IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MOROGORO SUB-REGISTRY

REVISION NO. 32 OF 2020

BETWEEN

ALLIANCE ONE TOBACCO TANZANIA LTD.....APPLICANT

VERSUS

SHOMARI HAMISI.....RESPONDENT

JUDGEMENT

Date of Last Order: 06/07/2020

Date of Judgement: 10/07/2020

Aboud, J.

This is an application to revise and set aside the decision of the Commission for Mediation and Arbitration (herein referred as CMA) delivered on 13/12/2019 by Hon. Kiobya, Z. Arbitrator in Labour Dispute No. CMA/MOR/162/2016. The applicant filed this application under the provisions of Section 91 (1) (a), 91 (2) (c) and 94 (1) (b) (i) of the Employment and Labour Relations Act, 2004 [CAP 366 R.E 2019] (herein The Act) and Rule 24 (1), 24 (2) (a), (b), (c), (d), (e), (f), 24 (3) (a), (b), (c) and (d) and Rule 28 (1) (c), (d) and (e) of the

Labour Court Rules, GN. No. 106 of 2007 (herein after The Labour Court Rules).

The affidavit of Sabatho Musombwa, applicant's Principal Officer supported the application. The respondent challenged the application through his counter affidavit.

The dispute background is shortly narrated as follows. The respondent was employed by the applicant way back on 2nd February, 2006 as trainee leaf buyer. After he had various employment contracts with the respondent, on 1st April, 2015 the respondent entered into a contract with the applicant as a leaf buyer for a period of three years which was to end on 31st March, 2018. On 23rd August, 2016 the respondent was terminated from employment on the ground of misconduct namely intent to disrupt the company and dishonesty.

Aggrieved by the termination the respondent referred the dispute to CMA where the matter was decided on his favour. The Arbitrator awarded him 22 months salaries as compensation for the remaining period of the contract. Being dissatisfied with the CMA's

award the applicant filed the present application for the Court to revise and set aside the CMA's award.

During hearing both parties were represented by Learned Counsels. Mr. Said Nyawambura and Mr. Boniface Woiso were for the applicant, while Mr. Imam Daffa, appeared for the respondent.

In support of the application Mr. Said Nyawambura prayed to adopt the applicant's affidavit to form part of their submission. He submitted that, according to the CMA award the Arbitrator found the applicant did not follow the procedures for terminating the respondent employment as provided in law. He stated that, at page 21 of the award the Arbitrator's finding is vague because he did not say clearly which procedures were violated by the applicant.

He went on to submit that, at page 18 of the award the Arbitrator decided that the offence committed by the respondent was negligence which did not deserve to be terminated rather was to be warned. The Learned Counsel argued that, the respondent committed an offence which amount to gross misconduct as it is provided under Guideline 4 (11) of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures (herein the Guidelines). He

added that, the offence committed caused a loss to the applicant to the tune of USD 22,840.35 as it is in investigation report of 25/07/2016, which is Iringa Market problem and Disciplinary Committee Form titled (Exhibits K5 and K6 respectively) in the CMA record.

Mr. Said Nyawambura submitted that, at page 11 of the award, it is reflected in Exhibit K3 that, the respondent denied being involved in grading the tobacco from lower to higher grade. Mr. Nyawambura stated that, this was an offence under Rule 33 (1) (2) (3) of the Tobacco Industry Regulation, 2011 GN. 392 of 2011 read together with Rule 34 (1) (2) (3) of the relevant Regulation.

Mr. Boniface Woiso took over and submitted that, the Arbitrator at page 16 of the award decided that the respondent did not indicate which rules were contravened by the respondent. He stated that, it was not proper to decide so because the violated rules are in the Tobacco Industry Regulations. Mr. Boniface Woiso strongly submitted that, even the respondent himself had knowledge of those regulations as he testified so before the CMA. To support his submission he referred the case of **Vedastus S. Ntulangenka & 6**

Others Vs. Mohamed Trans Ltd., Revision No. 4 of 2014, HC. Shinyanga (unreported). Where Mipawa, J. (Rtd.) held that:-

> "Like in the present case the respondent has not shown any written code embodying the rule or standard regulating conduct relating to employment. We can found the particular rules, may be included or contained in the employee's written contract of employment. It may also be included in the policy or personal manual or in notice places on the notice boards in the working place. Other sources where rules regulating the conduct of employees can also be found, other than unilateral decision of the employer are:-
>
> (1) Common law sources.
>
> (2) Legislations".

Mr. Boniface Woiso further submitted that, in the case at hand there was legislation that regulated the conduct of the respondent, that is the Tobacco Industry Regulations. He therefore submitted that, it was wrong for the Arbitrator to find that there was no valid

reason to terminate the respondent as it is in page 18 of the award. The Learned Counsel strongly argued that, the applicant had valid reason to terminate the respondent because he violated the Tobacco Industry Regulations of which he was aware.

As regard to procedural fairness the Learned Counsel submitted that, the Arbitrator was wrong to say that the applicant did not follow procedures in terminating the respondent. He said, the respondent was properly charged and all the charges were known to him before hearing proceeding and he testified on those charges.

Mr. Boniface Woiso argued that, offences which the Arbitrator found they were not among the charged offences were just the consequence of the main offence, which is to buy tobacco without following the Tobacco Industry Regulations. He strongly argued that the offence of dishonesty was the consequential one which the applicant considered it not important to charge him with. He referred the case of **Vedastus S. Ntulangenka** (supra), where at page 18 in (iv) Mipawa, J. (Rtd.) expressed that under the common law, duties expected of the employee among them is to promote the employer's business and act in good faith. The Learned Counsel added that the

duty to act in good faith is automatically the consequence of any employment.

As regard to relief he submitted that, the Arbitrator wrongly awarded the respondent 22 months salary, considering that the respondent was paid his terminal benefits. He therefore prayed for the application to be allowed.

In reply Mr. Imam Daffa submitted that, the respondent's termination was on the grounds as they are reflected at page 19 of the award. He stated that, the respondent charged for buying tobacco without following procedures, but the evidence tendered by the applicant at the CMA was that the respondent bought the lower grade tobacco instead of high grade as was expected to do. The Learned Counsel said, the evidence by the respondent was that, the person who was supposed to grade the tobacco in question was not the respondent but a classifier from the Tanzania Tobacco Board.

Mr. Imam Daffa went on to submit that the Arbitrator was right when she held that procedures which were alleged to be violated by the respondent were not tendered by the applicant. He added that, even DW2 who testified before the CMA said he was not aware of

those alleged violated procedures as it is reflected in page 16 of the award. The Learned Counsel stated that, the Arbitrator decided to consider the investigation report (Exh. K6) to conclude that there was negligence which does not warrant termination of employment of the respondent. He submitted that, at page 18 of the award the Arbitrator found the respondent had never committed any offence before the one charged with and referred to Rule 9 (3) of the Guidelines. Mr. Imam Daffa added that, at paragraph 15 of page 18 of the award, the Arbitrator held that there was no good ground or valid reason to terminate the respondent.

As regard to the alleged loss of USD 22,840.35 caused by the respondent, Mr. Imam Daffa stated that, the report was prepared by the legal officer of the applicant and not the financial expert.

On the issue of procedures whether were fairly followed in terminating the respondent, the Learned Counsel submitted that, the charge sheet which was given to him reflects that he was charged with buying tobacco without following procedures, but during the hearing before the Disciplinary Committee he faced three charges, which includes causing big loss to the company and being dishonesty

to his employer as it is indicate in 1st paragraph at page 19 of the award. Mr. Imam Daffa submitted that, there was no evidence at the CMA, that there were witnesses of the applicant during the hearing at the disciplinary committee to testify and prove those charges against the respondent.

He further submitted that, after the hearing at the disciplinary committee level, the respondent was terminated on different ground and not as he was charged. That, at page 19 of the award in para 3 the Arbitrator addressed such issue. He therefore, submitted that the arbitrator was right when he decided that procedures were not followed as is expressed at page 21 in fourth paragraph of the award.

As regard to the relief granted, Mr. Imam Daffa submitted that, the Arbitrator rightly granted compensation of 22 months because respondent had a fixed term contract and at the time of termination he had 22 months remaining in his contract. He stated that, the terminal benefits which were paid to the respondent were not part of the remaining 22 months. He therefore prayed for the Arbitrator's award be upheld and the application be dismissed for want of merit.

In rejoinder Mr. Nyawambura submitted that, it is not true that the applicant had no witness during the disciplinary committee hearing. He added that, it is on record that DW1 was the witness at that level as well as at the CMA. He stated that, the financial loss report was rightly prepared by the legal officer of the applicant who was competent to do so.

The Learned Counsel further submitted that, the charges against the respondent expressed the offences he committed and those were the charges which were tabled during disciplinary hearing committee. He also added that, it is true that the respondent was not a classifier but he was supposed to follow the regulations under the Tobacco Industry Regulations. He urged the Court to allow the application.

After consideration of parties' submissions, Court record, the relevant applicable Labour Laws and practices, I find the issues for determination in this matter are whether there was valid reason in terminating the respondent's employment, secondly is whether the applicant followed proper procedures in terminating the respondent's employment, whether termination is an appropriate sanction in the

application at hand, and lastly is to what relief are the parties entitled.

From the outset let me say the Court observes that termination of employment at the employer's will, that is the right to hire and fire is not part of the Tanzania Labour Laws. Under the Labour Laws of this country the employee has a legitimate right to expect that if everything remains constant he/she will be in the service throughout the contractual period. That is why the employee has remedy where that right is breached by way of special damages, compensation and reinstatements orders.

In the first issue as to whether there was valid reason in terminating the respondent's employment. It is an established principle that employers should only terminate employees basing on fair and valid reason. The legislature intention is to prevent and ensure that employers terminate employees on fair and valid reasons only and not on their own whims.

Under our labour laws the concept of a valid reason is elaborated under Section 37 (2) of the Act, which provides:-

"Section 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 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 above position is in line with the **International Labour Organization Convention (ILO) 158 of 1982 under article 4**, which provides:-

"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 that spirit employers are required to examine the concept of unfair termination on the basis of employee's conduct, capacity, compatibility and operational requirement before terminating employment of their employees.

It is on record that the respondent was terminated on the ground of intent to disrupt the Company and dishonesty as indicated in the termination letter. The relevant charges were styled in Swahili as "kudhamiria kuihujumu kampuni na kukosa uaminifu". To the contrary in the notice to attend disciplinary hearing the respondent was informed of the charge of buying tobacco without following procedures. During disciplinary hearing the second offence of dishonesty was included. The records are clear that the charge of intent to disrupt the company was only included to the respondent in the termination letter.

Thus, it is crystal clear that terminating the respondent on the ground of intent to disrupt and dishonesty is completely injustice and violation of human rights because he was condemned unheard. The

applicant created a total confusion on the misconduct leveled against the respondent. As this Court is obliged to examine the reason for termination if was fair and valid, I have no hesitation to say that the applicant had no valid reason to terminated the respondent because the termination was based on unfounded charges which were not proved during disciplinary hearing.

In my view the application would have merit if the respondent was terminated with the charge of failure to follow procedures in buying tobacco. Because it is vividly evidenced in the disciplinary minutes that the evidence presented was in respect of such charge. If that would have been the position I fully agree with the Counsels for the applicant that the fact that the contravened rules were not tendered does not rebut its existence. The record reveals that the respondent was aware of the existence of the relevant rules. The requirement of adhering to the rules is also provided in the employment contract where the respondent was informed that among others he was required to purchase tobacco in accordance with AOTTL buying policies. Therefore, the referred case of **Vedastus S. Ntulanyenka** (supra) could have been relevant if at all

the respondent was only charged and terminated with buying tobacco without following procedures.

However, that was not the position in this application, thus the evidence tendered in respect of the offence of buying tobacco without following procedures cannot be used to convict the respondent on offences he was terminated with.

On the second issue as to whether the applicant followed proper procedures in terminating the respondents' employment. In the application at hand the Counsels for the applicant argued that, termination procedures were followed in this application. On the other hand the respondent's Counsel supported the Arbitrator's finding at page 21 of the award where he stated that the termination procedures were not followed as the respondent was not afforded the right to be heard.

It is trite law that a person shall be entitled to fair hearing and to the right to be heard before any decision is made against him/her. The right to be heard in any matter before the Court, including labour disputes is so fundamental and a Constitutional one as has been decided in a chain of cases. In the case of **Mbeya - Rukwa Auto**

parts and Transport Ltd. vs. Jestina Mwakyoma [2003] TLR no. 251, it was held that:-

> "In this country natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of the equality before the law, and declares in part:-
>
> (a) wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu".

Also, in case of **Abbas Sherally & another vs. Abdul S.H.M Fazalboy,** Civil Application No. 33 of 2002, the Court held that: -

> "The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will

be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice".

"It has long been settled that a decision affecting the individuals rights which is arrived at by a procedure which offended against principles of natural justice, is outside jurisdiction of decision-making authority."

As discussed above the respondent was terminated for the offence of intent to disrupt the company without being heard. Therefore unlike the Arbitrator's finding that only some of the procedures were not adhered, I am of the view that all termination procedures as stipulated under Rule 13 of the Employment and Labour Relation (Code of Good Practice) Rules, GN. No. 42 of 2007 were not followed. The respondent was not notified of the charge of dishonesty to allow him to prepare for his defense on that regard. Again he was terminated for the offence of intending to disrupt the Company without being heard. In my point of view the three offences imposed to the respondent are quite different and ought to have been dealt

with independently. It will be injustice to assume that the relevant charges amounted to the same misconduct.

Though the law set for minimum standards to be considered in termination under misconduct as provided under Rule 12(1) of GN. 42 of 2007, where all the three offences falls within such category, however each offence has its own elements needed to be established and proved.

On the basis of the above analysis is transparent that the respondent was condemned with the offence of intending to disrupt the company without being heard at the disciplinary hearing. Furthermore, before the disciplinary hearing he was charged with the offence not included in the disciplinary hearing notice. Therefore, it is my view that the procedures in terminating the respondent for the alleged offences were unfair and in violation of human rights as discussed above.

As to the third issue of whether termination was an appropriate sanction, the law provides for factors to be considered in determining if termination is an appropriate sanction. The same are provided under Rule 12 (4) of GN. No. 42 of 2007 which is to the effect that:-

(4) "In determining whether or not termination is the appropriate sanction, the employer should consider:-

(a) The seriousness of the misconduct in the light of the nature of the job and the circumstances in which it occurred, health and safety, and the likelihood of repetition; or

(b) The circumstances of the employee such as the employee's employment record, length of service, previous disciplinary record and personal circumstances".

In this application I would have agree with the applicant's Counsels submission that, termination was an appropriate sanction to be imposed to the respondent if he was terminated with another reason emanated from the offence charged but not those discussed above . The respondent alleged to have contravened to the rules regulating buying of tobacco. Therefore it can be easily concluded that, termination was not an appropriate sanction for the offences he was terminated with.

Turning to the last issue as to what relief are the parties entitled, the applicant's Counsel argued that the Arbitrator wrongly awarded the respondent twenty (22) months salaries considering the fact that the applicant paid him his terminal benefits. It is my view that, terminal benefits are compulsory statutory entitlement of an employee upon termination of the contract of employment, however other remedies stipulated under section 40 of the Act intends to heal the employee from the wrongful act committed by the employer.

In the application at hand it is undisputed fact that the respondent had three years contract with the applicant with effect from 01/04/2015 to 31/03/2018. The respondent was terminated on 23/08/2016. I have duly calculated the respondent's remaining period of his service, and was only about twenty (20) months. In this aspect I fault the Arbitrator's decision that the respondent had twenty two (22) remaining months in his contract of employment.

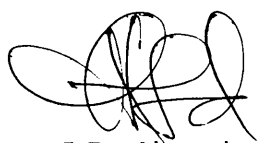
It has been the position of this Court that, when an employee on a fixed term contract has been unfairly terminated the direct and foreseeable consequence is the loss of the remaining month's salaries. The position was observed by the Arbitrator in the referred

case of **Good Samaritan Vs. Joseph Robert Savani Munthu,** Rev. No. 165 of 2011 [2013] LCCD 1.

On the basis of the above analysis it is my considered view that the respondent is entitled to the remaining period of his contract which was twenty (20) months only and not twenty two (22) months as wrongly calculated by the Arbitrator.

In the result as rightly held by the Arbitrator the applicant unfairly terminated the respondent both substantively and procedurally. That being said I find this application to have partly succeeded, that the Arbitrator's award to the respondent is reduced to twenty (20) months salaries.

It is so ordered.



I.D. Aboud

JUDGE

10/07/2020