IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 155 OF 2019

BETWEEN

KULWA SOLOMON KALILE.....APPLICANT

VERSUS

SALAMA PHARMACEUTICALS LTD.....RESPONDENT

JUDGMENT

Date of Last Order: 04/05/2020 & 10/06/2020

Date of Judgment: 10/07/2020

A. E MWIPOPO, J

Aggrieved by the award of the Commission for Mediation and Arbitration [herein after to be referred to as CMA] which was delivered on 25/01/2019, in the Labour Dispute No. CMA/DSM/ILA/R.296/2016, the applicants namely **KULWA SOLOMONI KALILE** have filed the present application for revision. The applicant is praying for the following Orders:-

(i). That, this Honourable Court be pleased to revise the award issued by Hon. Msina, H.H (Arbitrator) in Labour Dispute No. CMA/DSM/ILA/R.296/2016 dated 29th day of May, 2017.

(ii). Any other relief that the Honourable Court may deem fit and just to grant.

The applicant have five grounds for revision which are as follows:

a. That the Honourable Arbitrator erred in law and facts for failing to record properly the evidence of Applicant and also failed to consider the evidence of the applicant that had never called any disciplinary hearing during the ensuing of written warning.

b. That the Honorable Arbitrator erred in law and facts for failing to consider that even if the said act was committed by the applicant it doesn't weight to termination of employment.

c. That, the Honourable Arbitrator erred in law and in facts for failing to calculate the compensation in terms of remuneration and did it in terms of basic wage.

d. That, the Honourable Arbitrator erred in law and facts failing to consider the applicant's final submissions.

e. That, the Honourable Arbitrator erred in law and facts failing to consider the amount of compensation demanded by the applicant.

The brief background of the dispute is that the applicant was employed by Salama Pharmaeutical Ltd (Respondent) on 5th December, 2006 as salesman and was terminated for disciplinary conduct on 13 April, 2016. The employer reason for termination is that the applicant was coming late to work. Being dissatisfied with a respondent decision, the applicant referred the matter at CMA. CMA decided the matter not in her favour hence this application.

The application was supported by sworn affidavit of Kulwa Solomoni Kalile. The respondent filed counter affidavit sworn by **Emmanuel Safari** who is respondent's Advocate.

The application before this court was disposed of by way of written submission whereby the applicant was represented by Mr. Elias S. Pazia, Personal Representative from TUICO, whereas the respondent was represented by Ms. Flora Jacob Advocate.

In supporting of the application, Mr. Elias S. Pazia submitted on first ground of revision that the arbitrator erred by confirming that there was a valid reason for termination but the respondent failed to follow the procedure. However, there is no evidence which shows that the employee was given a reason for termination and that the reason was supposed to be

both substantially and procedurally fair. The applicant was not called in any disciplinary hearing which led to the issuing of the alleged written warnings. The Arbitrator wrongly held in the award that the termination was fair substantially but unfair procedurally. As result he awarded the applicant to be paid a compensation of 3 months' salary for procedural unfair termination instead of compensation of not less than 12 month's salary for substantial and procedural unfair termination.

The second ground of revision is that the Honorable Arbitrator erred in law and facts for failing to consider that even if the said act was committed by the applicant it doesn't weight to termination of employment. The applicant stated that the arbitrator decision is based on fact that the applicant has been given several written warnings as stated at page 5 on the 1st paragraph of CMA's award. Therefore the applicant was not supposed to be terminated by the respondent.

On third ground that the Hon. Arbitrator erred in law and in facts for failing to calculate the compensation in terms of remuneration and did it in terms of basic wage, the applicant submitted that the Hon. Arbitrator earned in Law and facts for failing to calculate the applicant's amount entitled to be compensated contrary to S. 40(1) (c) of the Employment and Labour

Relations Act, 2004. He added that it was undisputed before CMA that the applicant's remuneration was Tshs. 660,000/= per month.

On fourth ground that the Honourable Arbitrator erred in law and facts failing to consider the applicant's final submissions. The applicant argued that the Hon. Arbitrator erred in Law before awarding compensation not claimed in relation to S. 37(2) (a) (b) (i)(ii)(c) of the Employment and Labour Relations Act, 2004. He further argued that the Hon. Arbitrator is trying to separate substantial and procedurally aspect of termination without considering that if one aspect is not honored then termination could not stand. Thus, he prayed for the application to be granted.

In reply, Ms. Frola Jacob submitted on first ground of revision that there was a valid reason for the termination of the applicant's employment. The primary duty of an employee is to come at work on time in order to discharge his duty. The facts that the complainant used to come late was sufficiently proved by numeration of exhibit including exhibit SP-2, SP-3, SP-6, SP-7, SP-8. Clause 3(a) of employment contract – exhibit SP-1 provides that the applicant shall report in the office by 8:30 am but the applicant used to report in the office after that time. Habitual lateness for work of an employee constitutes serious misconduct which justify termination of employment contract as provided under rule 9 (4) (a) of GN No. 42 of 2007.

The applicant admitted that in some occasion he used to report direct to the field before reporting to the office without proof of employer's instruction to that effect. Therefore, the applicant's termination was for valid reason.

In respect to the aspect of fairness of the procedures in terminating the applicant, Ms. Flora Jacob submitted that the procedure for termination was fair. She argued that the procedure to be adopted is determined by reason for termination. Since in this matter the reason for termination is misconduct then the relevant provisions for fair procedure is provided under Rule 13 of GN No. 42 of 2007 and the same was applied in his termination as evidenced by exhibit SP-9. The applicant was informed about his offence, the date of conducting disciplinary hearing and the place or venue where the disciplinary Committee will take place. The applicant was afforded all rights but the applicant wished to stand alone and not to call any witness to support his case during the hearing. Thereafter the outcome of the disciplinary hearing was communicated to the employee at reasonable time and applicant signed hearing form confirming its content. To support her argument she referred this Court to the case of **W. Stores Ltd Vs. George Wandiba and 2 Others, Revision No. 26 of 2007, High Cour Labour Division, at Dar Es Salaam, (unreported).** Therefore the applicant's

argument that the Hon. Arbitrator earned in Law and facts for failing to properly the evidence of applicant lack merit and is afterthought.

Regarding the condition of compensation, the respondent submitted that it is clear from the record that Tshs. 300,000/= was the applicant's remuneration, including other benefits as evidenced by exhibit SP-1 {Employment contract}. There is no evidence on record adduced by the applicant which show that the applicant's monthly salary was 660,000/=. That is a new allegation which was not testified at CMA. It is a well-established principle that new fact should not be raised at this stage. The same was discussed in the case of **Raphael Enea Mngazij Vs. Abdallah Kalonji Juma, Civil Appeal No. 240 of 2018, Court of Appeal of Tanzania at Tanga, (Unreported).** Therefore this Court lacks jurisdiction to determine new facts.

Ms. Flora Jacob submitted further that the amount of compensation demanded by the applicant of 48 month's salaries lacks merits since the applicant failed to adduce evidence justifying the amount claimed to support her submission. She referred this Court to the case of **International Medical Technological University Vs. Eliwangu Ngowi,** Revision No. 54 of 2008, High Court Labour Division, at Dar Es Salaam, (Unreported), where it was held that " The law provides for an award of not less than

twelve months' remuneration. This is the only certain figure mentioned by the law. Any amount above that must be justified by the fact of the case".

She further argued that the reason for termination was applicant's unpleasant and repeated behavior of coming late, therefore the facts of this case does not justify payment of any compensation to the applicant even though the Hon. Arbitrator awarded him 3 month's salary as compensation. Since the scenario of the present case is different to that of both substantively and procedurally unfair, this means procedural unfairness is a less severe as provided under Rule 32(s) of GN No. 67 of 2007, therefore the applicant's argument on such basis lacks legal stand. Thus, she prayed for application to be dismissed.

In rejoinder, the applicant retaliated his submission in chief emphasized that his total monthly remunerations was 660,000/=. Salary being 300,000/=, house allowance 45,000/=, transport allowance 50,000/=, overtime allowance 50,000/= meal allowance 20,000/= and Ex Gratia 220,000/=. He prayed for the Court to award him compensation for 48 month's for unfair termination.

From above submissions there are three issues for determination in this application. The issues are as follows:

1. Whether the reason for termination of applicant employment by the respondent was valid and fair.
2. Whether the procedure for termination was fair.
3. What are remedies entitled to the parties?

The employment and Labour Relations Act, 2004 provides in section 37 what amount to be unfair termination. Section 37(1) of the Act provides that it shall be unlawful for an employer to terminate the employment of an employee unfairly. The Act provides further that it is the duty of the employer in dispute for termination of employment to prove that the termination was fair. The termination is unfair if the employer fails to prove that the reason for termination is valid and fair or/and failure to prove that the procedure for termination was fair. The section reads as follows:-

"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 section requires employers to terminate employees on valid and fair reason and on fair procedures, but not on their own whims. 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. (see the case of **Tanzania Railway Limited V. Mwajuma Said Semkiwa, Revision No. 239 of 2014, High Court Labour Division at Dar Es Salaam**, (Unreported).

Starting with the determination of the first issue whether the reason for termination of respondent's employment was valid and fair, validity and fairness of the reason for termination of employment is provided under section 37 (2) (a) and (b) of the Employment and Labour Relations Act, 2004. Further, it is a well-established principle of law that once there is issue of unfair termination the duty to prove the reason for termination was valid and fair lies to employer and not otherwise. (see **Tiscant Limited Vs. Revocatus Simba, Revision No. 8 of 2009, High Court, Labour**

Division, at Dar Es Salaam and Amina Ramadhani vs. Staywell Appartment Limited, Revision No. 461 of 2016, High Court Labour Division, at Dar Es Salaam).

In the present matter the evidence available in the record especially Exhibit SP-2 (1st Warning letter), SP-6 (The second warning letter to the applicant following disciplinary hearing conducted on 31/03/2015), SP-7 (warning letter to the applicant dated 16/05/2015) and SP-8 (warning letter dated 02/06/2015) show that the applicant several times reported late in his working station contrary to the employment contract. The applicant's employment contract – Exhibit SP1 provides in clause 3 (a) that from Monday to Friday the working hours starts at 08:30 hrs in the morning up to 17:00 hrs in the evening with a half an hour lunch break in between. For Saturday working hours start at 08:30 hrs in the morning up to 13:00 hrs in the afternoon. Therefore, the available evidence prove clearly that the applicant was reporting late to his work station even after being warned several times by the respondent.

Rule 12(1) of the Employment and Labour Relations (Code of Good Practice) GN No. 42/2007 provides for the duty of the employer when deciding to terminate the employee for misconduct to consider among other

thing whether the employee contravened a rule or standard regulating the employment. The rule reads as following, and I quote:-

"12 (1) Any employer, arbitrator or judge who is required to decide as to termination for misconduct is unfair shall consider;

(a) Whether or not the employee contravened a rule or standard regulating conduct relating to employment

(b) If the rule or standard contravened, whether or not;

(i) It is reasonable

(ii) It is clear and unambiguous

(iii) The employee was aware of it

(iv) It has been consistently applied by the employer.

(v) Termination is appropriate sanction for contravening the rule."

In this matter the applicant repeated the same misconduct of reporting late to his working station despite of previous warnings. The

misconduct violates the term of his employment contract which is clear and unambiguous, the term was well known to him as provided under clause 3(a) of employment contract. The misconduct is a serious one since the evidence have proved that the applicant was reporting late to his working place and have been repeating the same mistake several times in spite of several warning letters from the respondent. From the applicant record, there was a possibility for the applicant to repeat the same misconduct which is contrary to Rule 12(4) (a) of G.N No. 42 of 2007. The applicant was the habitual offender. The assertion by the applicant that those warning letters were given to him without conducting disciplinary hearing have no basis since one of the letter – Exhibit SP6 was given to the applicant after disciplinary hearing was conducted. In the circumstance, I find that the respondent had a valid reason for terminating the applicant since the applicant violated a term of his contract of employment repeatedly even after warnings. Therefore, the Arbitrator rightly held that the reason for termination was valid and fair. The first issue answer is negative.

The second issue is whether the procedure for termination of applicant employment was fair. Fairness of procedure for termination of employment is one of the requirement of the law under section 37 (2) (c) of the Employment and Labour Relations Act, 2004, which the employer have to

prove in the dispute concerning termination of employment. The fair procedure for termination in the present case is that which guide termination for misconduct as provided under rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007. The rule provides that, I quote:

> ***13.-(1) The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held.***
>
> ***(2) Where a hearing is to be held, the employer shall notify the employee of the allegations using a form and language that the employee can reasonably understand.***
>
> ***(3) The employee shall be entitled to a reasonable time to prepare for the hearing and to be assisted in the hearing by trade union representative or fellow employee. What constitutes reasonable time shall depend on the circumstances and the complexity of the case, but it shall not normally be less than 48 hours.***

(4) The hearing shall be held and finalized within reasonable time and chaired by a sufficiently senior management representative who shall not have been involved in the circumstances giving rise to the case.

(5) Evidence in support of the allegation against the employee shall be presented at hearing. The employee shall be given a proper opportunity at hearing to respondent to allegations, questions any witness called by the employer and to call witness if necessary.

(6) Where employee unreasonably refuses to attend the hearing, the employer may proceed with the hearing in the absence of the employee.

(7) Where hearing results in the employee being found guilty of the allegations under consideration, the employee shall be given the opportunity to put forward any mitigation

factors before a decision is made on the sanction to be imposed.

(8) After the hearing, the employer shall communicate the decision taken, and preferably furnish the employee with written notification of the decision, together with brief reasons.

From above provision of the law, the procedure to be followed in termination for misconduct aim to give the employee right to fair hearing before the termination of employee's employment. In the case of **Mbeya Rukwa Auto Parts and Transport Limited v. Jestina George Mwakyoma**, Civil Appeal No. 45 of 2000, Court of Appeal of Tanzania, (unreported), where it was emphasized that one of the ingredients of fair hearing is to observe the right to be heard.

It is on record that the respondent notified the applicant with the Notice of hearing on 10th April, 2016 and the disciplinary hearing was conducted on 12th April, 2016. The applicant was served with the charge sheet which contained one count of unacceptable work performance. During disciplinary hearing the applicant was given his right to be represented by a fellow employee, to call his witness and to call interpreter but he decided to proceed without any of them.

The hearing form – Exhibit SP9 shows that after the charges were read to the applicant he admitted the offence and the chairperson of disciplinary committee decided to terminate the applicant. The applicant was not given any chance to mitigate before the decision, he was given chance to mitigate after the decision of the chairperson of the disciplinary committee to terminate him. The Act of the Disciplinary Committee to give the applicant a chance to mitigate after it have pronounced the verdict means the mitigation has no value. The reason is that the applicant verdict has already been given hence no need for mitigation. Further, there was no evidence to prove that the employer conducted an investigation to ascertain whether there are grounds for a hearing to be held. This is a mandatory procedure provided by rule 13 (1) of the G.N. No. 42 of 2007. Moreover, the applicant was not given right to appeal against the decision. Therefore I'm of the same position with the trial Arbitrator that the procedure for termination was not adhered. Therefore, the answer to the second issue is positive.

Since I have found that the applicant was not fairly terminated procedurally, then what is the remedy? The trial arbitrator awarded the applicant with compensation for three months' salary. The applicant have submitted that the arbitrator was not supposed to award the applicant with compensation of not less than 12 months' salary for unfair termination.

According to rule 32 (5) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, G.N. No. 67 of 2007, the arbitrator has discretion to award an appropriate amount of compensation when he found the termination was not fair.

In the present case the arbitrator was of the view that it is not a justice to award the applicant with 12 months' remuneration being a compensation for procedural unfair termination. The arbitrator did take into consideration that the applicant was reporting late in the office despite being given by the employer motorcycle. He was of the view that awarding the applicant with 12 months' salary compensation will encourage misconduct to other employees. In the circumstances, I find no sufficient reason to revise the decision of the arbitrator to award the applicant with three months' salary compensation for unfair termination.

The applicant have asserted that his monthly remuneration was Tshs. 660,000/=. However, the only available evidence about the remuneration of the applicant is his opening statement which shows that his monthly salary was 300,000/= and other allowances per month were house allowance Tshs. 45,000/=, transport allowance Tshs. 25,000/=, lunch allowance 20,000/= and ex gratia Tshs. 220,000/=. This is the only available evidence which shows the applicant monthly salary was 300,000/=. The other allowances

are just privileges which are paid only when the employee is in the office. Since the compensation is for unfairness of the termination of applicant's employment, I am of the opinion that the applicant have no right of the allowances while he is not in the office. Therefore, for the purpose of calculation for compensation for unfair termination the arbitrator rightly used the basic salary of Tshs. 300,000/=.

Therefore, the application is dismissed in it's entirely and the Commission Award is hereby upheld. Each party to bear his own cost.

A. E. MWIPOPO
JUDGE
10/07/2020