IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT IRINGA

LABOUR REVISION NO. 05 OF 2023

(Originating from Labour Dispute No. CMA/MAF/ARB/19/2021 in the IRINGA/ MAFINGA Commission for Mediation and Arbitration)

BETWEEN

UNILEVER TEA TANZANIA LIMITED.....APPLICANT

AND

STELLA KASAMBALA.....RESPONDENT

JUDGMENT

Date of Last Order: 03.04.2024
Date of Judgment: 19.04.2024

A.E. Mwipopo, J.

Unilever Tea Tanzania Limited, the applicant, employed Stella Kasambala, the respondent, as the Human Resource Business Partner at Mufindi on the 24th day of September, 2015, for a permanent employment contract. The applicant initiated disciplinary proceedings against the respondent for the disciplinary offence by forming an enquiry committee and suspending with full pay the respondent from the 09th day of April 2021 to the 07th day of June 2021. After enquiry, the applicant charged the

respondent for six (6) disciplinary offences before a Disciplinary Committee. The Disciplinary Committee found three (3) disciplinary offences were proven and recommended for the applicant's employment termination. The applicant was not satisfied with the decision of the disciplinary Committee and appealed against the decision. The respondent's appeal was dismissed, and the applicant terminated the respondent's employment for disciplinary grounds on the 6th day of July 2021.

The respondent was aggrieved and referred the dispute to the Commission for Mediation and Arbitration (CMA) for unfair termination. The mediation failed, and an arbitration hearing proceeded, in which the Commission found that the reason for the termination of the respondent's employment was not fair. The applicant was unsatisfied with the Commission's decision and filed the present revision.

The application was instituted by Notice of Application and Chamber Summons, supported by the affidavit sworn by Jonathan Wangugo, the legal counsel and principal officer of the applicant. The applicant is praying for the court to revise and set aside the Commission for Mediation and Arbitration award in a labour dispute No. CMA/MAF/ARB/19/2021 dated the 15th day of

March 2023 between the parties. In opposition, the respondent filed a notice of opposition accompanied by the applicant's counter affidavit.

The applicant has a total of five (5) legal issues as found in paragraphs 8 (a), (b), (c), (d), and (e) of the affidavit as follows:-

1. *The Arbitrator erred in law and fact by making findings that there was no fair reason for termination even after finding that the respondent breached the policy relating to accurate records, reporting and accounting.*
2. *The Arbitrator erred in law and facts by finding that the respondent was not in breach of the conflict of interest policy.*
3. *The Arbitrator erred in law and facts for failing to consider the applicant's evidence on record in finding that the respondent did not use her position to influence employees to lend her money unduly.*
4. *The Arbitrator erred in law and fact to award the respondent annual leave and three months' salary in place of notice while there is evidence on record that the respondent was paid.*
5. *The Arbitrator erred in law and fact to award reliefs not prayed for.*

At the hearing, the applicant was represented by Mr. Jonathan Wangugo, the advocate, whereas Mr. Remmy William, the advocate, represented the respondent.

In his submission, Mr. Jonathan Wangugo said that they are dropping the third legal issue (ground) and arguing the remaining issues chronologically.

On the first legal issue, he said that the CMA's failure to account for part of the advance payment received by the applicant does not constitute good grounds for termination. The Arbitrator misdirected himself in interpreting the applicant's Code of Business Principles (exhibit RE2). Page 20 of exhibit RE2 clearly states that failure to record transactions accurately, fortifying or creating his reading information, or Influencing others to do so could constitute fraud. Rule 12(3) of the Employment and Labour Relations (Code of Good Practice) Rule, G.N. No. 42 of 2007, provides that fraud is misconduct that may lead to termination of employment. The arbitration did not consider the functions stated by rule 12(1) of G.N. No. 42 of 2007 to determine whether the termination of employment was an appropriate remedy. In her testimony (page 37 of the award), the respondent acknowledged the existence of exhibit RE2. The respondent failed to account for a total of 45 million shillings.

He said the nature of the respondent's job (human resource business partner) and the circumstances of the disciplinary offence committed, the

disciplinary offence amounted to gross misconduct. The relationship between the respondent and the applicant was irreparably eroded. In **Platinum Credit Ltd vs. Maston Joaqim**, Civil Appeal No. 138 of 2022, Court of Appeal of Tanzania at Tanga (unreported), on page 13, it was held that the rules or regulations governing employee's conduct might arise either from the express or implied terms of the employee's contract and express provisions of the employer's disciplinary code. Under Rule 1(2) of the Guideline for Disciplinary, Incapacity and Incompatibility Policy and Procedures, which is part of the G.N. No. 42 of 2007, the employees are expected to carry out their duties effectively and reasonably conduct themselves so that any act shall at all-time be by the policies and rules existing within an organization. Exhibit RE2 provides in paragraph 20 that failure to record accurately will constitute fraud, resulting in a penalty to the employee which include termination of employment. For that reason, there was a fair reason for termination.

The counsel said on the 2nd legal issue of the revision that the Arbitrator concluded on page 36 of the award the absence of a conflict of interest for the act of the respondent to provide human resource management service to DICA and Grumeti because there is no proof

presented that the two company do similar activities with the applicant. There is no proof that the respondent was employed and received salaries from the two companies. According to Regulation 9 of G.N. No. 42 of 2007, the proof under the Labour matters is on a balance of probabilities. Section 37(2) (b) of Cap 366 provides that the reasons for termination are considered fair if they relate to the employee's contract. The applicant has satisfied the standard required by the law. Exhibit RE2 shows on page 16 that a conflict of interest arose when an employee allowed their actual perceived or potential personal financial or non-financial activities to affect their objectivity when performing their job with the applicant.

He was of the view that the Arbitrator misunderstood the issue of conflict of interest by failing to understand that as an employee of the applicant, the respondent could not have provided the same service to any other entity, whether it is in a similar business with the applicant or not. The applicant never alleged that DICA and Grumeti employed and paid the respondent. In any case, a conflict of interest never arises when another employer pays an employee's salary. SU2 (Fatuma Kuru) proved the respondent had contravened the rule of standard regarding the conduct of employment by committing the serious offence of dishonesty and major

breach of trust by failing to declare a conflict of interest involving providing the related service to DICA and Grumeti. Gross dishonest is a good ground for termination as it was held in **Unilever Tea Tanzania Ltd vs. Thomas Okelo Atito,** Revision No. 256 of 2019, High Court Labour Division at Dar Es Salaam (unreported) at page 6 that dishonesty includes non – non-disclosure of information and pilfering. The respondent did not deny signing documents on behalf of DICA and doing human resource services for Grumeti.

Arguing the 4th ground of revision, the counsel said the record on page 10 of the award shows the respondent was paid annual leave and three months' salary in lieu of notice. The respondent admitted to be paid annual leave, salary up to the 5th day of July 2021, and a certificate of service. Section 40(1) of the Employment and Labour Relationship Act provides that when termination is unfair, the Arbitrator may order the reinstatement of the employee or order payment of 12 months' salaries as compensation. Payment in lieu of notice is included in the compensation of 12 months. After the Arbitrator has ordered payment of 12 months' salary compensation for unfair termination, he could not order the payment of monthly salary in lieu of notice.

Regarding the last ground, he said the Arbitrator awarded 12 months' salary to the respondent while the respondent did not pray for an award of 12 months' salary in the CMA Form No.1. Under the circumstances, as the respondent did not pray for 12 months' salary compensation for unfair termination, it was wrong for the Arbitrator to award 12 months' salary compensation to the respondent without giving the reasons for the award.

In response, Mr. Remy William said the respondent was charged with six counts of disciplinary offences, and she was found guilty by the disciplinary Committee for three counts only. One of the counts of which she was not found guilty is living according to the employer's code of conduct. It enticed her to live by the employer's code of conduct. In the 1st legal issue, he said the respondent never breached the employer's code of conduct. The disciplinary Committee found the respondent not guilty of breaching any code of conduct. The misconduct did not warrant termination due to the failure to record accurately. The evidence at the CMA shows that the respondent failed to retire receipts for the funds corrected by the employer for audit. Exhibit RE2 shows from pages 26 to 28 that the failure to retire the receipt is not misconduct. The employer is required to deduct the

employee's salary from the amount for which the employee failed to retire the receipt.

The counsel said the Arbitrator's finding is in line with employer policy that the failure by the respondent to make the retirement does not constitute misconduct, which warrants termination, as seen on page 37 of the award. The same does not amount to fraud. Before the CMA or disciplinary Committee there was no fraud charge against the respondent. Thus, rule 2(1) of G.N. No. 42 OF 2007 could not be invoked. The cited case of **Platinum Credit Limited vs. Martin Joaqim** (supra) is distinguished as the respondent did not contravene the employer's code of conduct.

The counsel submission to the second legal issue is that the respondent was charged with the disciplinary offence of undue influence for borrowing money from co-employees. As a result, she breached the conflict of interest policy. Landing money to co-employees was not among the misconducts constituting a breach of the conflict of interest policy. It was also alleged that the respondent had a love affair with another employee and was giving him favour by offering him a 2-year training course at Mbeya. Exhibit R.E. 20 (investigation report) on page 47 shows seven employees were provided training appointments for different causes. Thus, it was

absurd to say the employee was offered preferential treatment. The employee's line manager initiates the procedure for employees to go to the training and not the human resource department. Dr. Nchimbi, the line manager of the respective employee, initiated his training process. The respondent was not involved in appointing the employee to attend the training. Thus, the respondent did not breach the employer's code of conduct.

He said another alleged breach of the conflict of interest policy was that the respondent was providing service to other companies, namely DICA and Grumeti. The respondent's evidence at the CMA is that she was a Grumeti Game Reserve employee before her employment with the appellant. Some documents from her previous employer were found on her laptop. She testified that she was not working for her former employer. Also, DICA Tanzania was working with the applicant. The respondent selected DICA Tanzania to serve the applicant through the procurement department. The Arbitrator properly reasoned what amounts to a conflict of interest on page 26 of the award. There was no conflict of interest between the applicant and the two companies, as the applicant failed to provide evidence to prove that the respondent was providing human resource services to DICA or Grumeti

Companies. Grumeti Company is in Mugumu District, and the applicant is located at Mufindi. Considering the distance between the location of these two companies, the respondent couldn't provide human resource service to Grumeti. Grumeti and DICA do not do activities similar to those of the applicant. The applicant's code of conduct and policy restrict employees from providing their service to other service providers providing services similar to those offered by the applicant. Even if the respondent was serving Grumeti and DICA, the same was not breaching the conflict of interest policy as the companies conduct different business services from the applicant.

On the applicant's claim that the Arbitrator failed to hold the applicant proved the termination was fair on a balance of probabilities, the counsel for the respondent said that the trial Arbitrator decided that the applicant failed to discharge the burden of proof under section 39 of the Employment and Labour Relations Act. The applicant has to prove that the termination was for a valid reason and that it was a fair procedure. It was not the burden of the employee to prove that the termination was unfair. The applicant claimed dishonesty was proved against the respondent, which is a sufficient reason for termination. However, dishonesty was not among the disciplinary offences the respondent was charged with at the disciplinary committees or

the CMA. The same could not arise at this stage. The second ground of revision has no merits.

Arguing the fourth legal issue, the counsel conceded that the respondent admitted to receiving one month's salary instead of leave, three months' salary in lieu of notice, severance pay and repatriation cost. The Arbitrator erred to award the same as they have already been paid.

Regarding the last ground, the counsel for the respondent said that in the CMA Form No. 1, the respondent prayed for severance pay, retirement benefit, and notice pay, but the Arbitrator awarded compensation for unfair termination without giving the reason. The evidence in the record shows that the respondent prayed for compensation because the employment relationship had been damaged irreparably. She said she had already secured another employment. The law allows such arguments under rule 32 of G.N. 64 of 2007. Thus, the Arbitrator adequately granted compensation instead of reinstatement.

However, in the CMA award, the Arbitrator said nothing about the fairness of the termination procedure. The Arbitrator was supposed to make a conclusion on the fairness of the prosecution. The court has to consider

the evidence in the record, especially the submission before the CMA, and hold that the procedure was unfair. The court should confirm the CMA Award accordingly.

In his rejoinder, Mr. Jonathan Wangugo said the Arbitrator considered the fairness of the procedural aspect of the termination on page 40 of the award and found that the applicant followed the fair procedure. It was the reason for termination, which was found to be unfair. The issue of dishonesty came from the respondent's failure to disclose information to the applicant, which is not new. It is part of a disciplinary offence that the respondent failed to disclose important information to the applicant. The code of business process of the employer provides several instances of breach of conflict of interest, including the prohibition to work with the company providing similar business, as seen on page 16 of exhibit RE2. There are several other instances of breach of conflict of interest provided under exhibit R.E2, which the applicant provided that the respondent has breached. The counsel retaliated his submission in chief and prayed for the appeal to be allowed.

After hearing the lengthy submissions from the counsels of both parties, it is now the duty of the court to determine the appeal. The appeal

will be determined by disposing of the legal issues raised and submitted by the learned counsels.

In the 1st, 2nd and 3rd legal issues, the applicant claimed that the disciplinary offences committed by the respondent amounted to gross misconduct due to the nature of the respondent's employment. Failure to record accurately constitutes fraud, which is a gross misconduct. The same applies to the breaching employer's conflict of interest code policy and respect, dignity and fair treatment code policy. The penalty to the employee includes termination of employment. For that reason, there was a fair reason for termination. In contention, the counsel for the respondent said the respondent never breached the employer code of conduct, and she was found not guilty of breaching any code of conduct by the Disciplinary Committee. The misconduct of failure to record accurately, which the respondent was found guilty of by the Disciplinary Committee, did not warrant termination. There is no evidence to prove other disciplinary offences for which she was found guilty by the Disciplinary Committee.

The Employment and Labour Relations Act, Cap. 366 R.E. 2019, provides in section 37 (1) that it is unlawful for an employer to terminate the employment of an employee unfairly. The Act provides further in 37 (2) that

the termination has to be based on valid reason and fair procedure. The respective section reads as follows, hereunder:-

> *"37 (2) A termination of employment by an employer is unfair if the employer fails to prove-*
>
> *(a) that the reason for the termination is valid;*
>
> *(b) that the reason is fair-*
>
> *(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 by a fair procedure."*

From the above section, for the termination of employment to be considered fair, it should be based on valid reason and fair procedure. In the case of **Tanzania Railway Limited vs. Mwajuma Said Semkiwa, Revision No. 239 of 2014, High Court Labour Division, at Dar Es Salaam**, (Unreported), this court held that;-

> *"It is established principle that for the termination of employment to be considered fair it should be based on valid reason and fair procedure. In other words, there must be substantive fairness and procedural fairness of termination of employment".*

In the case of **Tanzania Revenue Authority vs. Andrew Mapunda**, Labour Revision No. 104 of 2014, High Court Labour Division at Dar es Salaam, {unreported}, this court, while discussing substantive and procedural fairness of termination of employment under section 37 (2) of the Act held that: -

> *"I have no doubt that the intention of the legislature is to require employers to terminate employees only basing on valid reasons and not their will or whims."*

Under section 39 of the Employment and Labour Relations Act, in any proceedings concerning an employer's unfair termination of an employee, the employer is obligated to prove that the termination is fair. Thus, it is the employer's duty to prove that the termination of employment is fair. See **Association of Tanzania Tobacco Traders vs. Ahmed Ally Ahmed,** Revision No. 11 of 2012, High Court of Tanzania, Labour Division at Tabora, (unreported).

The evidence available in the record shows that the applicant charged the respondent with six disciplinary offences of breaching the employer's conflict of interest code policy; accurate record, reporting and accounting

code policy; respect, dignity and fair treatment code policy; Living the code policy; Anti-bribery code policy and loss of trust according to the law. The disciplinary Committee found the respondent guilty of breaching the employer's conflict of interest code policy, accurate record, reporting and accounting code policy, and respect, dignity and fair treatment code policy. The Committee discharged the respondent from the disciplinary offence of Living the code policy, Anti-bribery code policy, and loss of trust according to the law.

In the offence of breaching accurate record, reporting and accounting code policy, the particulars of the disciplinary offence are that the respondent collected cash in advance from the company without retiring the receipts or the money collected, influenced the finance team to structure her loan payment against the procedure, collected a cash advance for buying a carpet authorized to be collected by another employee without purchasing it or without submitting requisite receipts for accounting purposes. The respondent did not dispute the claims and said she still works on work permit and visa charge which contributing to most of the unaccounted money. She said she paid Rehema, who asked her to buy a carpet after paying for the carpet, but Rehema failed to collect the carpet, making the company deduct

the amount from Rehema's salary. She also said that the finance department forgot to deduct from her salary the payment for the loan she took from SACCOS. As a result, she was owed almost 20 million shillings. This evidence proved that the respondent breached the policy.

The applicant's code of business principles and code policies (exhibit RE2) provides on page 20 that employees must record all transactions accurately, completely and promptly. The code further provides that any failure to record accurately, falsifying or creating misleading information, or influencing others to do so could constitute fraud and result in fines or penalties for employees or the company. Nothing in the record shows fraud from the respondent's conduct of not accounting for the money she collected from the applicant. What was proved is the failure of the respondent to make the retirement of the money collected. The respondent said in her evidence that the remedy for the breach was to deduct the money from her salary. The applicant's submission that the penalties for failure to follow the code includes termination is misconceived. The business code provides that the breach could constitute fraud and result in fines or penalties. Before the disciplinary Committee, there was no fraud charge against the respondent. From the provision, the breach penalties commences with a fine and ends

with other penalties. The words of the code do not show that termination is available among the penalties. As the respondent breach does not constitute fraud, even the penalty was supposed to be the minimum. Thus, the CMA adequately held that the penalty to the respondent in the breach of policy was fine and not termination.

In the offence of breaching the employer's conflict of interest code policy, the applicant failed to prove their claims that the respondent misused her position by influencing employees to lend her money for personal use, some of which were not refunded, influenced employees to act as her guarantor for personal loans and sign loan request forms in capacity they do not hold. Further, the applicant claimed the respondent was engaged with various companies and provide service while employed by the applicant. She provided human resource service to DICA and Grumeti, and she was romantically involved with other employee. However, the applicant failed to prove the romantic relationship between the respondent and another employee. The claim was not proved.

The basis of the claims that the respondent is working with DICA and Grumeti is documents found in the respondent's laptop, which were authored or signed by the respondent. However, the document's authorship or

appending signature of those documents does not prove that she was engaged with other companies while employed by the applicant. In her evidence, the respondent said Grumeti Game Reserve employed her before the applicant employed her. After her departure, Grumeti Game Reserve asked her to train the human resource officer employed in the position she left vacant. The respondent evidence on this issue has more weight than the applicant's. She said the documents found in her laptop were for training purposes. The applicant is the one who engaged DICA, and the procurement unit selected the service provider. She assisted DICA in discharging the applicant's duties. Nothing in the record shows a conflict of interest between the applicant and the two companies. The applicant failed to provide evidence to prove that the respondent was providing human resource services to DICA or Grumeti Companies. The explanation given by the respondent that she was assisting his former employer in training their new human resources officer carried sufficient weight.

The claim that the respondent misused her position by influencing employees by lending money to them, forcing them to act as guarantors, and signing her personal loan forms has no basis. The claims constitute the offence of breaching respect, dignity and fair treatment code policy. The

applicant policies do not prohibit employees from taking loans from fellow employees or other institutions. The respondent said she was taking care of her sick husband, and she had to pay for his medical bills. As a result, she was taking loans from various sources. The respondent paid all her loans. The applicant failed to parade any witness during the disciplinary hearing and during arbitration to prove the allegation. Thus, the CMA held correctly in the award that the disciplinary offence of breaching the employer's conflict of interest code policy was not proved. Generally, the trial Commission correctly found that the reason for termination of respondent's employment was unfair.

Turning to the fairness of the procedure for termination, the counsel for the respondent claimed that the trial Arbitrator said nothing about the fairness of the procedure for termination. However, the Arbitrator held on page 41 of the award that the procedure for termination was proved to be fair by Ms. Nkariziki Malya (SU1). The record shows that the respondent was served with notice of hearing, she was informed in the notice of her rights to call witnesses, provided with exhibits she needed and investigation report, the evidence was presented in her presence, she cross-examined the witnesses, defended herself and brought witnesses in her defence, she was

given the outcome of the hearing, mitigated, she was given the recommendation of the disciplinary Committee, appealed against the decision of the committee before she was given the result of the appeal and served with termination letter. The only procedure which was omitted was to serve the respondent with the disciplinary charges in the notice of hearing, but the omission was served by the act of the Disciplinary Committee to use charges in the notice to show cause given previously to the respondent. As a result, the respondent was aware of the disciplinary offences she faced and, hence, not prejudiced. Thus, I agree with the Commission that the procedure for termination was fair.

The 4th and 5th legal issues are on the remedies awarded by the Commission to the respondent. The applicant submitted that after the Arbitrator had ordered payment of 12 months' salary compensation for unfair termination, he could not order monthly salary payment in lieu of notice under section 40(1) of the Employment and Labour Relationship Act. Payment in lieu of notice is included in the compensation of 12 months salary. He went on to say that the respondent did not pray for an award of 12 months' salary in the CMA Form No.1. Thus, it was wrong for the Arbitrator to award 12 months' salary compensation to the respondent

without giving the reasons. The counsel for the respondent conceded that the respondent admitted to receiving one month's salary in lieu of leave, three months' salary in lieu of notice, and repatriation cost.

The remedy for the unfair termination is provided by section 40 (1) and (2) of the Employment and Labour Relations Act, Cap. 366 R.E. 2019. The Arbitrator or Court may order the employer to reinstate the employee without loss of remuneration, to re-engage or to pay compensation to the employee of not less than twelve months' remuneration. The Act provides further in 40 (2) that an order for compensation made under the section shall be in addition to, and not a substitute for, any other amount to which the employee may be entitled in terms of any law or agreement. Further, section 44 (1) (a), (b), (c), (d), (e), (f), and (2) of the Act provides that termination payment shall include any remuneration for work done before the termination, annual leave pay, notice pay, severance pay, transport allowance, and certificate of service. These payments are in addition to an order for compensation for unfair termination. Thus, with due respect, the counsel for the applicant was wrong to say that when 12 months' salary compensation is awarded for unfair termination, the employee does not deserve payment of notice of termination due.

In this case, the trial Court awarded the respondent 12 months' salary compensation for unfair termination, severance pay, notice pay due, annual leave pay due, and certificate of service. The evidence in the record shows that the respondent admitted to receiving one month's salary in lieu of leave, remuneration for work done, three months' salary in lieu of notice, and repatriation cost. It was wrong for the trial court to award the respondent notice pay due, remuneration for work done, and annual leave pay due, as the applicant had already paid the respondent those awards.

The counsel for the applicant claimed that the respondent did not pray for 12 months' salary compensation for unfair termination. Hence, it was wrong for the Commission to award compensation not pleaded without sufficient reason. The counsel for the respondent was of the opposite view that the respondent, in her evidence, said that she prayed for compensation as she has got another employment.

As stated by the counsel for the applicant, the CMA, in its award, did not provide the reason for awarding 12 months' salary compensation to the respondent instead of re-engagement which was prayed in the CMA Form No. 1. In her evidence at the Commission, the respondent prayed to be paid 12 months' salary compensation for unfair termination, severance pay and

early retirement benefits. She did not say why she is praying compensation for unfair termination instead of re-engagement. However, the Commission record shows that one of the applicant's witnesses was Ms Nkariziki J. Malya (SU1). SU1 testified that she has been the Human Resource Business Partner of the applicant from the 1st day of November 2021. It means the respondent position has already been filled. Also, the circumstances of the case have made the working environment no longer friendly. The respondent's relationship with the applicant was irreparably damaged. The best remedy for the respondent is not re-engagement but compensation, as she prayed in her testimony. Thus, the Commission's award for compensation for unfair termination was correct and is upheld.

Therefore, I quash the order of the Commission for Mediation and Arbitration awarding the respondent shillings shillings 36,900,000/= as three months' salary notice pay and shillings 14,248,273/= as annual leave pay. The applicant has to pay 18,450,000/= as severance pay and shillings 147,600,000/= as 12 months' salary as compensation for unfair termination to the respondent. The total amount the applicant has to pay to the respondent is Tanzania shillings 166,050,000/=. This being a labour matter,

each party shall take care of its own cost of the suit. It is so ordered accordingly.

Dated at Iringa this 19th day of April, 2024.

A. E. MWIPOPO

JUDGE