IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 288 OF 2019

BETWEEN

WINFRIDA LWASA.....APPLICANT

VERSUS

THE MANAGING DIRECTOR

LANCET LABORATORIES.....RESPONDENT

JUDGEMENT

Date of Last Order: 10/06/2020

Date of Judgement: 24/06/2020

Aboud, J.

The Applicant filed the present application seeking revision of the award of the Commission for Mediation and Arbitration (herein CMA) which was delivered on 02/01/2018 in Labour Dispute No. **CMA/DSM/ILA.R.961/16/874** by Hon. Mpapasango. B, Arbitrator. The application was made under the provisions of Sections 91 (1) (a) (b) & 91 (2) (a) (b) and 94 (1) (b) (i) of the Employment and Labour Relations Act [CAP 366 R.E 2019] (herein the Act) and Rules 24 (1),

24 (2) (a) (b) (c) (d) (e) (f), 24 (3) (a) (b) (c) (d) and 28 (1) (a) (b) (c) (d) (e) of the Labour Court Rules, GN No. 106 of 2007 (herein the Rules).

The applicant supported her application by her affidavit. On the other side the respondent challenged the application through the counter affidavit of **GODLIVING NKYA**, Respondent's Principal Officer.

The facts leading to the present application are as follows; on 02/05/2013 the applicant was employed by the respondent as a Phlebotomist. On 29/07/2016 her employment contract was terminated on ground of misconduct namely; insolence/using abusive language bring the company image into disrepute and time keeping. Aggrieved by the termination she filed the dispute to CMA where the award was delivered on her favour after the Arbitrator found that the termination was based on valid reason but procedures were not followed by the respondent. Applicant was awarded four months salaries compensation. Being resentful of the said Arbitrator's award she filed the present application for it to be revised on the grounds

indicated in the chamber summons to the effect that:-

i. That the Honourable Arbitrator was correct by holding that the employment of the applicant was unlawful terminated but erred in fact and law by not awarding appropriate damages to the applicant and without giving the reasons on little amount awarded.

ii. That the Honourable Arbitrator erred in fact by making calculation of the award on a wrong rate of salary.

By leave of the Court the matter proceeded by way of written submission and both parties were represented. Mr. Thomas Brash Learned Counsel was for the applicant while Mr. Emmanuel Nasson, Learned Counsel was for the respondent.

On the first ground Mr. Brash submitted that, the award was correct in all intents after the respondent had failed to prove that termination of employment was lawful as required by section 39 of the Act. That after the CMA had established that the termination of the applicant was unlawfully, the Arbitrator was duty bound to award remedies as stipulated under section 40 of the Act.

Mr. Brash further argued that, the Arbitrator has discretion to choose any of the remedies stipulated under section 40 of the Act. He stated that since the Arbitrator in this matter opted for the remedy of compensation as provided under section 40 (1) (c) of the Act, he ought to have awarded the applicant compensation of not less than twelve months remuneration. Mr. Brash stated that, the provision of section 40 (1) (c) of the Act does not give an option for the Arbitrator to award below 12 months salaries as compensation. He submitted that the Arbitrator awarded the applicant four months remuneration without any justifiable reasons. He therefore argued that, the applicant is entitled to 12 months salaries remuneration as provided by the law.

On the second ground Mr. Brash submitted that, when the applicant's claims were lodged in the CMA at part 4 (MATOKEO YA USULUHISHI) of the Referral form she mentioned the rate of her monthly salary was 1,057,100/=. That the same amount was stated in part "B" of the applicant's opening statement which forms part of the record, that the salary slip was also attached to the affidavit in support of the application as well as attached before this Court. Mr. Brash stated that, the salary rate was not disputed by the respondent

before CMA and to this Court. Therefore, it was not proper for the Arbitrator to rule out that the amount applicable was Tshs. 665,000/= instead of Tshs. 1,057,100/=. He concluded by praying for the application to be allowed.

In reply to the application Mr. Nasson raised two preliminary objections to the effect that:-

i. The matter was filed before CMA out of time

ii. That the CMA Form. No. 1 was not signed by the applicant.

On the first preliminary objection Mr. Nasson submitted that, the labour dispute at the CMA was filed out of time without an application for condonation. He stated that the applicant was terminated on 29/07/2016 while the dispute was referred before CMA on 05/10/2016, which was 68 days from the date of termination contrary to Rule 10 (1) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007 (herein Mediation and Arbitration Rules).

Mr. Nasson stated that, when the applicant was terminated she chose to pursue administrative remedies to appeal internally.

However, that did not bar the applicant to file her dispute before CMA on time. The Learned Counsel argued that even if is considered that termination was made on 05/09/2016 still the applicant will be time barred since she referred the dispute to CMA on 05/10/2016. He stated that the dispute was referred 31 days from termination contrary to the Law. Mr. Nasson prayed for the application to be dismissed and, to robust his argument he cited the case of **The DED Sengerema D/Council vs. Peter Msungu & 13 others** [2014] LCCD 77.

On the second preliminary objection Mr. Nasson submitted that, CMA Form. No. 1 was not signed by the applicant. That in the part the form ought to be signed by the applicant it was signed by the respondent's officer. The Learned counsel strongly argued that, this was a material irregularity which has effect as if there was no dispute at all before CMA. To support his position he cited the case of **Paul Kavulalye Mgonja vs. Tanzania Electric Supply Co. Ltd**. Lab. Rev. No. 36 of 2013, HC, Mbeya (unreported), where it was held that:-

> "The Arbitrator in my view is not strictly bound to the technicality being a quasi judicial officer

> ought to have guided the applicant before he admitted the application or complaint that the pleadings were to be signed. Thus the Arbitrator would have ordered the pleading be amended before he proceeded to determine the application for condonation which was not signed (CMA F.1 and CMA F.7). That was a material irregularities which goes to the root of the application as on the eyes of the law it is the same as there was not application before the CMA".

He stated that in the above cited case the court went further to hold that:-

> "Having discussed as I did I find no need to labour much on the other ground for revision after I observed the above material irregularities which nullifies the whole proceeding of the Arbitrator".

He therefore prayed for the court to dismiss the application as the same is nullity.

Before submitting on the merit of the application, Mr. Nasson notified the court that, both parties were aggrieved by the award and they both filed applications for revision in this Court. He said unfortunately the respondent's application was struck out on technical grounds and have, filed an application for extension of time to file proper application out of time, which is still pending before the court.

As to the merit of the application Mr. Nasson submitted that, the termination was fair both substantively and procedural. He said it is on record that the procedures for termination of the applicant employment were followed and, the applicant was given sufficient time to prepare for hearing. The learned Counsel argued that what is important in for disciplinary hearing procedures in labour matters is not an application of the code in the checklist fashion, rather is to ensure the process used is according to fair hearing in the labour content.

On the first ground of revision Mr. Nasson submitted that, it is true the compensation for unfair termination is guided by section 40 of the Act, but the same reads together with section 88 (8) of the Act

which provides that:-

> "An Arbitrator may make any appropriate award but may not make an order for costs unless a party or a person representing a party acted in a frivolous or vexation manner".

He further submitted that, the Arbitrator has discretion in awarding compensation depending on each case provided that such compensation is just and equitable. In support of his argument, he referred the case of **Michael Kirobe Mwita vs. AAA Drilling Manager** [2014] LCCD 42.

The Learned Counsel stated that, it is undisputed that the applicant committed the misconduct because she pleaded guilty to the offences charged. He said the award of four months salaries compensation was just and equitable because the termination was found only unfair procedurally.

On the second ground of revision Mr. Nasson submitted that, CMA made a decision in accordance with the evidence presented before it. He stated that, it is not true that the applicant attached her salary slip in the opening statement as she submitted in court. Mr.

Nasson further submitted that according to the applicant's employment contract it is reflected her salary was 665,000/= per month. Thus, he said, the Arbitrator was correct to consider the applicant's salary which was in her employment contract. Mr. Nasson argued that the respondent disputed the applicant's salary and stated that there was no proof of promotion or salary increment that would have charged the applicant's salary as it was in her contract to the amount claimed in the matter. He therefore, prayed for the application to be dismissed.

Responding to the first preliminary objection as raised by the respondent, Mr. Brash submitted that, the respondent's Counsel is deliberately misleading the court. That in the applicant's referral CMA Form No.1 the applicant mentioned her termination date was on 05/09/2016 and the same was proved by exhibits on record. The Learned Counsel argued that, the applicant was paid her salary until 30/09/2016 and the salary slip of that particular month was produced to prove that she was still the employee of the respondent. He concluded that this point of objection has no merit.

On the second objection that the CMA form No. 1 was not signed by the applicant, Mr. Brash submitted that, there is no indication that the respondent was aggrieved by the procedures taken through trial. That the objection is a matter of evidence which cannot be adjudicated without calling parties to give evidence.

Mr. Brash further submitted that the applicant upon filling the referral form she signed the same and submitted it. He stated that, even if is assumed the Form No. 1 was not signed by the applicant the same can be rectified by applying the overriding objective principle as it is provided in the case of **Sanyou Service Station Ltd. Vs. BP Tanzania Ltd. (Now Puma Energy (T) Ltd.**, Civ. Appl. No. 185/17 of 2008.

On the main application Mr. Brash reiterated the submission in chief. He therefore prayed for the application to be granted.

Having gone through the Court's records as well as submissions by both parties, it is my considered view that the preliminary objections raised by the respondent need to be determined before turning into the merit of the application.

On the first preliminary objection, I have noted both parties' submissions as well as the court record. From the record it is undisputed that the applicant was terminated on 29/07/2016 as per exhibit M3 on record. Dissatisfied by the said termination the applicant appealed against it and on 02/09/2016 and the second disciplinary hearing was conducted. On 05/09/2016 the Appeal Committee upheld the decision to terminate her employment. Aggrieved by the respondent decision on 05/10/2016 the applicant referred the dispute to CMA. From such analysis the Court is bound to determine if the dispute was timely referred to CMA.

The law requires a dispute about fairness of termination to be referred to the CMA 30 days from the date of termination or when the employer made final decision to terminate an employee. This is in accordance with Rule 10 (1) of the Mediation and Arbitration Rules which provides that:-

> "10-(1) Disputes about fairness of an employee's termination of employment must be referred to the Commission within thirty days from the date of termination **or the date that the employer**

made a final decision to terminate or uphold the decision to terminate".

[Emphasis added].

And in computation of time limit as is provided in the referred rule above, I have considered the provision of the Interpretation of Laws Act, (Cap. 1 R.E.2002), to wit section 60 (1) (b) which provides that:-

> "In computing time for the purposes of a written law where a period of time is expressed to be reckoned from, or after, a specified day, that day shall not be included in the period"

In the matter at hand the employer made final decision to terminate the applicant on 05/09/2016 when the Appeal Committee confirmed the decision of the Disciplinary Committee of 02/09/2016. Therefore applicant was supposed to refer the dispute to CMA 30 days from that 05/09/2016. Diligently I have cross checked the calendar of the year 2016 and, noted that the month of September, 2016 had only 30 days. The applicant referred the dispute to CMA on 05/10/2016 which was 30 days from 05/09/2016, the date the

employer made final decision to terminate her from employment. And in computation of time limit as is provided in the referred rule above, I have considered the provisions of the Interpretation of Laws Act, (Cap. 1 R.E.2002), to wit section 60 (1) (b) which provides that:-

> "In computing time for the purposes of a written law where a period of time is expressed to be reckoned from, or.....that day shall not be included in the period"

Therefore, on the basis of the foregoing analysis it is my considered view that the dispute was referred to CMA within thirty (30) days as prescribed by the law to wit under Rule 10 (1) of the Mediation and Arbitration Rules referred above.

On the second point of objection that, CMA Form. No. 1 was not signed by the applicant. I have considered parties submissions and examined the Court records and it is apparent on the face of the CMA Form. No. 1 that, it was signed by **Pauline Mahene**, respondent's Accountant. On record, there is no any evidence to prove that the said Pauline Mahene was authorised by the applicant to sign the CMA Form No. 1 on her behalf as is provided in laws. The law requires documents before the CMA have to be signed by a party

or any other person authorised by him. This is pursuant to Rule 5 (1) of the Mediation and Arbitration Rules which provides that:-

> "5 (1) document shall be signed by the party or any other person entitled under the Act or these rules to represent that party in the proceedings".

Rule 23 (1) of the Rules clearly provide that:-

> "A member an official of a party's trade union, employers association or an advocate may represent a party in mediation or arbitration proceedings".

On the basis of the above the one who signed the CMA Form No. 1 in this matter did not qualify to sign on behalf the applicant. And from the above discussion it is very clear that there is no any evidence to prove **Pauline Mahene** signed under which capacity, may be that would have enlightened the court as it considered the issue in question as to whether the application before CMA was defective for not being signed by the applicant herself.

In this application as rightly submitted by Mr. Nasson the CMA Form No.1 appears as if the dispute was initiated by the respondent

because one of his principal officers signed on behalf which was not the case.

Now the question to be addressed is what is the remedy for having such defective CMA Form No. 1 in this matter? It has been discussed in a chain of cases that defect in verification does not make a pleading void, it is a mere irregularity which is curable by amendment. This position was firmly stated in the case of **Philip Anania Masasi vs. Returning Officer, Njombe North Constituency, The Attorney General & Jackson Makweta**, Misc. Civ. Cause No. 07/95 (unreported).

The position above can also be applied in the present application. The court or any tribunal's powers to amend pleadings is intended to serve the ends of justice. Therefore, narrow and technical limitations do not fetter the discretion of the court or such other tribunals. The court and other quasi-judicial bodies should be extremely liberal in granting amendment unless serious injustice or irreparable loss is caused to the other side. This was the position in the case of **Haridas vs. Godraj Ruston,** AIR 1983 SC 319.

The respondent urged the court to dismiss the application. However, on the circumstances of the present application I join hands with the applicant who asked the court to invoke the overriding objective so as to ensure ends of justice, as I am bound by the decision of Hon. Justice, Kitusi J. in **Sanyou Service Station** (supra) where he stated that, rules of procedures should be followed but not without some sense of reasoning and justice.

It is my view that the omission to sign the pleadings is not fatal and the application is not liable to be dismissed for such omission as it was decided in an Indian case of **Iyakku Mathoo V. Julius Elias Metropulian AIR 1962 Ker 19**. Also in the case of **AIR V. Ramachandra AIR 1961 Bon 292**, where it was decided that, I quote:-

> "The court may allow the pleading to be signed at any stage if it may be signed in a Court of Appeal if the defect was defected before the Appellate Court and that signature after the expiry of the period of limitation for filing of the suit does not render the suit barred by limitation

if the plaint was presented within the period of limitation".

In this matter the applicant detected that the complaint at the CMA was signed by the respondent which, in my view such omission is curable even at this stage of revision which is the same as an appellate court of the matters originated from the CMA as it is established in the above referred persuasive cases of India.

Thus, on the basis of the above discussion, I without hesitation overrule the second point of preliminary objection and order the applicant to sign CMA Form 1 so as to cure the defects and set the records clear for any future reference.

Turning to the merit of the case, the applicant in this application did not dispute the substantive reason of her termination. She agreed with the Arbitrator's findings that the respondent had a valid reason to terminate her. Therefore the issue to be determined is, whether the applicant was properly awarded. In determining this issue the court will focus on three sub issues to the effect that; if the termination procedures were properly followed, if the Arbitrator's

award based on entitled salary of the applicant and lastly if the award of four months compensation is proper.

On the first sub issue of termination procedures, the Arbitrator in his findings observed that the procedures in terminating the applicant were not followed. I have gone through the parties' submission and court records and, after analysis I have observed that termination procedures in the present application were followed by the respondent. The Arbitrator found that there is no proof if the second disciplinary hearing was conducted. On the record, at page 12 of the award the Arbitrator stated as follow:-

> "Mwajiri baada ya kikao cha kwanza hakuna uthibitisho wa uwepo wa kikao cha pili alichoeleza DW1 kwamba kilikaa baada ya mlalamikaji kukata rufaa".

However, the Arbitrator's finding was contrary to the testimony of the applicant where she testified that the second disciplinary hearing was conducted. I quote her testimony in verbalism for easy of reference:-

"Baada ya 2nd hearing niliandikiwa barua ya matokeo ya kikao hicho, barua hiyo ni hii hapa kieelezo AW A-1".

Loosely translation of the quotation is that, after the second disciplinary hearing she was given the outcome of that hearing as per exhibit AW A-1. Therefore, from the applicant's testimony it is evident that the second disciplinary hearing was conducted as it is in exhibit AW A-1 in records. Hence, the Arbitrator was wrong to conclude that the second disciplinary hearing was not conducted in this matter.

The Arbitrator also found that, nothing was done in the second disciplinary hearing as the Second Disciplinary Committee upheld the first Disciplinary Committee's findings. The Arbitrator stated so at page 12 of the award to the effect that:-

"Pia kwa maelezo yake mlalamikaji ambayo hayakupingwa na mwajiri ni kwamba matokeo ya kikao cha rufaa yalieleza kuwa yamethibitisha kikao kilichofanyika cha kwanza hii ni sawa na kusema kwamba hakuna kilichozingatiwa zaidi ya kupitisha tu ionekane kwamba kikao cha rufaa kimekaa".

In my view the Arbitrator was wrong on the above finding. The fact that the second Disciplinary Committee confirmed the first Disciplinary Committee's decision does not justify that the said hearing was not conducted. The said hearing was conducted but the applicant did not bring any new or additional evidence to lead the Committee to arrive at a different conclusion.

The Arbitrator also misdirected himself to hold that the second disciplinary hearing was chaired by the same Committee as it was in the first disciplinary hearing. That was stated at page 12 of the impugned award and I quote his findings for easy of reference:-

> "Na imeelezwa bila kupingwa na mlalamikiwa kuwa hata walioongoza kikao cha pili cha rufaa walikuwa ni walewale walioongoza kikao cha kwanza ingawa mlalamikaji aliomba uongozi ubadilishwe, kitu ambacho sio sahihi".

The record reveals that the second disciplinary hearing was chaired by Mr. Ekta Lakhani after the applicant rejected the said hearing to be chaired by Mr. Said Geruka. Therefore, the Arbitrator was wrong in his finding.

I have also observed other procedures in terminating the applicant were all followed by the respondent. The applicant was notified to attend disciplinary hearing on 05/07/2016 as per the Notice to attend disciplinary hearing (exhibit M2). Applicant appeared before the first Disciplinary Hearing Committee on 12/07/2016 as per Hearing Form (exhibit M3) when charges against her were levied and she admitted some of them. On 27/07/2016 she was terminated after the first Disciplinary Committee found her guilty of the alleged misconducts as evidenced by exhibit M3. The applicant being aggrieved by the said termination, she appealed against that decision to the Appeal Committee whereas on 16/08/2016 she was notified to attend the second Appeal meeting as per Notice to Appeal meeting (Exhibit M4). On 02/09/2016 the second disciplinary hearing was held where the applicant brought her witness Mr. Raphael Sechambo. On 05/09/2016 the second disciplinary Committee upheld the First Committee's finding.

Therefore, on the basis of the above discussion it is crystal clear that all the termination procedures were followed as stipulated under Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 reads together with Guideline 4

of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures.

As to the second issue, if the Arbitrator's award based on a wrong salary. Before CMA the only proof of the applicant's salary was her employment contract which indicated the applicant's salary to be Tshs. 665,000/=. Therefore, the Arbitrator finding on this sub-issue was correctly based on the stipulated amount. The applicant attached before this court her salary slip, which I find to be improper because the same ought to be tendered before CMA and not at this stage. Applicant had that opportunity to tender that piece of evidence during arbitration proceedings, but she failed to do so. Hence a copy of her salary slip is regarded as new evidence which cannot be considered before this court where the matter is at revisional stage.

On the last sub-issue as to compensation, it is on record that before CMA the Arbitrator awarded the applicant four (4) months salaries compensation after finding that the procedures for terminating her employment were not followed as contested in the first issue above.

The law is very clear on remedies for unfair termination. The same are provided under section 40 of the Act which is to the effect that:-

> "40 (1) if an Arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer:-
>
> (a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or
>
> (b) to re-engage the employee on any terms that the arbitrator or Court may decide; or
>
> (c) **to pay compensation to the employee of not less than twelve months' remuneration**".
>
> [Emphasis is mine].

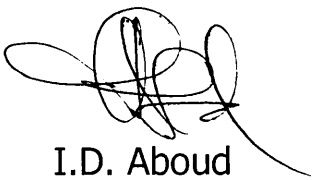
In the matter at hand I fully agree with Mr. Brash's submission that following the Arbitrator's finding on none compliance with

termination procedures, the applicant was supposed to be awarded 12 months salaries compensation in accordance to section 40 of the Act. In my view the provision under section 40 of the Act does not empower the Arbitrator or Court to award less than twelve months for unfair termination let it be substantively or procedurally, but he/she may award above 12 months compensation as is pleaded and the circumstance of the case allows.

Neither the court or CMA are at liberty to change the letters of the laws, in section 40 (1) (c) of the Act, it provide the minimum compensation to be 12 months, so it was not proper for the Arbitrator to award beyond what is prescribed in law.

However, in the application at hand as I have discussed above that the court found the applicant termination employment was both substantively and procedurally fair; therefore she is not entitled to any of the remedies stipulated under section 40 of the Act. Thus, Arbitrator wrongly awarded the applicant the compensation.

In the result I find the present application has no merit. The Arbitrator's award to the applicant is hereby revised and set aside because the applicant was fairly terminated.



I.D. Aboud

JUDGE

24/06/2020