IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 28 OF 2016

CMA/CGM TANZANIA LTD.....APPLICANT

VERSUS

JUSTINE BARUTI.....RESPONDENT

JUDGEMENT

Date of Last Order: 26/02/2018

Date of Judgement: 23/05/2018

L.L.Mashaka, J.

This judgement is in respect of the application for revision filed by the applicant CMA/CGM Tanzania Ltd against the CMA award issued by the Commission for Mediation and Arbitration [herein referred as CMA], which ordered compensation of 12 months' salary, severance pay, one month salary in lieu of notice and one year leave equal to one month salary after a finding of unfair termination on substantive fairness.

The application was made by Notice of Application, Chamber Summons and supporting affidavit of one Lawrence Sajilo, under Rule 24(1),(2)(a)(b)(c)(d)(e) and (f), and (3)(a)(b)(c) and (d),11(2), Rule 28(1)(c)(d) and (e) of the Labour Court Rules 2007,GN 106 of 2007,Section 91(1)(a) and (2)(a)(b), 94 (b)(i) of the Employment and

Labour Relations Act No. 6 of 2004; Section 51 of the Labour Institutions Act, No 7 of 2004.

During the hearing, the applicant was represented by Mr. Makaki Masatu, Advocate and Mr. Mashaka Ngole, Advocate represented the respondent.

Learned Counsel for the applicant submitted that, on the 25th November 2016 the CMA issued an award in favour of the respondent, the applicant was aggrieved, thus on the 22nd December 2016 setting out grounds for revision the applicant filed this present application. He prayed to adopt the chamber summons and affidavit as part of his submission that they have raised 3 grounds for revision.

The first ground for revision was on jurisdiction of the CMA. That an employee who is aggrieved by the decision of an employer in terms of Rule 10(1) of GN No. 64 of 2007 is required to file a referral to the CMA in terms of the provision in CMA Form No. 1 a statutory form and is required before filing or referring the matter to the CMA to have it served to the employer. That CMA Form No.1 made under Section 86(1) of the Employment and Labour Relations Act, No. 6 of 2004 provides at part B of the said Form requires the party must complete the prescribed form CMA Form No. 1 and part C provides where the form should go or be sent. That the title part C is where does the form go and the copy to the CMA together with proof of the form having been served on the other party.

That the respondent in his referral stated on the CMA Form No. 1 that the dispute arose on the 19/09/2015. However this form was served to the applicant on the 01/12/2015, thus beyond the 30 days as required

by Rule 10(1) of GN No. 64 of 2007, after expiry of over 60 days. That the CMA Form No. 1 directed that before the form is filed with the CMA the CMA F1 is required to have been served to the other party together with proof of the same that it has been served. The referral form that initiated the matter at the CMA attached as Annexure CMA 9 indicates the date it was served to the applicant. That it was their submission the matter was referred out of time thus the CMA had no jurisdiction to determine matters filed out of time.

The 2nd ground was that the applicant was condemned unheard as you can be seen at page 3 of the CMA award only 2 issues were framed by Hon. Arbitrator. Looking at the decision of Hon. Arbitrator it held that termination was unfair substantively and procedurally. That the issue of whether the procedures were fair or otherwise was not an issue before the CMA to be addressed by the parties. Holding that termination was both substantively and procedurally unfair was condemning the applicant to not being heard. Learned Counsel insisted that a decision which is reached without according a party a right to be heard is a violation of the principle of natural justice. The effect of which make the decision void or no decision at all.

That the effect of not according a party to be heard was discussed by the Court of Appeal of Tanzania in the case of **Abbas Sherally Mehrunissa Abbas Sherally Vs. Abdul Sultan Haji Mohamed Fazalboy** Civil Application No. 133 of 2002, Court of Appeal of Tanzania at Dar es Salaam (unreported) at page 8, quoted with approval the decision in the case of **General Medical Council Vs. Spackman** (1943) AC 627 *"if principles of natural justice are violated in respect of any decision it is*

indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision."

That the finding of Hon. Arbitrator on whether the applicant followed fair procedures and the decision on that aspect was made without according the party the right to be heard. That had Hon. Arbitrator wished to decide on that particular aspect he should have included the issue of procedural fairness as among the issues for determination.

That the non-inclusion of the issue on procedural fairness was not an incidental omission, was a deliberate decision informed by the particulars facts of this matter. That during the disciplinary hearing (DH) the respondent admitted commission of Count no. 1 and 2 that admission is available in a letter written by the respondent in mitigation. The hearing form and mitigation letter are Annexure CMA 4 and 5 respectively. It is the submission of Learned Counsel that the circumstance which led to the non-inclusion of the procedural fairness or otherwise. That the applicant has been prejudiced as a result of Hon. Arbitrator deciding on matters that the applicant was not accorded a right to be heard.

Learned Counsel submitted on the 3rd ground for revision that the decision of Hon. Arbitrator was not supported by the evidence on record and it was against the weight of evidence on record. That looking at the award, the finding of Hon. Arbitrator is to the effect that the applicant failed to prove a reason for termination. That finding was contrary to what was before him. That it is on record that the witness for the applicant one Gerald Yambi tendered a number of documents including the hearing form

Annexure CMA 4 and the mitigation letter Annex CMA 5. In Annexure CMA 4 respondent admitted two counts. The first count was failure to follow instructions, insolence or disrespectful conduct towards the management. apart from the admission during DH, that the respondent further admitted in his mitigation letter Annexure CMA 5. In the 1st paragraph of Annexure CMA 5 the respondent wrote as follows " I admitted both count 1 and 2." Having the respondent admitted the charged offences count 1 and 2 and the documentary evidence evidencing the admission, it was not rational for Hon. Arbitrator to decide to prove the offence which the respondent was terminated.

That it is the law that once a charged employee admits the offences he is charged with there is no need of conducting a Disciplinary hearing (herein referred as DH). This was stated by this Court in the case of **Nickson Alex Vs. Plan International**, Revision No. 22 of 2014, High Court Labour Division at Mwanza at page 7. He submitted that in that matter the respondent was given a show cause notice, served a charge and summoned to the Disciplinary Committee hearing and appeared. Had he not admitted the charges, hearing would have taken place. So it was not proper for Hon. Arbitrator to hold that the disciplinary charges were not proved.

That had they had submitted there was adequate evidence before the Arbitrator to prove that the respondent committed the counts he was charged and it was the same which formed the basis of his termination, it

was expected of Hon. Arbitrator to hold that the respondent committed the offences and the applicant had reasons to terminate the respondent's employment.

Learned Counsel argued that where there was sufficient evidence on record and Hon. Arbitrator decided otherwise; that the decision is unlawful, irrational and illogical thus become amenable for revision under Section 91(2)(c) of the Employment and Labour Relations Act No. 6 of 2004 as amended. That this position was held by this Court in the case of **TBL Vs. Mary F. Mgulu**, Revision No. 343 of 2016, High Court Labour Division at Dar Es Salaam (unreported).

In addition, he submitted that, an issue to be decided by Hon. Arbitrator as issues framed as whether the offences with which the respondent was found guilty would justify termination. That according to the copy of the charge sheet, Count No. 2 offence of insolence or disrespectful conduct towards the management. That this kind of offence first it appears in the ELR (Code of Good Practice) GN No. 42 of 2007 as part of item 11 whose title is offences which may constitute serious misconduct and leading to termination of an employee. This item 11 covers a number of offences including unacceptable conduct towards other employees, customers, clients or members of the public. In respondent's matter it was unacceptable conduct towards the management (mgt), it was misconduct committed against the applicant's General Manager.

That the same offence features in the applicant's Human Resource Policy Manual Procedures which is attached as Annexure CMA 11. In this

Manual Annexure CMA 11 at page 44, area on behavior, it covers a number of offences including unacceptable conduct towards management which justified termination on first commission. That Hon. Arbitrator confused two distinct offences in the same document. At page 6 of the CMA award, he is making reference to offences found in page 4 of the Annexure CMA 11 or Exhibit B 5 in CMA record and concluded that the punishment prescribed is warning. But the offence at page 43 is distinct from the one appearing at page 44. At page 43 the offence is about unacceptable behavior, whereas the respondent was charged with an offence of unacceptable conduct which appears at page 44, a serious offence which attracts termination at its commission. That the finding of Hon. Arbitrator is contrary to the evidence on record, the charge sheet, the disciplinary hearing form and the termination letter all which were tendered indicated the offence which the respondent was charged with and found guilty on his own admission.

That the offence of unacceptable behavior discussed by Hon. Arbitrator does not feature on the documentary evidence tendered at the CMA. Thus under Section 91(2)(c) of the Employment and Labour Relations Act No. 6 of 2004 as amended and as interpreted by this Court in the case of **TBL Vs. Mary F. Mgulu (supra),** this application be revised.

It was their submission that it was wrong for Hon. Arbitrator to order reinstatement of the respondent without regard to the fact that the respondent admitted the offences, failing to take into account that the respondent was a very senior person of the applicant who occupied the position of Operations Manager.

Learned Counsel prayed that the CMA award dated 25/11/2016 be set aside.

In response Learned Counsel Ngole for the respondent submitted that the submission by Learned Counsel for the applicant was devoid of merit and should be disregarded by this Hon. Court.

That the submission raised an issue on jurisdiction of the CMA. Learned Counsel submitted that this is a new issue which has never been raised in the chamber summons, notice of application and affidavit before this Court which is contrary to the provisions of Rule 24(3)(c) of Labour Court Rules GN No. 106 of 2007. Therefore he humbly prayed the Hon. Court disregard the determination of this issue on jurisdiction. In addition, the grounds upon which an application for revision is based should have been stated in the affidavit, that he had read the whole affidavit in support of application and noted the grounds for revision are found at paragraphs 15,16,17,18 and 19 of affidavit. That the other paragraphs contain the statement of material facts and not statement of legal issues and from paragraphs 15-19 this issue of jurisdiction has not been raised.

That Learned Counsel for the applicant referred the date and signature of the recipient of the document which is on the first page on the referral form, he submitted that the said signature and stamp was not an indication of receiving the documents by the applicant. That it was in record that the referral was filed on 28/09/2015. It is also on record that the dispute came for mediation on the 12/11/2015 for the 1st time, therefore why would this referral be called for mediation on the said date and the applicant be served on 01/12/2015. Therefore Learned Counsel

submitted that the said 01/12/2015 was not indication of receipt of the referral by the applicant. That he has perused the provisions provided on the front page of the referral form item (c) and (d) and has the following observations. That what has been stated at part (c), it is the CMA which should have been served the proof of service of the documents together with the referral form and not the applicant employer, the interpretation is that it is in the said proof of service where the CMA and the Court can find the proper date the referral was served to the applicant employer before this Court and not a rubber and signature indicated in the referral form attached to the applicant's application. That the proof of service according to item (d) on the front page, the definition is that if the service has been done by hand, proof of service amounts to a receipt signed by a party or person who appears to be at least 18 years old and in charge of the party's place of residence or employment. Or a signed statement by the person who served the documents. Secondly by registered post, a proof of posting from the Post authority. It was his humbly submission that the stamp and signature do not fall anywhere among the interpreted proof of service. That assuming, which is denied the service was done by hand and the stamp indicated on the front page of the referral was an evidence of service, the stamp and signature lacks the position of the person who received the document and his /her age as required by interpreted clause of service at (d) on the referral form.

Learned Counsel humbly submitted that the referral form was filed before the CMA at Tanga with evidence of proof of service other than the

alleged proof of service. That it is in the record of the CMA that the said proof of service is the proof of Post authority. That the CMA had jurisdiction to entertain the dispute.

On the 2nd ground, Learned Counsel argued that he had gone through the whole award and have not seen the issue of procedure being determined by Hon. Arbitrator, that what was determined was the validity of the reasons for termination and reliefs sought by parties. That according to pages 9 & 10 of the CMA award refer page 9, 1st paragraph Hon. Arbitrator determined the validity of the reason for termination and not the procedural issue as alleged by the applicant. And at page 10, the 1st and 3rd paragraphs, the findings were same on the validity of the reasons for termination. That Hon. Arbitrator had this say refer paragraph 3 at page 10, his findings was on valid reason. That ground 2 was devoid of merit and this Hon. Court to disregard the same.

On the 3rd ground for revision, Learned Counsel submitted that the argument advanced is devoid of merit and Learned Counsel for the applicant has misinterpreted the finding by Hon. Arbitrator on that issue. That Counsel for the applicant has taken out of context the last paragraph at page 8 and 1st paragraph at page 9. That his arguments were what Hon. Arbitrator said that the applicant failed to prove the respondent had failed to clock in and out and not the whole charge. Therefore it was right for Hon. Arbitrator to come to a finding that the applicant had failed to prove the allegation of clocking in and clocking out by the respondent, even though the respondent admitted the whole charge on failure to carry out instructions of his employer. The finding of Hon. Arbitrator in the 1st

count of the charges was in favour of the applicant and was based on; I pray to delete the whole sentence.

Learned Counsel further submitted that, on the 2nd part of the 3rd ground for revision, Learned Counsel has misconstrued Exhibit B5 the Human Resources Manual referred, what was alleged by Learned Counsel is that the charges against the respondent fall within the provisions of Exhibit B5 at page 44, was totally wrong. That at page 44 there is no indication of the offences and corresponding punishment, there is only procedure to be adopted in execution of the hearing of the charges and handling of the charges. That the offences and corresponding punishment are at page 43 only and Hon. Arbitrator derived its decision. That according to page 44 of Exhibit B5, the offence which led to termination is punishable by warning letter. Also all the charges at page 43 are not punishable with termination at the first instance. Learned Counsel argued that the comparing of charges in Exh B5 and the offences in GN No. 42 of 2007 is totally wrong. That GN No. 42 of 2007 is a fall back law to the Exhibit B.5 and can only be invoked where the Human Resource Manual is silent, which is not the case in this dispute. He agreed with Learned Counsel that the respondent was charged which the offence of insolence or disrespectful conduct towards the management, and strongly contended this offence falls within item 5 of the Exhibit B5 the area on behavior including unacceptable conduct towards others and management. That the issue on behavior and conduct are same and similar according to Exhibit B5.

That the decisions referred to by Learned Counsel he had no any problem on the findings of the judgments but argued that are distinguishable with the case at hand.

In rebuttal, Learned Counsel Makaki on the 1st issue, prayed to draw the Court to their chamber summons 1st paragraph (a) on the grounds for revision. That on the issue of limitation, they have pleaded at paragraph 9 of affidavit. That it was not true that they have not set out facts on jurisdiction.

Secondly, he submitted that it was trite law that jurisdiction can be raised anytime, and they raised in chamber summons and affidavit.

That the cited Rule 24 (3) (c) of the Labour Court rules 2007 has been complied with by the applicant. Furthermore, on the 2nd ground, they reiterated their position and the facts were pleaded in supporting affidavit. That if the respondent had proof other than they have produced would have attached proof which they consider to be applicable and proper than what they have provide. That the kind of proof of service as at paragraph (d) it is in line with what is indicated on the referral form and attached to their affidavit.

Learned Counsel submitted that they wish to draw to the confusion created by Learned Counsel for the respondent on the date they filed the referral. That in his submission, he said the referral was filed on 28/09/2015. But in paragraph 9 of counter affidavit he made reference to the 16th October 2015 when the referral was filed. The issue at hand is that referral form according to directives given in CMA Form No. 1 cannot be filed at the CMA without the same to have been served to the respondent. That the law requires the same to be accompanied with proof of service of the referral to the other party. The applicant employer was served on the 01/12/2015 which was out of time for more than 60 days.

That on the right to be heard and whether procedures were followed; reading the CMA award from pages 7 to 9 there are findings by Hon. Arbitrator on how disciplinary hearing should have been conducted procedural hearing include how evidence is adduced. And at page 8, Hon.Arbitrator challenges issues relating to tendering of evidence and made findings in respect of the same.

It was their submission that, the respondent having admitted the 2 offences, issues of leading evidence were not there. Even the issues framed was not about proof of the reasons but was for assessing the reason was fair, that is was there a fair reason for termination. That Hon. Arbitrator determining there was no evidence supporting the commission of the offences was contrary to the agreed issue and made without giving an opportunity to the applicant to respond and disregarded the evidence on records, i.e. the DH form and the mitigation letter.

On the last item, he submitted that Learned Counsel for the respondent has led words into the Human Resource Policy and Manual Exhibit B5 which are not there. He had submitted that the word 'behavior' at page 43 is interpreted at page 44, nowhere is it stated in the Manual Exh B5. That the first column at page 43 shows offences and it includes an offence of unacceptable behavior and at page 44, second column shows offences and includes an unacceptable conduct towards others including against the Management. That these were two distinct offences. That at page 43 the last column indicate procedures to be followed for an offence at the 1st column.

That at page 44, the third column sets out procedures in respect of an employee charged with the offences including an unacceptable conduct towards management. The procedures set out goes to part 8 which indicate termination may be prescribed for the offence in the 2nd column. On the other hand, the offence discussed by Hon. Arbitrator is very clear he made a decision based on offence set out at page 43, as per page 9 of CMA award. That the offence set out at page 43 is not the offence the respondent was charged with.

Learned Counsel prayed the application for revision be granted and the award be set aside.

After hearing submissions by both parties in this dispute and records at hand the issue for determination is whether or not the employer applicant had valid reason for termination, and reliefs entitled to the parties. The issue of procedural fairness was not amongst the issues drawn at the CMA.

On the jurisdiction issue, the records shows that the respondent's dispute was filed to the CMA on 16/10/2015, while the termination took place on 19/09/2015. The CMA delivered a ruling on the preliminary objection raised by the applicant employer that the application was not filed out of time. That it was on 19/09/2015 when the respondent employee became aware of the termination letter issued on 08/09/2015. There is ample evidence that the applicant employer was duly served and he appeared before the CMA, thus her right to be heard was not infringed. Refer page 2 paragraph 3 of typed CMA award, the final outcome/decision after appeal by the respondent to the applicant was made on the

17/09/2015. The ruling by Hon. Mwaikambo, Mediator on preliminary objection raised by applicant was delivered on the 07/03/2016 and the preliminary objection overruled. This ground for revision is dismissed for lack of merit.

On the 2nd ground that the applicant was condemned unheard as seen at page 3 of CMA award that only two issues were framed by Hon. Arbitrator, I perused the written proceedings at the CMA dated 04/05/2016 before Hon. Warda S.H. Arbitrator, both the parties were represented. The applicant was represented by one Endrew Miraa and the respondent was present and represented by Advocate Abubakar Mussa. The matter was coming for analyzing disputable issues, which were 2 that is whether there was a fair reason for termination of employee (respondent) and what are the reliefs entitled to both parties. The raised issues by the applicant in this application on fairness of procedure was not a disputable issue at the CMA.

Hence from the proceedings at the CMA, parties agreed there were only 2 disputable issues as explained. Hence this ground 2 for revision is with no merit and accordingly dismissed.

The reasons for termination was as per letter of termination Exhibit A5 failure to carry out instructions of the employer and insolence or disrespectful conduct towards the Management.

On the first count for termination as per Exhibit B1 & A5 Hon. Arbitrator ruled out that the applicant employer failed to prove that there was misunderstanding between the respondent and the General Manager. The evidence adduced by the only witness of the applicant Gerald Yambi

[DW1] Commercial Manager admitted not to witness rather he heard it from another person and the General Manager failed to enter appearance to testify before the CMA and be cross –examined by the respondent. The testimony by DW1 on this aspect cannot be relied upon, it is hearsay evidence.

The second count on failure to follow instructions of the employer, it is on record that the respondent employee admitted the same on the reason that following the nature of his position, sometimes it was not possible to punch the clock in and clock out on the Finger Printer Register machine when reporting on duty and when leaving. He testified that when the ship is on dock he has to be there and therefore not possible to go direct to the office to punch first. Hon Arbitrator ruled out that there was no evidence tendered at the CMA to show the print outs from the applicant employer to corroborate the same, the analysis of the Tanga Office Finger Point Register Report for April 2015 was never tendered before the CMA.

On both the 1st and 2nd counts, Hon. Arbitrator found that the applicant employer had no valid reason to terminate the respondent employee. According to the applicant employer's Human Resource Policy and Manual & Procedures Exhibit B 5 at page 43, the so termed 'misconduct' was to attract verbal warning as a proper penalty under Exhibit B 5 and not termination as the applicant employer decided. The third count on the charge sheet, the respondent employee was acquitted because the management failed to adduce evidence before the Disciplinary Committee.

This Court finds no any valid reasons advanced by the applicant employer to fault Hon. Arbitrator's finding on the validity of reason for termination. The employer failed to prove that there was a valid reason to terminate the respondent.

Under Section 37(1) and (2)(a)&(b) of the Employment and Labour Relations Act No. 6/2004 provides that:-

*"S. 37. (1) It **shall be** unlawful for an employer to terminate the employment of an employee unfairly.*

(2) A termination of the employment by an employer is unfair if the employer fails to prove-

a) That the reason 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 ....."

The cited provision above is in line with Article 4 of the ILO Convention on Termination of Employment, No. 158 of 1982 which provides that the employer must have a valid reason for termination of an employee and a fair procedure must be followed. Article 4 stipulates that:

"..... the employment of a worker shall not be terminated unless there is a valid reason for such termination connected the capacity or conduct of the worker or based in the operational requirement of the undertaking, establishment or service ....."

From evidence adduced by the applicant employer failed to prove that termination of the respondent was for a valid reason, the applicant employer had no valid reason to terminate the respondent.

Also being a first offender as provided for under Exhibit B5 – CMA CGM (Tanzania) Ltd Human Resource Policy Manual & Procedures page 43, refer page 9 of CMA award, the offence for failure to carry out instructions from a superior or employer, attracts a verbal warning, if repeated written warning, second written warning and for a habitual offender it is termination. The respondent was a first offender and the proper punishment was supposed to be a verbal warning and not termination. If the case may have been that the 2nd count for disrespectful conduct to the management under Exhibit B 5 punishment for a first offender is warning letter, 2nd offence is same warning letter and the 3rd time is termination. As contended by Learned Counsel for the applicant that under page 44 of Exhibit B5 Human Resource Policy Manual and procedures has 3 columns for area, offences and procedure, but there is no column for type of warning which is adequately provided for at page 43 of same Exhibit B5. At page 43, there is a column for offence type of warning and procedure. Page 44 provides further clarity on the areas which have been referred to at page 43 as offence. The Court finds the termination of employment was substantively unfair.

On the reliefs entitled to parties, after a finding of unfair termination Hon. Arbitrator ordered under Section 40(1)(a) of the Employment and Labour Relations Act No. 6 of 2004 the reinstatement of the respondent from the date of unfair termination without loss of remuneration during the period that the respondent was absent from work due to the unfair termination. In the alternative if the applicant employer has no wish to reinstate the respondent, according to Section 40(3) of the Employment and Labour Relations Act No. 6 of 2004, Hon. Arbitrator ordered the

applicant to pay the respondent 12 months wages that is 12 x Tshs 3,000,000/= equal to 36,000,000/=, salary from August 2015 to the final date of payment, severance pay of 10 years equal to 8,076,923/=, one month salary in lieu of Notice and one month salary leave as per Section 44(b) of the Employment and Labour Relations Act No. 6 of 2004. Learned Counsel for the applicant argued that the order of reinstatement made by Hon. Arbitrator was not proper. Having gone through the records there was an order of reinstatement and an order in the alternative shown above, if the applicant does not wish to reinstate the respondent.

Since termination of employment was substantively unfair, this Court finds the decision by Hon. Arbitrator was fair, just and properly arrived at.

The applicant CMA/CGM Tanzania Ltd has an option to reinstate the respondent Justine Baruti under Section 40(1)(a) of Employment and Labour Relations Act No. 6 of 2004 or pay compensation to the respondent under Section 40(3) of same Act, No. 6 of 2004. In the circumstance, this application for revision is dismissed for lack of merit.

Right of appeal explained.

L.L.Mashaka

JUDGE

23/05/2018