

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION NO. 659 OF 2019

BETWEEN

WAMILIKA GAMA..... APPLICANT

VERSUS

ACTION AID TANZANIA RESPONDENT

JUDGMENT

Date of Last Order: 13/05/2020

Date of Judgment: 03/07/2020

S.A.N. Wambura, J.

Aggrieved by the award of the Commission for Mediation and Arbitration [herein after to be referred to as CMA] dated 27/06/2019 the applicant **WAMILIKA GAMA** has filed this application under the provisions of Sections 91(1)(a), (2)(b)(c) and 94(1)(b)(i) of the Employment and Labour Relations Act No. 6 of 2004 [herein after to be referred to as CAP 366 RE 2019] and Rules 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d) and 28(1)(c)(d)(e) of the Labour Court Rules, 2007 GN No. 106 of 2007 praying for the Orders that:-

- (i). *This Honourable Court be pleased to revise and set aside the award of the Commission for Mediation and Arbitration dated 27/06/2019 in Labour Dispute No.CMA/DSM/KIN/R.673/16/604.*
- (ii). *Any other relief this Honourable Court may deem fit, just and equitable to grant.*

The application is supported by her sworn affidavit and was represented by BM Attorneys. Mr. Benjamin Mwakagamba, the respondent's Advocate swore a counter affidavit challenging the application.

With leave of the Court, hearing was by way of written submissions. I thank both parties for adhering to the schedule and for their submissions.

The brief facts of the case are that on 1/10/2013 the applicant was employed by the respondent as a Human Resources, Organizational Development and Support Services Manager in a three (3) years contract. It was to end on 30/9/2016.

However, on 28/6/2016 the applicant was terminated basing on various misconducts which were contrary to the Organizational Human Resource Policies and Procedure Manual (2013) and Organization's Local

Financial Policies and Procedures Manual (2009). The applicant being resentful with the termination, knocked at CMA's door claiming to have been unfairly terminated both substantively and procedurally.

CMA decided on her favour and ordered the respondent to re-engage the applicant. The applicant was dissatisfied with the award and filed the present application.

The applicant's counsel submitted that the Arbitrator awarded the applicant the reliefs which were not prayed for by the applicant. In her prayers, the applicant sought for reinstatement but to the contrary the arbitrator ordered re engagement of the applicant. The Arbitrator also issued an order for the respondent to remove from office any person who was employed in the position held by the applicant before she was unlawfully terminated but the same was not done.

It was submitted that the respondent did not comply with the arbitrator's order as he issued an employment contract and a new job description to the applicant which clearly indicated clerical duties to the applicant. The applicant was supposed to report to the officer who covered her former position. They cited Section 40 of Cap. 366 RE. 2019 and the

case of **Joram Molel v Everest Chinese**, Civil Appeal No. 24/2008 where it was held that:-

"It should always be borne in mind that, a court of law is not a charitable institution. Its duty in civil cases is to render unto everyone according to the proven claim. It is trite law that a court is not a Father Christmas sought not to go about granting to parties reliefs which they have not asked for. A court is powerless to a claimant what he did not claim or grant an unsought relief."

Thus prayed for the revision of CMA's award.

In reply to the applicant's submission the respondent's counsel submitted that the applicant's termination was both substantively and procedurally fair. The respondent had sufficient evidence to prove the alleged misconducts conducted by the applicant, citing the case of **G4 Security Services Ltd v Peter Mwakipesile**, Rev. No. 109 of 2011 HCLD, DSM.

It was further submitted that upon finding that the termination was unfair, the arbitrator has discretion to issue reinstatement, reengagement or compensation as provided under Section 40 (1) of Cap. 366 RE. 2019.

That the arbitrator is not limited to the relief claimed in CMA Form No.1, referring the case of **Sodetra [SPRL] Ltd v Njellu Meza and Another**, Rev. No. 207 of 2008 (unreported) where it was held *inter alia* that:-

"the Arbitrator is mandated not to order reinstatement where termination is unfair because the employer did not follow the fair procedure."

The respondent's counsel further contended that the power vested to the Court or Arbitrator is discretionary. It may be exercised or not as it is provided under Section 53(1) of the Interpretation of Laws Act (Cap. 1 RE. 2002).

It was further submitted that soon after the award was issued by the Arbitrator, the respondent complied with the Arbitrators order as he re engaged the applicant to her former position of Human Resources and Support Services Manager, with the same terms and conditions and the same salary from the date of ruling. The applicant was issued with the employment contract and the job description for purpose of signing the same but she never went back to work. Instead she filed the present application. That the court does not mandate the employer to re-engage

University College of Cooperative and Business Studies v Patrick John Ngwila, Rev. No. 61 of 2015, LCCD Part 1 2015.

In rejoinder the applicant's counsel submitted that the respondent's averment that the applicant was terminated due to grave misconduct is not true on the reason that the Arbitrator delivered a judgment which was contrary to that view, and the respondent was satisfied with the award as he did not file any appeal.

He thus prayed for the order of reinstatement as prayed before CMA.

Having gone through the rival submissions of both parties, I believe this court has to determine **"Whether the award was properly procured."**

The applicant's main complaint is that she was awarded with what she did not pray for. It is on record that the applicant prayed for reinstatement as it is divulged in CMA F1 but the Arbitrator ordered re engagement.

Having cautiously gone through the award I have found that the Arbitrator failed to properly analyze the framed issues. At page 2 of CMA's typed proceedings, it clearly shows that on 27/10/2016 the matter was

scheduled for framing of issues where by the following issues were framed:

- i. Whether the applicant was recruited from Beijing China.*
- ii. Whether the termination was lawful.*
- iii. What are the reliefs entitled to the parties?*

It is the requirement of the law that the Arbitrator should write and sign a concise award containing the decision within the prescribed time as provided for under Rule 27(1) of Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN 67 of 2004.

Again Rule 27(3) of GN 67 provides for the content of the award that:-

"Rule 27(3) An award shall contain the following;

- a. Details of the parties.*
- b. The issue or issues in dispute.***
- c. Background information (i.e. information admitted between the parties).*
- d. Summary of the parties evidence and arguments.***
- e. Reasons for decision.***

f. The order (the precise outcome of the arbitration)."

[Emphasis is mine].

It is apparent that in determining the lawfulness of the termination, the Arbitrator only determined the procedural aspect of it. There is no where you can find the reasoning concerning the substantive aspect of the award even if it was amongst the applicant's claims as per CMA F1.

It is a principle of law that termination of employment must be on valid and fair reasons and procedure. There must be substantive and procedural fairness of termination of employment as provided for under Section 37(2) of the Employment and Labour Relations Act, No. 6 of 2004 which states that:-

"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.***

[Emphasis is mine].

It is the respondent's submission that the respondent had valid reasons for terminating the applicant as the alleged misconducts were sufficiently proved. This was strongly refuted by the applicant's Counsel as he stated that the Arbitrator's finding was contrary to that. It is crystal clear that the award was not properly procured as the Arbitrator issued an order for reengagement without justification. This is because he failed to determine the validity of the reason for termination. It is not clear as to whether the respondent had valid reason for terminating the applicant or not. I find this to be a material irregularity.

In the case of **Kukal Properties Development Ltd v Maloo and Others** 1990-1994 E.A 281, Court Appeal of Kenya; it was held that:-

"A judge is obliged to decide on each and every issue framed. Failure to do so constituted a serious breach of procedure."

This position was emphasized in the case of **People's Bank of Zanzibar vs. Suleiman Haji Suleiman** [2000] TLR 347 where the Court stated that:-

"It is necessary for a trial court to make a specific finding on each and every issue framed in a case even where some of the issues cover the same aspect."

[Emphasis is mine].

In addition to the fore mentioned irregularity, the arbitrator failed to adhere to Rule 27(3) of GN 67 as he did not summarize the parties arguments and evidence as evidenced in his award.

In the case of **Bidco Oil Soap v Abdu Said & 3 Others**, Rev. No 11/2008 it was held that:-

"The functions of arbitration are quasi-judicial, so arbitrators should insist on basic characteristics of orderliness and regularity in execution of their duties. Luckily the Commission has made elaborate rules (published as GN 64/2007 and GN 67/2007). These rules of procedure are subsidiary legislation and

arbitrators are bound to follow rules set therein.”

[Emphasis is mine].

In view of the above findings, this Court is of the view that the award was improperly procured as it contains material irregularities. In the circumstances, I herein quash and set aside CMA's award. For the interest of justice I remit the record to CMA for arbitration to be conducted by another Arbitrator expeditiously.

S.A.N. Wambura
JUDGE
03/07/2020

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Date: 03/07/2020

Coram: Hon. F.A. Mtarania, Deputy Registrar

Applicant: Present

For Applicant: Mrs. Lucy Nambuo Advocate

Respondent:

For Respondent: Mrs. Nambuo holding brief for Advocate Mwakagamba

CC: R. Mchocha

COURT: Judgment delivered in presence of Mrs. Lucy Nambuo Advocate for the Applicant who is also holding brief for Mr. Mwakagamba Advocate for the Respondent.


F.A. Mtarania

DEPUTY REGISTRAR

03/07/2020