THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT MBEYA

LABOUR REVISION NO. 07 OF 2023

(Originating from Labour Dispute CMA/MBY/MBY/05/2023/ARB.04)

TAULINUS RUGAIMUKAMU ISISHA.....APPLICANT

VERSUS

KINFON COMPANY LIMITED..... RESPONDENT

JUDGMENT

Date of Last Order: 15/12/2023
Date of Judgment: 28/03/2024

NDUNGURU, J.:

In this application for revision, the applicant, TAULINUS RUGAIMUKAMU ISISHA is calling up on this court to call for records of the Commission for Mediation and Arbitration for Mbeya at Mbeya (the CMA), examine and revise the record, proceedings and the award dated 15/05/2023 in Labour Dispute No. CMA/MBY/MBY/05/2023/ARB.04. The applicant is also seeking this court to satisfy the correctness, legality, regularity of the said award then to declare it a nullity for failure to

evidence of both parties, the CMA came to the conclusion that the respondent had a valid and fair reason, that is gross dishonest. As regards the procedure, the CMA came to the decision that it was fair since the applicant was called and given time to return money but failed to do so also that there are circumstances where procedures are dispensable for example when an employee admits the offence, hence, that, the termination was fair.

Discontended by the CMA decision, the applicant has preferred the instant application inviting this Court to resolve the following four issues:

(i) Whether the award delivered by the hon. Arbitrator was fair

(ii) Whether the Applicant provided sufficient objection grounds to reject the admission of electronic evidence.

(iii) Whether the applicant provided sufficient evidence for unfair termination against the respondent.

(iv) Whether the applicant is entitled for relief prayed before the CMA for unfair termination against the respondent.

At the hearing of the application parties appeared in person without legal representation. It was disposed of by way of written submission.

analyse the evidence on record. The application was supported by an affidavit sworn by the applicant himself.

KINFON Company Limited, (the respondent herein) protested the application through a counter affidavit sworn by one Happiness Abel Marogoi, the respondent's principal officer.

The brief facts leading to the present application is that; the applicant and respondent were employee and employer respectively. The applicant was employed as a sales manager on a contractual bases in 2021 for a one-year contract ended 30/9/2022. Then a six months contract, commencing on 01/10/2022 ending 30/03/2023. However, on 07/01/2023 he was given a letter terminating his employment which it came to be revealed in the evidence by the respondent's witness that the applicant was terminated on the reason of gross dishonest that, he embezzled the employer's money Tshs. 9,212,100/= which he collected from customers but used it for his own uses. That he was availed with time to return the amount but did not do so. Also that even the deduction of his salary did not suffice the amount.

The applicant did not object the reason of termination made by the respondent's witness, he however maintained that there was no valid reason and fair procedure for termination. Having considered the

evidence of both parties, the CMA came to the conclusion that the respondent had a valid and fair reason, that is gross dishonest. As regards the procedure, the CMA came to the decision that it was fair since the applicant was called and given time to return money but failed to do so also that there are circumstances where procedures are dispensable for example when an employee admits the offence, hence, that, the termination was fair.

Dissatisfied by the CMA decision, the applicant has preferred the instant application inviting this Court to resolve the following four issues:

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At the hearing of the application parties appeared in person without legal representation. It was disposed of by way of written submission.

Supporting the application, the applicant submitted generally that the respondent did not adduce sufficient evidence on the validity of reason for termination and procedure as it is required by the law under section 37 (2) of the Employment and Labour Relation Act. As also stated in the case of **Tarcis Kakw esigaho vs North Mara Gold Mine Ltd** Lab,.MSM, Revision No. 6 of 2014, 16/03/03 LCCD 1 and **Naftal Nyangi Nyakibari vs Board of Trustees NSSF** Lab. MZA, Revision No. 12 of 2014, 20/03/15 LCCD 1. He further complained that the letter for termination did not include the reason for termination and the account that the applicant admitted the offence was not proved.

The applicant further contended that the respondent only tendered a flash disk which the CMA relied up on while it did not adhere to the requirement of receiving electronic evidence regarding its authenticity and reliability contrary to section 18 of the Electronic Transaction Act of 2018. That it was not established how the recording was transformed into flash disk. That it was produced without prior information to the applicant hence contradicted the requirement of Rule 24 of the Labour Institution (Mediation and Arbitration Guidelines) Rules 2007 which requires parties to provide copies of each document intended to be used as evidence for the arbitrator and for each part to the dispute. Further,

that the award was improperly procured as the applicant was not served with copy of the flash disk. He thus prayed for grant of the application.

Replying to the complaint that flash disc was not served to applicant the respondent argued that it did not prejudice him as the same was admitted for identification purpose. The main document was a written note signed by the applicant admitting to have used the respondent's money and the same was served to the applicant as it formed list of documents, she argued.

The respondent, on the complaint that there was no valid reason replied that there was valid reason of the applicant taking money Tshs. 9,212,100/= and he committed to return the same but never did so. That as to the procedure they summon him twice on the first time was when he admitted and the second was when he was proceeding with payment thus that termination was fair substantively and procedurally.

The respondent argued generally that there was valid reason and fair procedure and all cases cited by the applicant are distinguishable with the circumstance of this matter. She argued alternatively that since this court is first appellate court it has jurisdiction to re-evaluate the evidence and reach to its own conclusion as per cases of **Watt vs**

Thomas [1974]1 1 All ER 582 and **Peters vs Sunday Post Limited** (1958) EA 424. The respondent for dismissal of the application.

The rejoinder submission by the applicant is the repetition of the submission in chief as well as the prayers.

Having considered the rival submissions by the parties and the record, I find the issues for determination are the same as those raised in the CMA as to whether the applicant's termination was fair; both substantively and procedurally and to what relief are parties entitled.

The applicant has also complained on the admission of a flash disk that it was contrary to the required procedures under the labour laws on admission of documentary evidence and in admission of electronic evidence. This complaint should not detain me much as it was correctly argued by the respondent, the flash disk was not admitted as exhibit instead for identification purpose. Again, I have found that it did not form basis for the CMA decision hence receiving it did not prejudice the applicant in anyhow.

Back to the merits of the application, it is the established principle that for a termination of an employee to be considered fair it should be passed on valid reason and fair procedure. Needless to say, there must

be substantive and procedural fairness of termination of employment. Section 37 (2) of the Employment and Labour Relations Act, Cap 366 R.E 2019 (the ELRA) provides that:

> *"(2) A termination of employment by an employer is unfair if the employer fails to prove*
>
> *(a)* ***That the reasons for termination is valid;***
>
> *(b) That the reason is a fair reason: -*
>
> *(i) Related to the employee's conduct, capacity or compatibility; or*
>
> *(ii) Based on the operational requirements of the employer; and*
>
> *(c)* ***That the employment was terminated in accordance with a fair procedure****".*

The legislature's sprit in the above provision is to ensure that termination of employment is based on valid reason and not on employer's will. That spirit goes along with Article 4 of the International Labour Organization Convention (ILO) 158 of 1982, which provides that:

> *"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 operational requirements of the undertaking establishment or service".

In this matter, according to the applicant, the CMA sailed into errors as it failed to properly analyse the evidence before it. That the respondent neither proved valid and fair reason nor fair procedures in terminating his employment. Nonetheless, having gone through the record, reason for termination according to the respondent's witness is that the applicant embezzled the respondent's money Tshs. 9,212,100/= which he collected from customers as sales manager. That upon asked about the money the applicant admitted to have used the amount for his personal use and he promised to return it but in vain. In effect, the applicant did not deny this piece of evidence. Indeed, he does not do so in this application as well.

Moreover, I am abreast of the law that it is the employers who are required to prove at the balance of probability on the validity and fairness of procedure for allegation of unfair termination. See section 37 (2) (a), (b) and (c) of the ELRA. As to the standard of proof, rule 9 (3) and (5) of the Employment and Labour Relations [Code of Good Practice) G.N. No. 42 of 2007. In the available uncontradicted evidence,

it is clear that the applicant being a sales manager of the respondent used the opportunity to misappropriate the respondent's money. This is also supported by a written note, that is exhibit RX2 in which the applicant admitted to have used all the customers' money of the respondent amount Tshs 9,212,100/= with promise to return the same. The applicant has claimed that the exhibit did not suffice to be considered as his own admission but the record reveals that the CMA looked at the signatures of the applicant and was satisfied that he signed it.

In the event, considering that the applicant was a sales manager, common sense dictates that collecting money was his major role. I have considered that the letter for termination did not specify the offence under which termination is based on however, logic does not demand that the applicant would reasonably think that misappropriation of employer's business money did not constitute any offence or would constitute simple misconduct to be tolerated.

As a general rule first offence of an employee shall not justify termination unless it is proved that the misconduct is so serious that it makes a continued employment relationship intolerable. And it is provided that gross dishonesty may justify termination see Rule 12 (2)

(a) of GN. No.42 of 2007. In the result, I concur with the CMA findings that the act of the applicant constituted a misconduct, that is gross dishonest. The respondent thus, has a valid and fair reason for terminating the applicant's employment.

Now, it follows the issue of whether the respondent followed fair procedures. The procedures to be followed when an employee is to be terminated for the reason of misconduct are under Rule 13 of G.N. No. 42 of 2007. The relevant part provides:

> *"13.-(1) The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held.*
>
> *(2) Where a hearing is to be held, the employer shall notify the employee of the allegations using a form and language that the employee can reasonably understand*
>
> *(11) In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense*

with them. An employer would not have to convene a hearing if action is taken with the consent of the employee concerned."

In this matter, the respondent stated that the applicant was called in a meeting at Mbeya branch where he was asked about the missing money. That he admitted to have used it and promised to pay it in the end of September, 2022 but in vain. Then that the applicant thereafter promised to return the amount in October and December but again in vain. As the result he was called to Dar es Salaam and availed with the termination letter. On his side, the applicant testified that on 6/1/2023 he received bus fare to go to Dar es Salaam, there he was surprised with termination letter issued on the next day that is 7/1/2023. And that he was arrested and taken to police station at Chang'ombe in Dar es Salaam.

Basing on that evidence and considering the law as above, I have already resolved that, the applicant's employment was terminated on the ground of gross dishonesty The applicant did not deny to have misappropriated the respondent's money. The procedures to be followed was for the respondent to firstly conduct investigation to ascertain if there was ground to hold hearing. That being the case it does not

appeal to me in the circumstance of this case as what investigation would have aimed at while it was undisputed that the applicant had misappropriated the respondent's money and had not returned the same.

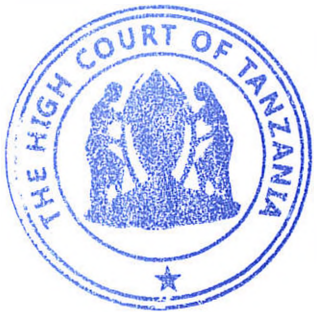
In my considered view, therefore, there were no need for the respondent to conduct investigation. I find the circumstances in this matter to be exceptional as stipulated under rule 13 (11) of G.N. No. 42 of 2007. Hence the CMA was correct to find termination of the applicant's fair in respect of substantive and procedure.

Before I close the discussion, I have found it prudent to put a word on the award of the CMA. It appears, having dismissed the applicant's claims, the CMA went on to order the applicant to pay the respondent Tshs 6,938,885/= as the amount remained unsettled from the amount that was used by the applicant Tshs. 9,212,100/=. This order, in my concerted view had no legal bases. This is because, being a labour dispute initiated by the applicant it was unreasonable for him to be ordered to pay any amount to the respondent while there was evidence that there was a criminal action taken against him. This evidence is at pages 6 and 14 of the typed proceedings as adduced by the respondent's witness and the applicant respectively. Though the

respondent made the prayer at the end of her testimony regarding the applicant to pay the remained amount yet it was improper for the CMA to grant it.

Owing to the discussion above, I hereby dismiss the applicant's application for want of merits. Consequently, the order by the CMA to the applicant to pay the remained amount of Tshs. 6,938,885/= is quashed and set aside. Being a labour matter, no order as to costs.

It is so ordered.



D.B. NDUNGURU

JUDGE

28/03/2024