IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

LABOUR REVISION NO. 40 OF 2020

(Originating from Labour Dispute No. CMA/ARS/ARB/59/020)

SOMA BIBLIA..... APPLICANT

VERSUS

MARTINE MWAISUMO.....RESPONDENT

JUDGMENT

23/2/2022 & 2/6/2022

ROBERT, J:-

The Applicant, **Soma Biblia** filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/ARS/ARB/159/2020. The applicant is praying for the following orders: -

1. *That, this Honourable court be pleased to call for and examine the records of CMA Award delivered on the 20th day of April, 2020, in Labour Dispute No. CMA/ARS/ARB/159/2020, by Honourable Arbitrator, OCTAVIAN MWEBUGA. For the purpose of satisfying itself as to the correctness, legality or propriety of the proceedings and orders made therein and revise and set aside the same.*

2. *That, any other relief(s) this Honourable court deems just and fair be granted.*

The application was supported by the affidavit sworn by Ms. Miriam Jackson Nitume, counsel for the applicant and resisted by a counter affidavit of Ms. Vanessa Ayubu Nyanga, counsel for the respondent.

Briefly stated, facts giving rise to this application reveals that, the Respondent was first employed by the applicant on 11th May, 2015 while residing in Dar es salaam, later on 31st March, 2020 he signed a new Employment agreement as Arusha Branch Manager running from 1st April, 2020 to 31st March, 2021. However, he was terminated on 15th May, 2020 for gross misconduct. Dissatisfied, he lodged a complaint at the CMA alleging breach of employment agreement without reasonable cause. He claimed payment of TZS 11,440,000/= as compensation for the remaining contractual period. After the hearing, the CMA delivered its award in favour of the respondent. Aggrieved, the applicant filed this application challenging the CMA award on the basis of legal issues stated in paragraphs 5, 6, 7 and 8 of the affidavit filed in support of this application.

When this application came up for hearing, parties were represented by Ms. Miriam Jackson Nitume and Ms. Vanesa Nyanga, learned counsel for the applicant and respondent respectively. At the request of parties,

the court allowed the application to be argued by way of written submissions.

Highlighting on this application, Ms. Nitume submitted that this application is based on the following legal issues:-

1. *Whether the award is improper to consider the evidence, reasons and arguments adduced by the applicant in the Commission for Mediation and Arbitration thus arriving to unfair and unjustifiable decision.*
2. *Whether the arbitrator considered the evidence of the respondent in the Commission for mediation and Arbitration without any material evidential proof and without any support and unjustified reason (s).*
3. *Whether the arbitrator's award was based on his preconceived opinion without considering the reasons and evidence adduced by the applicant.*

Submitting on the cited legal issues together, Ms. Nitume argued that, at the hearing of this matter before the CMA the respondent admitted the alleged misconducts and all allegations levelled against him therefore, termination was justifiable even if the disciplinary hearing committee was wrongly constituted. She made reference to the case of **Levinga Kasene & Another vs Chodawu Makao Makuu**, Rev. No. 32 of 2010 [LCCD (2008-2014) at page 14, where it was held that:

"...Admission of misconduct justify the holding that termination of the application was for valid reasons and that it was necessary to follow the procedures prescribed in the law of termination."

She submitted that, although the appellant may have done the offence for the first time but the offence committed constituted a gross negligence which justifies termination. She referred the Court to the case of **Azizi Ally Aidha vs Chai Bora Limited** [2011-2012] LCCD 65).

She submitted further that, the Arbitrator arrived at an improper decision since he failed in his award to consider that:-

One, the respondent herein claimed for breach of contract but failed to explain which term of the employment contract was breached by the applicant.

Two, the respondent herein had admitted his misconduct which led to his termination and therefore a disciplinary hearing meeting being improperly constituted does not justify the holding by the arbitrator that the breach of contract was unfair in terms of procedure and proceed to award compensation.

Three, the Arbitrator disregarded the fact that it was the respondent who had committed a material breach of the contract provided for under clause 15 of the employment contract (exhibit P1). Although the Arbitrator

admitted in his award at page 5 that the Respondent committed and admitted the offence.

She argued that, it was the administrator's duty to dismiss the complaint as opposed to wrongfully awarding compensation as the award of compensation to the respondent amounts to one benefiting from his own wrong doing which is against the law. She referred the court to the case of **Bi Hawa Mohamed vs Ally Sefu**, Civil Appeal No. 9 of 1983.

Four, the Arbitrator adjudicated on matters which were not complained of by the respondent herein according to CMA Form No.1. She clarified that, since the respondent's claim was based on breach of contract (see CMA F.1), it was wrong for the Arbitrator to adjudicate on substantive and procedural fairness of termination. To support her argument, she made reference to the case of **Stamili M. Emmanuel vs Omega Nitro (T) Ltd** [2015] LCCD.

On the basis of the argued issues, she prayed for the court to quash and set aside the CMA award in Labour Dispute No. CMA/ARS/ARB/159/2020 and grant the order sought in this application.

Responding to the submissions by the learned counsel for the applicant, counsel for the Respondent maintained that the CMA award was fair and just due to the following reasons: - The admission of

misconduct by the respondent did not excuse the applicant from complying with the procedures prescribed by the law. He submitted that, section 37(2) of the Employment and Labour Relations Act, Cap. 366 R.E 2019 requires reasons for termination of employment to be valid and the procedures to be fair. Unfortunately, the procedures followed by the applicant was not in compliance with the law.

She argued that, the evidence tendered before the CMA proved that the applicant never followed the procedures stipulated by the law. No investigation was conducted as required by Rule 13 (1) of the Code of Good Practice Rules, G.N. No. 42 of 2007, involvement of biased members in the disciplinary hearing compromised impartiality of the hearing committee for example, PW2 was the complainant and immediate boss of the respondent had prior knowledge of the matter and PW3 had a knowledge of what is going on prior to the Disciplinary hearing and yet he participated as a judge in his own case. He cited the case of **Huruma Kimambo vs Security Group (T) Limited**, revision No. 412 of 2016 (HC) Labour Division (Unreported).

Secondly, he submitted that the disciplinary hearing was biased and improperly composed which is contrary to Rule 13 (4) of GN 42 of 2007. Exhibit P3 evidence that Pw3 and the employer were previously involved

in the incident which led to the disciplinary hearing and Mr. Bent Houmaa Jorgensen who heard the appeal could have been compromised just by being present at the disciplinary hearing and not to look at the proceedings before him with a fresh eye. With those three in the disciplinary hearing, the maxim *nemo judex in causa sua* was seriously violated. He maintained that, as a Christian Organization the Applicant ought to have forgiven the respondent when he apologized to his boss and to the disciplinary hearing. By failing to forgive him the applicant breached the employment contract particularly clause 15.

Third, no witness was called to prove the allegations made against the respondent and the investigation report was never submitted before the disciplinary hearing. The respondent was never given a chance to mitigate as required under Rule 13 (7) of GN 42 of 2007. He maintained that, the admission of the offence does not automatically waive the duty of the employer to follow the stipulated procedure in terminating an employee.

Further to that, since the alleged offence was the first one to be committed by the respondent, the applicant could have issued him a warning letter and called him to a well composed disciplinary hearing instead of terminating him unfairly. He explained that, the respondent's request for forgiveness is still unanswered which proves that the applicant

failed to live a Christian life of forgiving countless times and the punishment given was too big to the respondent. Further to that, the policies alleged to have been violated by the respondent were never tendered before the disciplinary committee and the CMA.

With regards to the issue of compensation, he submitted that the award of the CMA was properly procured since the respondent's claim according to the CMA F1 was for remedies against breach of employment contract. The Arbitrator was correct to adjudicate on procedural fairness as one of the basis of breach of employment contract under section 35 of Cap. 366 R.E 2019.

He maintained further that, the arbitrator's award was not based on his own preconceived opinion but on evidence on record (See page 6 of the impugned CMA award). In the end, he prayed for the court to uphold the CMA award and to dismiss the application for being frivolous.

In her brief rejoinder, Ms. Nitume maintained her arguments that, the case at CMA was for breach of contract and not unfair termination. She maintained that, the respondent was expected to act in the best standard and be a good example to his followers. Since breach of contract was not one of the issues raised at the CMA, it was wrong for the Arbitrator to

adjudicate on the same. She maintained that the CMA's award be quashed and set aside.

I have carefully examined the records filed in support of this application and the CMA records, and duly considered the submissions of both parties in this revision. The issues for determination are, firstly, whether there was a breach of contract on the part of the applicant without any reasonable cause. Secondly, to what relief(s) are the parties entitled to.

On the first issue, the respondent herein (claimant at CMA) alleged that the employer breached the employment agreement without any reasonable cause. However, the CMA made it clear that there was a valid reason for termination of the respondent's contract. Page 5 of the impugned award reads as follows;

> *"In this case complainant contravened a rule or standard regulating conduct relating to his employment which is against to rule 12 (1) (a) of GN 42/2007 as long as complainant was aware on existence of such rule, he could have performed duties with due care...*
>
> *As per Christian faith and ethics an employee needs to be a person who only obey reasonable and lawful instructions, to act in good faith and work with due diligence and skills. If complainant would act with due diligence and accuracy, he should have not committed this offence in which he admitted the same. Considering the circumstances of the case as provided under Rule 12 (4) (a) the gravity of misconduct is zero intolerable."*

The excerpt above together with the submissions made by the parties herein indicates that the respondent admitted the offence which led to his dismissal. However, the trial Arbitrator ordered the applicant herein to compensate the respondent only on the ground that although the applicant had valid reasons for termination, the procedures followed in terminating the respondent were contrary to the requirement of the law. He considered that, investigation was not conducted, the respondent was not given a chance to state his case promptly and the disciplinary hearing committee was constituted in a manner that violates rule 13 (4) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007.

Now the question to be asked here is whether on admission of misconduct by the employee there was no need for the employer to adhere the procedures for termination as prescribed by the law. Counsel for the appellant cited a persuasive case of **Levina Kasane & Another** (supra) where the court was of the view that as long as the employee admitted his misconduct which constitutes a valid reason for termination, it is not necessary to follow the procedures for termination prescribed by the law. The learned counsel was of the views that, even though it is a matter of procedure that the disciplinary committee was wrongly

constituted, the fact that the respondent herein admitted the alleged misconduct and all allegations against him justifies that termination done by the applicant was for a valid reason hence it is not necessary to follow procedures prescribed in the law of termination. This argument is strongly opposed by the respondent's counsel who maintained that, if procedures for termination were to be followed it could have changed the decision of the employer to terminate the employee. She maintained that, even though the respondent had admitted his allegations the applicant was still duty bound to follow the procedures as stipulated under section 37(2) of the Employment and Labor Relations Act. She made reference to the case of **Mic Tanzania PLC vs Sinai Mwakisisile,** Revision No. 387 of 2019 (unreported) in support of her argument.

From the records of this application, it is undisputed that the applicant employed the respondent under a fixed term contract with effect from 01/04/2019 to 31/03/2020. It is also undisputed that, the dispute filed by the respondent at the CMA according to CMA F1 was breach of employment agreement without any reasonable cause and claimed compensation for the remaining contractual period at a tune of TZS 11,440,000/=.

Having examined the CMA records and the records in this application, this Court is in agreement with the CMA that the applicant had a valid reason to terminate the respondent having contravened clause 15 of his employment contract. I equally agree with the CMA that the applicant failed to follow the procedures required by law to terminate an employee.

Section 37 (2) (c) of the Employment and Labour Relations Act provides that:

> *"A termination of employment by an employer is unfair if the employer fails to prove-*
> *(c) That the employment was terminated in accordance with a fair procedure."*

In the present matter though the applicant had a valid reason to terminate the respondent the procedures as stipulated under Rule 13 of G.N No. 42/2007 were not followed.

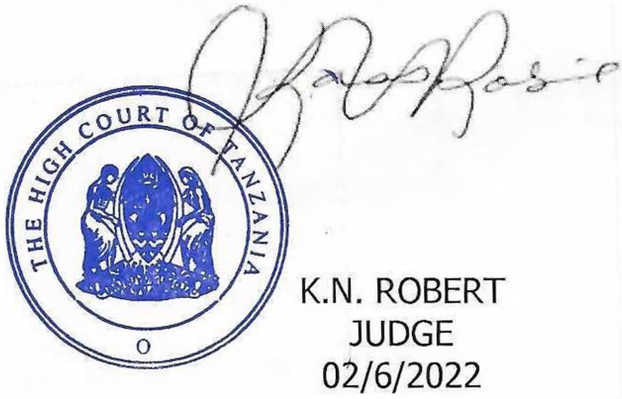
The said rule made it mandatory for the investigation to be conducted prior to the disciplinary hearing. Having revisited the records herein, counsel for the applicant admitted that there is no investigation report of this matter apart from the hearing form (disciplinary hearing) which contains allegations raised against the respondent herein. Although Rule 13 (1) imposes mandatory duty on the employer to conduct investigation before hearing, this Court finds and holds that as long as it

is not disputed that the respondent admitted to the charge against him, absence of investigation report cannot vitiate disciplinary hearing proceedings. However, on the issue of biasness due to the composition of the disciplinary hearing, this court finds that it was improper and unfair to the respondent for the employer who later determined the respondent's appeal to be part of the disciplinary hearing. For that reason, this court finds the respondent's termination to be procedurally unfair.

With regards to the issue of reliefs, the respondent prayed for compensation for the remaining contractual period. This court having decided that the respondent's termination was procedurally unfair, I find no need to fault the decision of the arbitrator for the respondent to be compensated for the remainder of the contractual period.

In the event I proceed to dismiss this application for want of merit.

It is so ordered.



K.N. ROBERT
JUDGE
02/6/2022