**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**

**ARUSHA DISTRICT REGISTRY**

**AT ARUSHA**

**LABOUR REVISION No. 24 of 2022**

***(C/f Labour Dispute No. CMA/ARS/ARS/300/20/197/20)***

**ZAKAYO MOLLEL..... APPLICANT**

**VERSUS**

**G4S SECURITY SOLUTIONS (T) LIMITED..... RESPONDENT**

**JUDGMENT**

**27th March & 24th July, 2023**

**GWAE, J.**

In this application, the applicant seeks the court's revision of the Award from the Commission for Mediation and Arbitration of Arusha (CMA) in Labour Dispute No. CMA/ARS/ARS/300/20/197/20 dated 22nd December, 2021 (Anosisye, A.K., Arbitrator).

The application is brought under provisions of section 91 (1) (a) (b), 91 (2) (a) (b) and 94 (1) (b) (i) of the Employment and Labour Relations Act, Cap 366, Revised Edition, 2019 (the ELRA) and Rule 24 (1), (2) (a) (b)

(c) (d) (f), (3) (a) (b) (c) (d) and 28 (1) (c) (d) (e), of the Labour Court Rules, GN. 106 of 2007 (Labour Court Rules).

The application is also supported by the affidavit dully sworn by the applicant in which under the 15th paragraph the grounds for revision are narrated as follows;

a. That, the Arbitrator erred in law and fact for illegally venturing facts, which had never been stated during the hearing of the case.
b. That, the Arbitrator erred in law and fact in ruling that, the termination was fair.
c. That, the Arbitrator erred in law and fact in relying on his own opinion to the rule of genuineness of the signatures while in fact there was no any expert evidence to prove the same.
d. That, the Arbitrator erred in law and fact in relying on mere words to prove that there was a disciplinary hearing conducted against the applicant.
e. That, the Arbitrator erred in law and fact in holding that the evidence adduced by the respondent was enough to conclude that there was a reason to terminate the respondent.
f. That, the Arbitrator erred in law and fact in failing to properly assess and evaluate the evidence tendered before it which led to wrong findings.
g. That, the Arbitrator's Award has occasioned miscarriage of justice to the applicant.

On the other hand, the respondent filed her counter affidavit dully sworn by the Mr. Clarence Kayombo, respondent's personal representative in which he disputed the claims while putting the applicant under strict proof thereof.

Brief background leading to the parties' dispute is to the effect that, the respondent employed the applicant as a security officer on 11th April, 2011 as seen in exhibited in PE1, employment contract. According to the respondent's evidence at the CMA, the applicant deserted his post on 31st October, 2019 and returned on 1st November, 2019. When questioned as to why disciplinary action should not be taken against him. The applicant responded in writing that (DE1), he went to take his mobile phone from a place where he left it charging. Such response was not satisfactory to the as per the respondent; he then decided to conduct a disciplinary hearing against him.

It was respondent's further evidence at the CMA that, the applicant disappeared again from 2nd November to 23rd December, 2019 on the ground that, he attended field work. Thus, the disciplinary hearing was conducted on 24th December, 2019. After hearing, he was officially terminated. Charge

sheet, disciplinary hearing procedure, applicant's explanation as to his absenteeism and termination letter were admitted as exhibit D2, D3, D4 and D5 respectively.

Aggrieved with decision he decided to file his complaint in the Commission for Mediation and Arbitration (herein the CMA) challenging the respondent's acts to be unfair. According to him, he was unfairly terminated because he never conducted any misconduct during his employment. He also asserted that, there was no any disciplinary hearing that was conducted against him. Thus, he strongly asserted that, the respondent forged all the documents tendered.

He further claimed that, the time he was alleged not to be at work was during official leave granted by the respondent which was from 5th November, 2019 to 28th January, 2020 as seen in exhibit P2, permitted leave to attend internship for three months. That, such leave was accumulation of three years leaves which he arranged with the respondent so that, he could attend his fieldwork (Internship). However, when he was back from internship, there was eruption of Covid 19 hence, on 29th January, he was notified by respondent to stay home until when there is a post and that, he

will be paid Tshs. 150,000/= monthly. To his surprise, he was never called again and later he was terminated on 15th May, 2020 without any justifiable cause.

When the applicant filed his complaint at the CMA, he claimed for payment of Tshs. 12,150,000/= in total. Tshs. 1,650,000/= being salaries for 11 months; Tshs. 150,000/= being payment of one month salary in lieu of notice; Tshs. 315,000/= being severance payment of 9 years; Tshs. 900,000/= being six months salaries from when he went for leave to when he was terminated. Tshs. 135,000/= being house allowance; Tshs. 9, 000, 000/= for mental and physical damage suffered by the applicant due to unfair termination and Certificate of Service.

At the end of the arbitration, the CMA procured its award in favour of the respondent on the ground that, the reason was valid and the procedure for termination was adhered to. The Commission only awarded him Tshs. 255,000/=, Tshs. 120,000/= as salary arrears and Tshs. 135,000/= as payment for house allowance.

Aggrieved by the CMM Award, the applicant preferred the current application, which was heard by way of written submissions. The applicant

was represented by Ms. Lilian Joely, learned Advocates whereas Mr. Clarence Kayombo, personal representative, represented the respondent.

Supporting the application, Ms. Joely submitted on ground **"a"** that, the evidence at the CMA does not show that the applicant and the DW1 at any point had any kind of misunderstandings. However, the arbitrator on his own motion decided to add facts, which were not tendered as evidence in respect of violation of the respondent's company's policy. She argued that, such policy was never tendered into evidence as exhibit hence the Arbitrator erred for using it to hold that, the applicant committed a misconduct by deserting his post as provided in the company's policy.

Ms. Joely submitted on grounds **b**, **d** and **e** jointly that, it was the respondent's duty to prove that, the impugned termination was fair in terms of reasons and procedure as provided in section 37 (2) of the ELRA and the case of **Othman Ntaru vs Baraza Kuu la Waislamu Tanzania**, Revision No. 323 of 2013 (unreported). She averred that, for the procedures of termination to be fair, the disciplinary hearing has to fairly done pursuant to Rule 9 (1) of the **Employment and Labour Relations (Practice of Good Conduct) Rules**, 2007, GN. No. 42 of 2007 (the Code). Learned counsel

argued that, in the application at hand, the applicant was never availed with the right to be heard as he was never given a chance to defend himself in the alleged disciplinary hearing. Neither proof of his attendance nor minutes of the said meeting was tendered at the CMA to show that, the said disciplinary meeting actually took place.

She further argued that, exhibit D3 admitted by the CMA is a questionnaire purported to be the minutes and the disciplinary procedure and the same does not show the offence nor the arguments on what really transpired in the meeting. On top of that, the applicant was not given enough notice for the meeting as the same was issued of 23rd December, 2019 and he was purportedly heard on 24th December, 2019.

Still expressing her dismay, the learned counsel for the applicant pointed another dent of the purported disciplinary hearing was not chaired by an impartial person as per rule 13 (4) of the Code. To support her argument, she referred the court to the case of **National Microfinance Bank vs. Rose Laizer**, Labour Revision No. 167 of 2013 (unreported), High Court at Arusha where the court observed that, failure to accord the

applicant right to a fair hearing and right to defend himself amounts to a procedural irregularity.

As to ground "**c**", it was Ms. Joely's submission that, according to section 75 (2) of the Evidence Act, Cap 6, R.E. 2019, the law requires the court to direct any person to make comparison of word or figures made by a person in dispute. She cited the case of **Costantia Chaila and Another vs. Evarist Maembe and Another**, Civil Application No. 227 of 2021, CAT at Dsm (unreported) which underscored the importance of forensic document examiners to examine the authenticity of a signature or document in question. She argued that, in the application at hand, the Arbitrator ruled on the genuineness of the applicant's signature as seen in exhibit D2, D3 and D4 without them being subjected to expert examination but ignored or turned down the exhibit P2, a letter granting leave to the applicant. That, the said letter was signed by HR, one Imelda Lutebinga, but she was never called to testify rather respondent's counsel was the one who refuted the letter while he was neither the maker nor custodian of the same.

On the complaint '**f**' and '**g**' the learned counsel argued them jointly that, the findings of the Award were erroneous hence caused miscarriage of

justice to the applicant. She asserted that, since there was no valid reason to terminate the applicant's employment and the procedure was not followed, the same be quashed and set aside. She prayed that the applicant be granted his entitlement pursuant to section 44 of the ELRA to the tune of Ths. 12,150,000/= as prayed at the CMA and any other reliefs as the court may deem fit to grant.

In reply. Mr. Kayombo submitted in respect of ground "**a**" that, the applicant's submission is confusing as he has not shown errors alleged to have been made by the Arbitrator hence making the same misconceived and unfounded. Submitting to grounds **b**, **d** and **e**, learned counsel averred that, according to section 37 of the ELRA and the Code, there was fair reasons and proper procedure to justify the applicant's termination. That, according to exhibit D1 and D4, the applicant admitted to have deserted his post as well as being absent from work for best reasons known to himself. Further that, the disciplinary meeting was fairly conducted as the applicant was availed right to be heard. According to him, the CMA did not err in holding that, that the applicant was fairly terminated.

On ground "**c**", Mr. Kayombo submitted that, it does not need an expert to see the similarity of applicant's signatures found in exhibits tendered before the CMA. As to the exhibit P2, Mr. Kayombo claimed the same to be forged on the ground that, one cannot ask for leave to attend internship without proof of leave of going to study any course at any college first. That, his failure to tender any proof that he was attending any studies makes his claims unfounded hence.

Mr. Kayombo submitted on grounds **f** and **g** that, by stating that, it is not the duty of the Arbitrator to obtain evidence but rather examine evidence tendered before him and make a fair decision, which is what he did. He finally prayed that, the claims for compensation of unfair termination as mentioned listed in CMA F1 be disregarded and the CMA's decision be upheld.

In her brief rejoinder, learned counsel for the applicant reiterated her submission in chief. She thus maintained that, the applicant was unfairly terminated. Hence, should be dully compensated.

Having gone through grounds of revision, competing submissions by both parties together with the CMA records, I now proceed to determine

grounds for revision which generally answers three (3) issues. First, whether or not there was valid reason for termination; second, whether or not fair procedures were followed; and last what the reliefs the parties were entitled were proper.

**Starting with the first issue** on the respondent's valid reason for termination, according to respondent, the applicant deserted his post from 31st October to 1st November, 2019 and admitted that he went to take his phone from where he was charging. He however left again from 2nd November to 23rd December, 2019 and admitted that, he was attending field work thus at the disciplinary hearing conducted on 24th December, 2019, he was terminated. Applicant however refuted such claims on the ground that, he never left his post and his absenteeism was due to the fact that, the respondent had granted him leave to attend internship/fieldwork and that no disciplinary hearing was conducted against him.

Looking at CMA F1, exhibit P1, D1, D2, D3 and D4, it does not need an expert to see that, in all document's applicant's signature appears different. Since the rivalry between the parties, dwells specifically on exhibits P1, D1, D2, DE3 and DE4 and each claim, the other to be forged there was a need of their authenticity to be proved by an expert and not by the CMA.

In the case of In the case of **Twazihirwa Abraham Mgema vs James Chistian Basil (as administrator of the estate of the late Christian Basil Kiria, Deceased)**, Civil Appeal No. 229 of 2018, CAT at Dsm, the Court of Appeal referred to its earlier decision in the case of **City Coffee Ltd vs. The Registered Trustee of Ilolo Coffee Group,** Civil Appeal No. 94 of 2018 (unreported), which held that,:

> *"....it is clear that regarding allegations of fraud in civil cases, the particulars of fraud, being serious allegation; must be specifically pleaded and the burden of proof thereof, although not that which is required in criminal cases; of proving a case beyond reasonable doubt, it is heavier than a balance of probabilities generally applied in civil cases."*

In the circumstances, the Arbitrator erred in holding that exhibit P2 was forged and exhibits D1, D2, D3 and D4 were genuine while there was no enough proof to justify his decision.

Be as it may, exhibit P2 clearly shows that, the applicant was granted leave for internship by the respondent for the period of three months from 5th November to 28th December, 2019. This exhibit was never challenge during cross-examination which draws an inference that, the respondent conceded to its genuineness. In that regard, the respondent's contention

that the applicant was absent during time within which he was granted leave to attend field works makes the allegations unfounded. As to the desertion of his post, it was respondent's testimony that, the applicant deserted his post around 4:50hrs on 31st October, 2019 but the CMA record including the exhibits tendered are silent on how long exactly did the applicant deserted his post. Since there are no records of similar conducts by the applicant for the duration of nine years he worked with the respondent, it is my considered opinion that, the amount of time of desertion was necessary to warrant the highest punishment of termination given to him.

Article 4 of ILO Convention No. 158 of 1982 provides for protection of employment rights whereby the employer must have a reason for termination of an employee and that, fair procedures must be followed. The Article reads;

> *"The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment of the service."*

It was the duty of the respondent to prove that, there were fair reasons to terminate applicant's employment however, the sole evidence of

DW1 was not sufficient to establish such fairness or validity of the termination of the applicant's employment. DW1 was not at the scene when the applicant allegedly deserted the post hence making his testimony hearsay. Relying on exhibit D1 that is alleged applicant's confession only, as intimated earlier that, such exhibit is wanting due to different appearances of signature. Nevertheless, even in the said exhibit it is not certain on the days of time of desertion. All these brings me to the conclusion that, there was no fair reason to warrant applicant's termination.

**The second issue is whether or not,** fair procedures were followed. Right to be heard is one of the fundamental principles of natural justice, failure of which vitiates proceedings. Rules of natural justice states that no man should be condemned unheard and, indeed both sides should be heard unless one side chooses not to. In the case of **Ridge vs. Baldwin** [1963] 2 All ER 66, it was insisted that the consequences of failure to observe the rules of natural justice is to render the decision void and not voidable. On the same note, **Mroso, J** in **Edwin William Shetto vs Managing Director of Arusha International Conference Centre** [1999] TLR 130, observed that, since the plaintiff could only be terminated for good cause, the plaintiff should have been heard before the decision to terminate him

could be taken. The fair procedure for termination is guided under Rule 13 of the Code. Starting with Rule 13 (1) which reads;

> *"The employer shall conduct an investigation in order to ascertain whether there are grounds for hearing to be held."*

In the application for revision at hand, there is no investigation report, which concludes that, no thorough investigation was done enough to warrant that applicant's disciplinary hearing. Likewise, Rule 13 (5) of the Code reads;

> *"Evidence in support of the allegations against the employee shall be presented at hearing. The employee shall be given a proper opportunity at hearing to respond to allegations, questions any witness called by the employer and to call witness if necessary."*

In the revision at hand, DW1 testified that, the applicant was given right to defend himself, call witnesses, cross-examine the witnesses. However, DW1 said that the applicant admitted everything hence not much was said. Exhibit D3, the disciplinary proceeding does not portray where the applicant admitted to the charge leveled against him where he could have waived his right to cross examination and call witness if any etc. There are no minutes showing what really transpired at the hearing and when cross-examined DW1 stated that, such minutes were left at the company, if truly,

there were minutes. Going through the exhibit (D3), I do not think it qualifies to be called a proceeding hearing because it is in the form of checklist. Worse still the meeting was chaired by DW1, who is the respondent's legal counsel who was the one dealing with the whole saga from its beginning. Therefore, I do not think if DW1 was impartial. Moreover, Rule 13 (7) of the Code provides that;

> *"Where hearing results in the employee being found guilty of the allegations under consideration, the employee shall be given the opportunity to put forward any mitigation factors before a decision is made on the sanctions to be imposed."*

In the present application, exhibit D3 does not show that there was any mitigation conducted. Also there is no record showing that the applicant was availed right to appeal, all these are a proof that there were irregularities in the procedure for termination. Thus, rules of natural justice were not adhered to.

Violation of the rules of procedures provided under Rule 13 and its sub-rules which have been couched in mandatory word "**shall"** to mean that the function so conferred must be performed, cannot be interpreted in any

other way except full compliance. Failure to substantively observe necessary procedures has completely impacted the hearing conducted by the alleged disciplinary committee to such extent that the termination of contract applied became redundant. In In the case of **Stamili M. Emmanuel vs. Omega Nitro (T) Ltd** Lab. Div. DSM Revision No. 213 of 2014 LCCD 2015 page 17, it was held *inter alia* that;

> *"I have no doubt that the intention of the legislature is to require employers to terminate* ***employee only basing on valid reasons and not their will or whims****. This is also the position of the international Labour Organization Convention (ILO) 158 of 1982 Article 4. In that spirit employers are required to examine the concept of unfair termination on bases of employee's conduct, capacity, compatibility and operational requirement before terminating employment of their employees". (emphasis supplied).*

In that regard, the respondent neither had fair reason nor applied fair hearing procedures before terminating the applicant's contract of employment. Hence, making the termination unfair.

On **the last issue as to whether the relief granted was proper**, I am of the view, this issue is from outset answered not in affirmative. As

the applicant's employment was permanent as depicted in the exhibit P1 which does not plainly show if it was for fixed term, the remedy is therefore provided under section 40 (1) (c) of the ELRA which provides for the compensation of not less than 12 months.

In the upshot, the application is merited to the extent explained hereinabove; the CMA's Award on reliefs is hereby revised and set aside and replaced with;

1. Twelve (18) months' salary .....Tshs. 2,700,000/=
2. One Month salary in lieu of Notice Tshs. 150,000/=
3. House Allowance Tshs. 135,000/=
4. Severance pay for nine years Tshs. 315,000/=

**Total** **Tshs. 3,300,000/=**

5. Clean Certificate of Service

Other applicant's claims of mental and physical relinquish are found to have not been substantiated. Considering the fact that this is a labour matter, I give no orders as to costs of this application.

It is so ordered.

**DATED** and delivered at **ARUSHA** this 24th day of July, 2023

**M.R. GWAE**
**JUDGE**
**24/07/2023**