IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

MISC. LABOUR APPLICATION NO. 77 OF 2022

(Originated from the Commission for Mediation and Arbitration (CMA) at Geita in Labour Dispute No. CMA/GTA/132/2018)

GEITA GOLD MINING LIMITED..APPLICANT

VERSUS

LUCAS NTOBI...RESPONDENT

RULING

Date of Last Order: 04/09/2023.

Date of Ruling: 29/09/2023.

Kamana, J:

This is an application for revisional orders against the decision of the Commission for Mediation and Arbitration (CMA) at Geita in respect of Labour Dispute No. CMA/GTA/132/2018. The impugned award which did not please the applicant was delivered on 31st May 2022. The respondent instituted the arbitral proceedings that bred the award in question, challenging the termination of his employment on the grounds that the reasons for termination and the procedure adopted were unfair.

Gleaned from the records, on 2nd February, 2006, the applicant employed the respondent as a truck operator before being made an excavator operator. While discharging his duty in the latter capacity, the

respondent was associated with the theft of stones believed to have gold ores.

It was alleged by the employer that the respondent on 2nd August,2018, while on night shift operating the excavator, seized the opportunity to load the stones into the trucks not owned by the employer. The trucks, as per the records were owned by KASCO company and were not allowed into the operating area. The said stones, as alleged, were taken to one Malimi.

After an investigation conducted by the applicant's officers, the disciplinary proceedings were put in motion and the respondent was found guilty of misconduct. That verdict was followed by the termination of his employment on 16th August, 2018. Aggrieved, he appealed to the Managing Director of the applicant who dismissed the appeal on 7th September, 2018.

Relentless, the respondent knocked on the CMA's doors. Thereat, he challenged the termination as substantively and procedurally unfair. The CMA entered judgment in his favour and awarded him Tshs. 34,874,000/- as severance pay for ten years and compensation for 24 months.

The decision of the CMA led to this application in which the applicant faults the decision on the following grounds:

1. That the arbitrator failed to properly evaluate the evidence adduced by the applicant hence reaching into a wrong conclusion that the applicant had no valid reasons for terminating the respondent's contract of employment.
2. That the arbitrator erred in law to conclude that the applicant did not follow some of the labour and employment procedures in terminating the respondent's contract of employment.
3. That the Arbitrator erred in law and fact by making some of her findings relying on the failure of the applicant to give the respondent the investigation report without considering that such report was tendered during the disciplinary hearing and was never contested by the respondent.
4. That the arbitrator erred in law and fact by relying her decision on a simple reason that the applicant did not bring some of the witnesses during the hearing of the matter to adduce their evidence without considering the weight of the evidence adduced by the applicant's witnesses.

5. That the arbitrator's decision is misleading since it suggests that the applicant should have proved its case 'beyond reasonable doubt' while the test for proof of labour disputes is based on the balance of probability something which the applicant was able to demonstrate and prove therein.

When the matter was set for hearing, the applicant was represented by Mr. Vianne Mbuya, learned counsel, whilst the respondent had the services of Mr. Erick Lutehanga, learned counsel. The application was argued orally.

Submitting in support of the first ground, Mr. Mbuya contended that the CMA misdirected itself in concluding that there were no valid reasons to terminate the respondent. In amplifying the argument, the learned counsel contended that the incident that led to the termination of the respondent was witnessed by three persons including Mr. Eliad William Majaliwa (DW3). Regarding DW3's evidence, the learned counsel submitted that the witness testified during the disciplinary proceedings to have seen the respondent loading the stones into the trucks not owned by the applicant.

Strengthening the argument, Mr. Mbuya contended that according to the evidence adduced during the disciplinary proceedings which was admitted by the respondent, only one excavator with No.410 was

operating at the scene of the crime which was operated by the respondent on the material night. About the reasoning of the CMA that other eyewitnesses were not fielded by the applicant during the arbitration, Mr. Mbuya faulted the reasoning as baseless since the witnesses who testified were sufficient to prove the offence.

On the second ground, Mr. Mbuya contended that in the process of terminating the respondent, the applicant adhered to all procedures and no respondent's right was infringed contrary to the position taken by the CMA. He mentioned the rights that were afforded to the respondent including the right to know the offences he was charged with and the right to be represented.

Regarding the third ground, Mr. Mbuya dismissed the reasoning of the CMA that the non-issuance of the investigation report to the respondent was fatal. Augmenting the argument, the learned counsel opined that it is not the mandatory requirement of the law that an investigation report be issued to an investigated employee.

He stressed that according to the Employment and Labour Relations (Code of Good Practice) Rules, 2007 (GN No.42/2007), an employer is required to submit the report during the disciplinary proceedings. In the same vein, the learned counsel contended that the case of **John Kanjeli v. Tanzania Revenue Authority**, Labour Revision

No. 426/817 of 2019 which was relied upon by the CMA was about the audit report and not the investigation report.

For reasons best known to the learned counsel, he did not submit on the remaining grounds.

Replying on the third ground, Mr. Lutehanga contended that the issuance of the investigation report is mandatory. He reasoned that the failure of the employer to issue the investigated employee with the investigation report is fatal as it denies the employee the right to know the thrust of the case against him which is essential in defence preparation. Buttressing the argument, the learned counsel cited the cases of **Kiboberry Ltd v. John Van Der Voort**, Civil Appeal No. 245 of 2021; and **Geita Gold Mining v. Eunice Mgore**, Labour Revision No. 39 of 2021.

On the second ground, Mr. Lutehanga contended that the procedures for termination were not followed. He argued that his client was arrested by police officers immediately after a disciplinary hearing. He amplified that due to such an arrest, the respondent was forced to appeal against the decision to terminate him while in remand.

To him, that was a gross departure from the procedures laid down in section 37 of the Employment and Labour Relations Act which prohibits termination of employment when the criminal charges have been

preferred. Bolstering the argument, the learned counsel cited the case of **Marwa Nyaiki v. Geita Gold Mining Ltd**, Labour Revision No.42 of 2019.

Concerning the first ground, Mr. Lutehanga contended that all evidence adduced did not point to the respondent. He went on to argue that the evidence adduced against the respondent was in shambles as the persons claimed to have witnessed the crime, except DW3, were not fielded to testify during the disciplinary and arbitral proceedings. He argued further that even DW3 confirmed that he did not testify in the disciplinary proceedings for the applicant but for the person called Ze Buti.

In his rejoinder, regarding the non-issuance of the investigation report, he contended that the same was not necessary as the respondent was supplied with the charge sheet. To him, the charge sheet was enough to make the respondent understands what was in store for him. He argued further that the respondent was allowed to ask questions on the report. Otherwise, he maintained that the charge against the respondent was proved on the balance of probabilities.

Having heard submissions of the learned counsel, the task ahead is to examine whether the application is meritorious. In doing so, I will refrain from repeating the arguments of the learned counsel unless it is necessary.

Starting with the first ground, I thoroughly went through the records. According to Bernard Alphonce Makungu (DW1), the Security Superintendent, he did not see the respondent stealing the stones. He was informed of the stealing by three young persons working with KASCO. He mentioned them as Deo Nicholaus, Eliad William and Remigius. As per his evidence, at the scene of the crime, there was only one excavator No.410 operated by the respondent who was also known as Ze Buti. This witness testified that according to the Modular Report prepared by Charles Obutu, the excavator was switched on by the respondent at 2346 hrs till morning. He testified further that the incident took place between 0000 hrs and 0100 hrs.

Steven Kaliwa Mashimba (DW2), the Security Superitendent, testified that he was informed of the incident by Suleiman Machila and DW1. Following that information, he mounted an investigation which revealed that the respondent was a culprit on the reason that he was the one operating the excavator on the material night at the crime scene. He testified that during the disciplinary proceedings, DW1 and the young man from KASCO testified.

Eliad William Majaliwa (DW3), the KASCO employee, testified that on the material date, he was at the scene of the crime. He evidenced that

at 2200 hrs he saw three trucks owned by KASCO being loaded with stones by the excavator operated by Ze Buti.

I have considered the evidence of the three witnesses. Indeed, I see no reason to fault the finding of the CMA about the non-existence of a valid reason to terminate the respondent. I hold so for the following reasons.

One, the evidence of DW1 and DW2 is purely hearsay as they did not see the respondent stealing the stones as they were not present at the scene of the crime when the incident took place. Both were informed of the stealing from various sources.

Two, the evidence of DW1 and DW2 centered on the fact that excavator No.410 was operated by the respondent the fact which is not disputed by the respondent. However, in his evidence, the respondent testified that he was assigned to operate excavator No.410 around 0000hrs on the material night after the health break. Such evidence was not disputed during cross-examination by the applicant. Further, the respondent testified that between 1900hrs and 2130 hrs, he was operating the dumper before retiring to health break. The evidence was also not disputed.

When I test this evidence with DW3's testimony that the stealing took place at 2200hrs, I am convinced that there was no sufficient proof

that the respondent participated in the alleged theft. If DW3 is taken to be a reliable witness, the alleged theft took place at the time when excavator No.410 was not assigned to the respondent.

With such incongruity in the applicant's evidence, I see no reason to depart from the findings of the CMA. The first ground fails.

Having determined the first ground, I think it is relevant to determine the third ground relating to the non-issuance of the investigation report by the applicant to the respondent. According to Rule 13(1) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007, an employer is required to conduct an investigation before instituting disciplinary proceedings against an employee. The investigation serves the purpose of establishing whether an employee has contravened the terms and conditions of his employment. Further, the investigation enables the employer to collect evidence against the employee. The Rule reads:

> *'13(1) The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held.'*

My reading of the cited rule convinces me that an employer is obligatorily required to mount an investigation before putting in motion disciplinary proceedings against an employee. Given that, an

investigation report is a vital document that informs the employer about the violation of the terms and conditions of the employment done by the employee.

Likewise, if disciplinary charges are preferred against the employee, the same report informs the employee the nature of the offences he is accused of. Further, the investigation report informs the employee of the gist of evidence against him. In that case, an investigation report must be supplied to the employee.

Failure to submit the investigation report denies the employee an opportunity to comprehend the case against him and hence affects his defence. Once the defence is affected in such a way, the hearing is considered unfair. In this regard, I am inspired by the Court of Appeal in the case of **Kiboberry Ltd** (Supra) where the Court had this to state:

> *'…….the failure to involve the appellant in the investigation that led to the formulation of the report coupled with the omission to share a copy thereof with the respondent was a serious irregularity.'*

That being the position, I hold that the failure of the applicant to issue the investigation report to the respondent was fatal and affected the latter's defence. The ground crumbles.

Concerning the second ground, since the same is about the procedures and I have held that the procedure relating to the issuance of the investigation report was contravened, I find it unnecessary to determine it as the same cannot save the application.

Though Mr. Mbuya did not argue the fourth and fifth grounds, I think it is relevant to say a word or two. In determining the first ground, the two grounds have been determined as the first ground was about whether there was a valid reason for termination. In determining the same, I went through the records and concluded that there was no valid reason that justified the termination. In that case, the two grounds suffer a natural death.

The application is dismissed. Order accordingly. Right To Appeal Explained.

DATED at **MWANZA** this 29th day of September, 2023.

KS KAMANA

JUDGE