

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 423 OF 2016

MIC TANZANIA LIMITED APPLICANT

VERSUS

ALLY MAKONGO RESPONDENT

(Original/ CMA/DSM/KIN/R. 280/14/106)

JUDGEMENT

Date of Last Order 16/03/2018

Date of Judgement 20/04/2018

A.C. NYERERE, J.

The applicant/**MIC Tanzania Limited** has filed the present application seeking revision of the decision and award of the Commission for Mediation and Arbitration (Herein to be referred as CMA) which was delivered on 10th January, 2016 in favour of the respondent/ **Ally Makongo**.

The series of events leads to the present application as per supporting affidavit filed in this court in support of the application are that;

respondent was employed by applicant on 28th May, 2013 as DVD Architect. His employment contract was terminated on 23rd April, 2015 for alleged misconduct of breach of IT Security Policy and fraudulent activities led to the loss of USD 17,500.

Respondent being aggrieved by termination decision he referred the referral to the CMA alleging unfair termination both substantively and procedurally. CMA in deliberating on the matter decided that respondent termination was substantively and procedurally unfair and ordered he be reinstated without loss of remuneration. That decision aggrieved applicant who file the present revision application faulting Arbitrator's award on five grounds articulated under paragraph 11 of the supported affidavit for easy of reference I quote them in verbatim.

- a) That, the arbitrator improperly awarded reinstatement to the respondent while there were enough evidence proving that the termination was substantively fair.**
- b) That the award of reinstatement was illogical and illegal comparing to the evidence adduced by both parties.**

- c) That, the arbitrator misconducted himself when ruled that termination letter includes new count.**
- d) That the arbitrator misconducted himself when ruled that the new charge did not appear in the notice to show cause hence the complainant could not have been in position to properly defend himself.**
- e) That the honorable Arbitrator misconducted himself when awarding reinstatement while there was enough evidence that the employer employee relationship has irreparably broken down.**

At the hearing of the application both parties were represented by advocates Mr. Rahim Mbwambo learned counsel appears for the applicant whereas Mr. Jamal learned counsel appears for the respondent and hearing proceeded orally.

Arguing the application Mr. Rahim Mbwambo learned counsel consolidated ground (a)(b) and (e) and argue them together that Arbitrator improperly and illegally awarded reinstatement to the respondent while there were enough evidence proving that the termination was substantively and procedurally fair. He said basing on Exhibit D4 and Exhibit D5

evidenced that respondent was terminated by the offence of violation or breach of Internal Policy and also by fraudulent activities such as illegal provision of list of numbers that were making fraudulent calls or transactions.

He further pointed out that Exhibit D "3" an investigation report and Exhibit D "2", Forensic report and oral evidence proved fraudulent activities such as configuration of a SIMCARD from pre-paid to post –paid and such configuration allowed free International calls which occasion applicant to suffer loss of USD 17,500. He also invite this court to concentrate on the evidence that respondent's computer was found with material like JAVA applications which he uses to damp call log that is why applicant failed to bring call list as evidence at the CMA and he asked this court to consider all the evidence in proceeding and quashed the order of reinstatement on ground that termination was substantively fair.

On consolidated ground (c) and (d) he argued that arbitrator misconducted himself when ruling that termination letter includes new charges which are different from what appeared in the notice to show cause thus respondent failed to defend himself properly. He said Arbitrator was supposed to read the contents and not one sentence and adjudged

that applicant failed to follow the proper procedures. He vehemently asked this court to go through the evidence and satisfied itself whether arbitrator was correct to adjudge the termination was procedurally unfair.

He further argued that even if this court finds that the termination was unfair therefore it was not proper for Arbitrator to award reinstatement because the employer/employee relationship has been damaged there is no trust any more between the employer and employee thus Arbitrator was supposed to be guided by Rule 32(2) of the GN 67/2007 and asked this court to quash and set aside the reinstatement order because the termination was substantively and procedurally fair.

In response on the consolidated grounds (a)(b) and (e) Mr. Jamal learned counsel submitted and faulted the argument by counsel for applicant that respondent's computer was found with materials which assist him to commit fraud. He said first the question of respondent's found with material was not an issue before the CMA thus applicant's counsel cannot raise it during revision stage. Secondly Exhibit "D1" paragraph 11 sub 18 page 15 evidenced that all laptops are the property of the applicant and applicant reserve the right to install any working tools and it is only IT

systems support and network support staff has the authority and access to install any tools.

He further argued that respondent was never involved in the fraudulent activities that led the applicant to suffer loss to the tune of USD 17,500 because Exhibit "D2" evidenced that the person who committed fraud is Harshendra Kumar who is located at India who access Tigo System and made calls. He said Arbitrator was correct to decide that the termination was for invalid reason because applicant failed to tender at the CMA any call log indicating the numbers used by respondent to make calls. He further argued that the argument made by applicant's counsel that respondent's computer had JAVA material which delete call log is unjustifiable because today all calls are recorded applicant would have supposed to tender at the CMA evidence proving that respondent made calls by using which numbers but in absence of such evidence Arbitrator was justifiable to decide that termination was substantively unfair.

Furthermore he argued that the argument made by applicant's counsel that the order of reinstatement is not justifiable Counsel for respondent is of the view that remedies for unfair termination are guided under Section 40(1) of the Employment and Labour Relations Act, No.

6/2004 and Arbitrator has discretion to award and he made a reference in the case of Barrick North Mara Mining Ltd v. Fanuel Petro Sasa Labour Revision No. 08/2013.

He further pointed out that Rule 32(1) and (2) of GN 67/2007 Labour Institutions (Mediation and Arbitration Guideline) empowers the arbitrator to reinstate or re-engage an employee once he has found the termination is unfair. Unless it has been established and proved that the relationship between employer and employee would be intolerable. He said in this case there is no any evidence from CMA indicating the applicant and the respondent were in antagonistic relation and he made reference in the case of **MARY MWADINI KIECHO VS HAJI MUHARM ABDALAH Civil Application No. 6/2014 CAT** at Zanzibar on page 5 of the decision CAT held among others:

“The trial court findings as to the credibility of witness is usually binding on appeal court unless there are circumstances on the record which call for a reassessment”.

Again in the same page the CAT referred to the case of **ALLY ABDALLAH RABABU & OTHERS** where the CAT held that:

"Where the decision of a case is wholly based on the credibility of witnesses then it is the trial court which is better place to assess their credibility than an appellate court which merely reads the report".

He further insisted on the allegation that, the applicant has lost trust against respondent has no leg to stand because was never deliberated at the CMA and in view of that the arbitrator was right to declare the termination of the respondent unfair and order reinstatement.

In respect of grounds (c) and (d) Counsel Jamal submitted that Notice to show cause was admitted on the CMA s Exhibit "P2" indicating two main reasons.

- (1) Violation of Internal Security Policy by the misuse of the software and company resources obtained fraudulently credentials of users to impersonate then to commit fraud.
- (2) An approved access to the HRR and illegal provision of list of numbers that were making fraudulent calls.

And in termination letter which was admitted as Exhibit P "5" indicated that respondent was terminated by gross misconduct due to

breach of IT security Policy and Fraudulently activities that led the Company to revenue loss of USD17,500. He said the two words used IT Security Policy and Internal Security Policy are distinguishable and have different meaning, and further to that on the notice to show cause respondent was never called to answer the loss of USD 17,500 but he was terminated on that ground without be given a right to be heard. And he finally asked this court to confirm arbitrator's decision and dismiss the application.

In rejoinder, Mr. Rahim Mbwambo learned counsel reiterated his submission in chief and respond on one vital issue that the policy which was tendered at the CMA and during the disciplinary committee it reads as IT AND NETWORK OPERATIONS SECURITY POLICY, he said IT SECURITY POLICY (Exhibit D1) is automatically reforming to the Internal Security Policy. He further pointed out that both notice to show cause and termination letter are talking about violation of policy and fraudulent activities. And he finally prayed the application be allowed the CMA award be quashed and set aside.

After careful considered parties industrious submission, CMA records, Affidavit and Counter affidavit filed in this court, labour laws and practice of this court my decision on the consolidated grounds are as hereunder.

On the consolidated grounds (a)(b) and (e) I must say in the outset that respondent's termination was for invalid reasons as correctly decided by arbitrator why? Because the evidence reveal that respondent was terminated from his employment for gross misconduct due to breach of IT Security Policy and fraudulent activities that led the company to a revenue loss totaling USD 17,000. The base for such reasons for termination was from belief and investigation conducted by applicant that respondent did configuration Simcards from prepaid to postpaid, the configuration which allowed the free international calls but the cost had to be borne by the company.

The Security Incident Report Exhibit D "3" first paragraph item 7 titled Security Observations at page 8 evidenced that the person who committed fraud is Harshendra Kumar, and Harshendra Kumar is located in India (THBS support) but his account was used from Tanzania. However, the user who committed fraud did not use his Tigo Laptop nor his Tigo

domain access. Thus to held respondent's liable on mere ground that his laptop was found with unwanted tools is unfair because it is clear from investigation report such act was never committed by using Tigo laptop or Tigo Domain access.

I managed also to go through Forensics Report (Exhibit D2) at page 6 and 7 respectively indicated the VPN connection was made from Tanzania though a Public IP Track using a Zantel Modem. Thus from all what I gathered in records there is no evidence in records which connect respondent and perpetrator one Harshendra Kumar in order to hold respondent guilty of the misconduct of breach of IT Security Policy and fraudulent activities. Thus I confirm arbitrator's finding that respondent was terminated for an invalid reasons.

My decision in respects of the consolidated ground (c) and (d) is that Arbitrator was correct to adjudged that respondent's termination was unfair procedurally because the records is very clear on Exhibit P5 which indicates that respondent was terminated due to gross misconduct due to breach of IT Security Policy and fraudulent activities that led the company to a revenue loss totaling Usd 17,500 while on the notice to show cause Exhibit P2 respondent was charged on different charges being:-

- a) Violation of Internal Security Policy by the misuse of the software and company resources obtained fraudulently credentials of users to impersonate then to commit fraud.
- b) An approved access to the HRR and illegal provision of list of numbers that were making fraudulent calls.

Therefore it is without flickers of doubt that respondent was terminated on unfounded charges which he was never afforded a right to be heard as rightly submitted by Mr. Jamal learned counsel. Our Court encourages fair practice as held in case of **BIDCO Oil Soap v. Robert Matonya & 2 others (Unreported)** that;

“.....fair practices incorporate observance of basic human right principles among them the presumption of innocence and right not to be punished unheard”

The fact that respondent was denied this fundamental rights, a fact which was not absolutely denied by applicant counsel on substance, I hasten agree with the CMA findings that respondent termination was procedurally unfair as observed above.

Concerning the issue of award of reinstatement I must point out that as rightly submitted by both counsel that powers of the arbitrator or court to award of remedy is for unfair termination under section 40(1) of the Act is discretionary, however, Arbitrator or court must be guided by circumstances of each case.

In the present case arbitrator granted reinstatement after adjudged termination to be substantively and procedurally unfair however applicant's in this court fault such discretion on ground that the relationship between the parties has been damaged thus award of reinstatement will be impracticable. My decision on this grounds prefaced on two aspects first as respondent counsel submitted this issue was supposed to be raised at the CMA in order for Arbitrator to consider it and invoke its power under Rule 32 of the GN 67/2007 and award appropriate remedy. Thus because this issue never featured at the CMA, it was first advanced in this court during revision this court cannot deliberate on it as rightly deliberated on the cited case of **MARY MWADINI KIECHO VS HAJI MUHARM ABDALAH Civil Application No. 6/2014 CAT** at Zanzibar.


Secondly when the order of reinstatement is made by the Court c
CMA and employer wishes not to reinstate, the law is very clear under
Section 40(3) of the ELRA which provide that;

**"Where an order of reinstatement or re-engagement is made
by an Arbitrator or Court and the employer decides not to
reinstate or re-engage the employee, the employer shall pay
compensation of twelve months wages in addition to wages
due and other benefits from the date of unfair termination to
the date of final payment."**

Thus if applicant finds the relationship between employee and
employer has been damaged he has discretion not to reinstate such an
employee by complying on the cited provision of the law rather than
challenging the respective award of reinstatement in this court which was
awarded pursuant to the law by the CMA.

In the end result I find this application lacks merit and I proceed to
dismiss it in its entirety.

It is so ordered.


A.C. Nyerere
JUDGE
20/04/2018