant who refused the service and the same was admitted as exhibit D4. That, the hearing was conducted as schedules as per exhibit D6 and the evidence was presented before the hearing committee but the applicant refused sign the hearing form or attend the hearing. He insisted that the applicant was given opportunity to respond to the allegation as per Rule 13 (5) and all necessary evidence were submitted before the hearing committee.

Mr. Qamara added that as the applicant unreasonably refused to attend the hearing, the same was conducted in his absence in compliance with the provision of Rule 13 (6). He contended that, there is evidence by witnesses proving that the applicant refused the service and the service of the documents in the place of work does not need swearing of affidavit by the server nor explanation by the village

chairman. He was of the view that the case of **The Arusha Hotel** was cited out of context and is of no relevance thus distinguishable from the present matter. He insisted that the evidence was produced before the hearing committee in the absence of the applicant who had waived his right by refusing to attend the hearing. On the cited case of **Gymkhana Club** Mr. Qamara submitted that, that case is distinguishable to the current case as the applicant was not denied his right to be heard.

On the validity of reasons for termination the counsel for the respondent submitted that, the applicant was terminated due to the incompatibility as the Employment and Labour Relation (Code of Good Practice) GN No. 42 of 2007. That, the applicant before the CMA did not deny the incompatibility with fellow employees. Mr. Qamara insisted that the termination was for a fair reason and the procedure were adhered to. He concluded that, the applicant was not entitled to any compensation as all his entitlements were paid to him as per exhibit D9 and the proceedings before the CMA together with the certificate of service as evidenced by exhibit D8.

In a rejoinder submission by the applicant's representatives, it was reiterated that, the respondent had no reasons to terminate the applicant's service on claim that the termination was due to the

misunderstanding with fellow employees while the said employees failed to prove at the disciplinary hearing and exhibit D6 proves that there was no reason for termination. They added that, before the CMA all respondent's witnesses testified that the applicant was terminated due to misunderstanding with co-employees which is not a sufficient reason to terminate the employee. They referred the case of the Arusha Hotel (supra), the case of **TANAPA Arusha Vs Dietrich Kateule,** Revision No. 55 of 2015 and the case of **Martina Nicholaus & another Vs Akiba Commercial Bank PLC**, Revision No. 20 of 2018 to insist on the point that the applicant was unfairly terminated without reasons and fair procedure of termination. They were of the view that the irregularities, omission and errors by the arbitrator were material to the substantive merit of the case as the same occasioned injustice and prejudice to the applicant.

The applicant's representatives thus prays that the arbitrators award be revised and this court be pleased to grant the applicant terminal benefits due to unfair termination according to section 40(1) (c) of the employment and labour relations Act No 6 of 2004.

From the analysis records, application and submissions for and against the application, there is no dispute that the applicant was an

employee of the respondent working as a security officer. It is also clear that the applicant's employment was terminated on 21st August 2019 and the CMA made its decision that respondent had valid reasons for termination of the applicant's employment for failure to cope with his employer and other staffs/employees.

What is disputed is the fairness of the reasons for termination and fairness of the procedures for termination. 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 allegation against the applicant was the incompatibility in both failures to relate with the management, employees and other people related to the company. As per the termination letter, the applicant was terminated due to misconduct involved in incompatibility in both unsuitability to work due to character bad relationship with the management and the employees and other people related to the employer.

Fairness of reason and procedures for termination on misconduct is governed by Rule 12 and 13 of GN No. 42 of 2007. The applicant was accused of mistreating fellow employees and raising false allegations against them. Several letters from employees complaining against the applicant's misconduct were admitted before CMA as part of evidence. Even the evidence of the applicant before CMA reveal that the applicant disrespected the Human Resource office (HR) and he admitted warning the HR not to deal with him. In that regard, I find that there was fair reason for termination as the applicant committed a misconduct for disrespecting the leader and for raising false allegations against fellow employees and for being incompatible with fellow employees.

The incompatibility as reason for termination is governed by Rule 22 of GN No 42/ 2007 which states that the incompatibility constitutes a fair reason for termination. Under that rule there are two types of incompatibility; one, unsuitability of the employee to his work due to his character or disposition and two, incompatibility by relating badly with fellow employees, clients or other persons who are important to the business.

In this application the applicant claims that there is no proof that he had no good relationship with other employees as alleged by the

respondent. Going through the evidence in records, it is clear that there was allegation that the applicant had no good relationship with fellow employees and the management. The complaint was received by DW1 in different occasions. Exhibit D1 are letters from different employees proving that there were various complaints laid down by the fellow employees against the applicant. Exhibit D8 is the termination letter showing two reasons leading to the applicant's termination to be incompatibility as well as the act of dishonest. Based on the evidence of DW1 and the above refereed exhibits I find it that there was a valid and fair reason for termination of employment.

Regarding the fairness of the procedure for termination, the same is guided by Rule 13 on the issue of misconduct and on issue of incompatibility it is governed by Rule 22 (2) (3) and (4) and Rule 18 of the Employment and Labour Relations (Code of Good practice) GN No. 42/2007. Rule 13 requires the investigation to be conducted before terminating the employee and in this matter, DW1 explained the whole process of collecting the letters containing the allegation against the applicant and writing to the applicant requesting him to responded to the allegation. That presupposes the existence of investigation process to which the applicant himself avoided. Under Rule 13 and 22,

disciplinary hearing is to be conducted after ensuring that the employee is informed of the allegations and notified to appear before the hearing committee.

By virtual of Rule 22(2) of GN No 42/ 2007 the incompatibility is treated in a similar way as incapacity for poor work performance. Under subrule 3 of Rule 22 the assessment on the procedure for termination based on incompatibility are set out under Rule 18 which deals with fairness of the procedure for termination on poor work performance. Under Rule 18 for the termination to be fair, the employer among other things must ensure that the employee is called for a meeting to explain why disciplinary action should not be taken against him and opt to be represented during the hearing if he so wishes. Rule 22 (3) and (4) provides for more process to be complied before terminating the employee for incompatibility.

In the present matter the applicant claims that the procedures for termination was unfair on account that the investigation was not conducted and the hearing was conducted without any witness signature on the hearing form the conduct which suggests that no any disciplinary hearing was conducted by the employer thus in contravention of Rule 13(5) of the Employment and Labour Relations (Code of Good practise)

GN 42 of 2007. That, exhibit D1 which are complaints letters were not tendered before the disciplinary hearing committee as directed by Rule 13 (5).

On the claim that no investigation was conducted, DW1 proved before the CMA that after several complaints directed to the applicant they investigated on the matter and opted to summon the applicant to respondent to the complaint but he refused the service The evidence of DW1 as depicted by the CMA in its award reveals that two different people DW1 Human Resource Officer and one Richard Ngoilenya Lekoine who was the head of the department to which the applicant was working tried to serve the applicant with the letter but refused the service. The applicant did not raise such allegation in his evidence until when he was cross examined and gave a general denial. The CMA believed the evidence from the respondent witnesses that there was service that was refused by the applicant and found no reason to disbelieve them. The applicant is now alleging that there was improper service of documents to him the fact that was not raised in his evidence before the CMA thus, the same is considered as an afterthought.

On the claim that no hearing was conducted as no signature on the hearing form proving that the applicant attended the hearing, it is my conclusion that, it is in record as well pointed out by the counsel for the respondent that the applicant was summoned to appear before the disciplinary committee but refused. Thus, it becomes obvious that the hearing was conducted in his absence as so required by Rule 13 (5).

On the case of **The Arusha Hotel Vs Focus Mlacha** (supra) and the case of **Gymkhana Club Vs. Diana Johnes and 2 others** (supra), I agree with the counsel for the respondent that they are distinguishable. The issue in case of the **Arusha Hotel** was whether the information disclosed by the employee to the Police and Immigration offices against the executive officer were protected information to amount to insubordination as a reason for termination. The court found that no proof that what was done by the employee was against the employment policy thus there was no reason for termination. That is different from the present case where the claim is on the misconduct based on incompatibility with the management and fellow employees to which the evidence proved that there was fair reason for termination. In the case of **Gymkana** the main contention was on the right to be heard which is not the case in the present matter.

Regarding the applicant's argument that he is not familiar with the language used in exhibit D3 which is a notice to attend the hearing, it is my view that Rule 13(2) of the Employment and Labour Relations (Code of good practice) GN 42/2007 makes it a mandatory requirement for an employer to notify the employee of the allegations against him. By virtual of exhibit D2 the employer notified the applicant of all the allegations against him. The contention by the appellant that exhibit D3 contravened the law is baseless because Rule 13(2) cited above requires the employer to notify the employee of the allegation against him in the language well reasonably understood by the employee and that was done through exhibit D2 which is written is Swahili language but the applicant refused to sign as shown in the evidence. Exhibit D3 is a mere notice of hearing thus no justification that the employer contravened the law.

On the claim that no affidavit was sworn or affirmed by the serving person or any official explanation from the village chairman of the applicant or any witness proving that the applicant refused to sign exhibit D3 it is my view that it is not the requirement of the law that there must be affidavit proving the service. If that is the case the same could have been raised before the CMA. As no evidence was advanced

during hearing before the CMA countering the mode of service, it becomes obvious that the evidence from the employer proved that the applicant refused service.

Based on the above argument it is in my view that pursuant to exhibit D6, a disciplinary hearing was conducted by the respondent in absence of the applicant and the outcome of the meeting suggested the termination of the applicant's employment contract. The allegation by the applicant that the evidence was not tendered during the hearing is a lame excuse as he deliberately refused to attend the hearing thus, not in a position to know what transpired in that hearing. The contention that the letters from the employees were not tendered during the committee hearing is unfounded. Exhibit D6 speaks on what transpired and who testified what against the applicant. The records shows that the applicant was served with a termination letter Exhibit D8 after a disciplinary hearing that was conducted in his absence. In my view, procedure was followed by the respondent prior to the termination of the applicant's employment and as the law also requires other terminal benefits were paid to the applicant by virtual of exhibit D8.

From the above arguments and reasons there to, I find no reason strong enough to make this court temper with the decision by the CMA.

The applicant was lawfully and fairly terminated from his employment. This application is thus devoid of merit and its hereby dismissed. Considering the nature of this case, I make no order as to costs.

DATED at **ARUSHA** this 19th day of May 2022.

D.C. KAMUZORA

JUDGE