IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 644 OF 2018

BETWEEN

BOLLORE TRANSPORT & LOGISTICS (TZ) LTD.....APPLICANT

VERSUS

JOHN MHONE ..... RESPONDENT

JUDGEMENT

Date of Last Order: 08/06/2020

Date of Judgement: 19/06/2020

Aboud, J.

The Applicant **BOLLORE TRANSPORT & LOGISTICS (TZ) LTD.** filed the present application seeking revision of the award of the Commission for Mediation and Arbitration (herein CMA) in the matter no. CMA/DSM/ILA/R. 922/16/862 delivered by Hon. Mourice Egbert Sekabila on 10/08/2018 in favour of the respondent herein, its subsequent corrected award delivered on 14/10/2018 and the ruling delivered on 12/08/2018 by Hon. Masawe, Arbitrator.

The application was supported by the affidavit of **ANGELINE KAVISHE MTULIA** the applicant's Legal Manager. The respondent challenged the application through his counter affidavit.

Brief facts leading to the present application are as follows; the respondent was employed by the applicant as a Ware House Clerk from 1st November, 2012 until on 26th September, 2016 when he was terminated on the ground of misconduct namely assault, attempted assault or fighting at work or within company's premises. It was alleged that, the respondent engaged in a fight with his fellow employee, the act which was contrary to the employer's employment disciplinary code. Aggrieved by the termination the respondent referred the dispute to CMA where the Arbitrator decided in his favour. Dissatisfied by the CMA's award the applicant filed the present application.

The matter proceeded by way of written submission. During hearing the applicant was represented by Daniel Kalasha, Legal Consultant while the respondent was represented by Mr. Lucas Nyagawa, Learned Counsel.

Arguing in support of the application the applicant submitted on the following legal grounds:-

i. The Honourable Arbitrator erred in law and fact by nullifying the respondent's termination while he had found and held that the respondent committed misconduct. The Honourable erred in law and fact by holding that the respondent did not have representation during the disciplinary hearing.

ii. The Arbitrator erred in fact and in Law by delivering an amended/corrected award without hearing the parties.

iii. Whether it is legally correct for the Arbitrator to award the respondent be reinstated while the respondent has never prayed for reinstatement and also considered the nature of termination whether or not reinstatement was proper.

On the first ground the applicant submitted that, there is no any dispute in the CMA records and the disciplinary hearing on 27/07/2016 found the respondent guilty of the offence charged as evidenced at page 7 paragraphs 4 of the award. Applicant's representative stated that the Arbitrator erred in law by nullifying his own decision while he had found the respondent guilty. He further submitted that, the Arbitrator's reason that the offence of which the

respondent was found guilty did not amount to termination was not proper and is contrary to Rules 9 (4) (a), 12 (1) (iii) and 12 (2) (e) of the Employment and Labour Relations (Code of good Practice) GN. 42 of 2007 (herein the Code).

As regards to respondent's representation during disciplinary hearing the applicant submitted that, the Arbitrator at page 10 of the award misdirected himself on scrutinizing evidence before him and reasoned that the respondent was never given the right of representation during disciplinary hearing. He stated that the evidence was very clear, as per Exhibit D9 at the second paragraph item (II) 1 the respondent was informed of a right to be represented by his fellow employee or the trade union. He added that during disciplinary hearing the respondent accepted to be represented by a trade union member, and that the issue of representation was not raised on his appeal.

On the second ground, the applicant submitted that it was not proper for the trial Arbitrator to determine an application for correction of award without hearing the parties. That since the application for correction was struck out the Arbitrator erred to proceed and determine the said application. He further submitted

that, though the Arbitrator has power to correct an award he was supposed to notify the parties by way of summons. He also argued that since the impugned award was delivered on 10/08/2018 and the corrected award was delivered on 14/09/2018, hence the said correction was made out of time.

On the last ground the applicant submitted that, it was not proper for the Arbitrator to award the respondent reinstatement as he did at page 10 paragraph 3 of the award because he did not pray for that relief is his CMA Form. No.1. To support his argument he cited the case **of SDV TRANSMI (T) LIMITED Vs. Faustine L. Mungwe**, Rev. No. 227 of 2016, DSM, (Unreported).

In reply Mr. Nyagawa submitted that, in determining whether termination is an appropriate sanction or not the employer should consider factors listed in Rule 12 (4) (a) of the Code. The learned Counsel stated that the Arbitrator was correct in law and fact to decide that the termination was unfair by applying Rule 12 (1) (2) and (4) of the Code. He stated that, it is from the record that the respondent had no any intention to assault DW1 he was just provoked. However, the applicant terminated him without putting into regard the historical conflicts between the parties as well as

respondent's hard working and good leadership skills, previous disciplinary records and length of service. To support his argument he cited the case of **National Microfinance Bank vs. Victor Modest Banda**, Civ. Appl. No. 29 of 2018 and the case of **National Microfinance Bank PLC Vs. Aizack Amos Mwampulule**, Rev. No. 06 of 2013, HC. Lab. Div. Lindi (unreported).

Responding to the issue of representation the Learned Counsel submitted that, it is clear from the record that the trade union representative was not chosen by the respondent. That it was the employer who served the notice for disciplinary hearing to the Trade union leaders and requested them to appear in the disciplinary hearing for the respondent. Hence the respondent was denied to choose a representative of his own.

On the second ground Mr. Nyagawa submitted that, the power of the Arbitrator to correct an award is derived from section 90 of the Act as well as under Rule 30 of the Labour Institutions (Mediation and Arbitration) Rules, GN No. 64 of 2007 (herein Mediation and Arbitration Rules). He stated that according to the relevant provision the Arbitrator may correct the award on application or on his own.

The Learned Counsel further stated that the application for correction of applicant's name was filed within 14 days from the date the respondent became aware of the error, that both parties were present when the Arbitrator corrected the award hence there was no need for notification. He further argued that, the correction was only in the name of the applicant herein but not to merit of the case hence the Learned Counsel strongly disputed that even if there was some irregularity, there was no any miscarriage of justice which caused to the applicant. He stated that the case of **Ephraim Haji Charitable Health Centre Vs Jeniffer Mlondezi** (supra) is distinguishable to the present application where the Arbitrator only corrected the applicant's name.

On the last ground the Learned Counsel submitted that, once an Arbitrator found termination is unfair what follows is to pronounce remedies which are provided under section 40 of the Act read together with Rule 32 (1) and (2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. No. 67 of 2007 (here forth Mediation and Arbitration Guidelines). He stated that the Arbitrator has discretion to choose either of the remedies provided under the provisions after taking into consideration of all factors

stipulated therein. To support his argument he cited a number of cases.

The Counsel strongly submitted that, due to the circumstances of this case the Arbitrator was right to order reinstatement, since the alleged committed misconduct does not breach trust between employer and employee, that the respondent had no previous misconduct records and that he had no intention of committing the said misconduct but he was only provoked.

In conclusion the Learned Counsel submitted that, the Applicant's counsel wrongly and improperly annexed CMA ruling and award to be part of his submission. He prayed for the same to be expunged from the records since they were materials of evidence. To cement his submission he cited the case of **Bish International B.V & Rudolf Teunis Van Winkelhof Vs. Charles Sarkodie & Bish Tanzania Ltd**, Land case No. 9 of 2006, HC, Land Division DSM (unreported).

Mr. Nyagawa in conclusion prayed for the application to be dismissed.

Having gone through the CMA and Court's records as well as submissions by both parties, it is my considered view that the issues for determination before the Court are, firstly, whether the Arbitrator erred in law by correcting an award. Secondly is whether there was valid or substantive reason of termination of the respondent. Thirdly is whether the termination was procedurally fair and lastly is to what reliefs are the parties entitled.

On the first issue as to whether the CMA erred in law by correcting an award, the applicant argued that the Arbitrator erred in law by proceeding to correct an award after the application was struck out. As rightly submitted by both parties, the Arbitrator derive power to correct an award from section 90 of the Act which is to the effect that:-

> "An Arbitrator who has made an award under section 88 (8) may on application or on his own motion, correct in the award any clerical mistake or error arising from any accidental slip or omission".

The above provision is in line with Rule 30 of Mediation and Arbitration Rules which provides that:-

> "30 (1) an application by a party to correct or set aside an arbitration award in terms of section 90 of the Employment and Labour Relations Act shall be made within fourteen days from the date on which the Applicant became aware of the arbitration award.
>
> (2) an arbitrator may on his own accord correct an award in terms of section 90 of the Act, within the time period stipulated in sub-rule (1) and shall re-issue the corrected award with a written explanation of the correction".

In the application at hand it is undisputed fact that the impugned award was delivered on 10/08/2018. The applicant made an application for correction of his name in the arbitral award on 20/08/2018 and the same was struck out on 12/09/2018 for being incompetent. The Arbitrator proceeded to correct the award on the same date on 12/09/2018 as indicated in CMA proceedings. Under those circumstances and in the light of the above cited provisions, in

my view the Arbitrator rightly corrected the award because he has powers to correct any clerical error in the award on application by the applicant or on his own accord. In this matter he corrected the award on his own accord after the applicant's application was struck out. Thus, the applicant's submission that the Arbitrator wrongly corrected the award out of time is baseless because the Arbitrator could have not acted on his own accord to correct the award within 14 days prescribed by the law while there was a pending application of correction of an award which ought to be determined. Therefore since the corrected award was delivered on the same date when the application for correction of the said was struck out in the presence of both parties there was no need of notifying the parties as claimed by the applicant. Moreover the applicant was not denied his right to file a competent application, thus if he had noticed any other clerical error apart from his name he ought to have filed his application before CMA.

On the second issue as to whether there was substantive or valid reason of termination it is on record that the applicant was terminated for assault/attempted assault or fighting at work or within Company premises. The applicant's disciplinary Committee held on

27/07/2016 found the respondent liable for the alleged offence on the reason that, even when Mr. Francis (the victim) asked for forgiveness the respondent continued to shout at him and hit the door closing handle on the container nearby the said Francis. The Arbitrator as correctly submitted by the applicant he found the respondent committed the offence charged against, but he stated clearly that termination was not an appropriate sanction for him because he provoked to commit such an offense by his fellow employee (Francis). The alleged offence of assault in our labour laws falls within the category of misconduct as it is provided under Rule 12 (3) of the Code which provides that:-

> "12 (3) The acts which may justify termination are:-
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> (a) gross dishonesty;
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> (b) willful damage to property;
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> (c) willful endangering the safety of others;
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> (d) gross negligence;
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> (e) **assault on a co-employee, supplier, customer or a member of the family of,**

and any person associated with, the employer; and

(f) gross insubordination"

[Emphasis is mine].

I have careful examined the evidence on record; the respondent denied the charges against him as per the reply to charge notification (Exhibit D8). He admitted that he exchanged words with Mr. Francis but he never tried to fight him. Before CMA all witnesses testified that the respondent tried to fight the said Mr. Francis. Now the question is, did the respondent tried to assault his fellow employee? According to exhibit D11 (Hearing Form) it indicates that, after viewing the evidence presented before the Disciplinary Committee, in particular the CCTV footage which showed that the respondent committed the alleged offence. The Committee's findings was also corroborated with exhibit D14 (CCTV Review Report) on record. At page 4 of the relevant report it shows that the respondent forced to enter in the container where Mr. Francis was working. The report reflects further that employees stopped working for sometimes so as to stop the respondent from fighting Mr. Francis. On the basis of the foregoing discussion it is my considered view that the

respondent attempted to assault Mr. Francis. In my view if at all the respondent confronted his fellow in a polite manner as claimed, his colleagues who were around the same would not have stopped him as is reflected in the evidence of the case discussed above. From the discussion above, the report showed that the respondent forced himself to enter in the container so as to fight Mr. Francis. I therefore join hands with the Arbitrator that the respondent committed the alleged misconduct.

It is my view that, if the respondent had any quarrel with his fellow employee he was supposed to report the matter to his higher authority before he decided to react on his own. Moreover, the record reveals that the respondent reacted after being called "a child" and his fellow asked for forgiveness but he persistently tried to fight him. In my view even if I take the Arbitrators position that the respondent was provoked by words altered by his fellow, the evidence reveals that he had time to cool down his temper. According to Juma Mohamed's statement (Exhibit D 17) who was the security guard testified that the respondent went out of the container after Mr. Francis asked him for forgiveness, but he later returned back for the second time with anger trying to fight his fellow while throwing words

like I will beat you ("Nitakupasua"). Therefore, there is no doubt that the respondent attempted to assault his workmate at the working place.

The Arbitrator in his award stated that the respondent's misconduct was not so serious to justify termination. It is an established principle that in determining fairness of termination for misconduct of the employee, some factors have to be considered. This position is clearly provided under Rule 12 (1) of the Code which is to the effect that:-

> "12. - (1) Any employer, arbitrator or judge who is required to decide as to termination for misconduct is unfair shall consider:-
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> (a) whether or not the employee contravened a rule or standard regulating conduct relating to employment;
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> (b) if the rule or standard was contravened, whether or not:-
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> (i) it is reasonable;
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> (ii) it is clear and unambiguous;

(iii) the employee was aware of it, or could reasonably be expected to have been aware of it;

(iv) it has been consistently applied by the employer; and

(v) termination is an appropriate sanction for contravening it".

Coming back to the case at hand, applicant's disciplinary code which was tendered at the CMA as Exhibit D13 reveals that the respondent acted against the relevant disciplinary code, therefore respondent contravened the rule regulating conduct relating to his employment as it is in Rule 12 (1) (a) of the Rules. Then the question is whether the contravened rule that is clause number 8.4.1 of the company disciplinary code passed the test of Rule 12 (1) (b) (i) - (v) of the code as described above. It is on record that when Exhibit D13 was tendered at the CMA during Arbitration proceedings, respondent did not object. Thus, in my view the respondent agreed that he was aware that he was restricted from engaging in any fight or committing assault at his work place, to the contrary he tried to fight his fellow employee. Therefore the respondent was supposed to

abide to the applicant's **disciplinary code** without any excuse of provocation.

On the basis of the foregoing discussion, with no hesitation I find that the applicant had valid reason to terminate the respondent's employment. The relevant applicant's disciplinary code provides for the sanction to the employee who contravenes the said codes to be termination from employment. Since the court found that responded contravened the disciplinary code, so the proper sanction against the respondent was to be terminated from employment and not otherwise. Had it been that Arbitrator had considered properly the evidence on record he would not have made the decision that, proper sanction was to reinstate the applicant at work as is in section 40 (1) (a) of the Act.

On the third issue as to termination procedures, the Arbitrator held that the procedures for terminating the respondent's employment were not followed. In the Arbitrator award is stated that, the respondent was not given right to have representative of his own choice. It is crystal clear that the respondent was informed of his right to be assisted at the disciplinary hearing by his fellow employee or Trade Union representative as is reflected in notice to

attend hearing at item II (9) (Exhibit D9). Therefore, he had a right to choose representative of his own choice. The respondent's allegation that he was not the one who served notice to trade union leaders to attend disciplinary hearing is baseless since he was not barred by the applicant to choose his own representative. Moreover, there is no any evidence on record to prove that the respondent was forced to be represented by a trade union representative regardless of who served them notice. As it is indicated in the hearing form (Exhibit D11) the respondent was asked if he wished to be represented by a trade union member from COTWU and he accepted the same, thus if he did not trust the union representation as he claimed he should have not accepted their representation. Therefore, on the basis of the above discussion it is my considered view that the Arbitrator wrongly found that the respondent right to choose representative of his own choice was violated by the applicant.

On the basis of the above discussion, I am satisfied that all the termination procedures as stipulated under Rule 13 of the Codes reads together with guideline 4 of the Guidelines for

Disciplinary, Incapacity and Incompatibility Policy and Procedures were followed in terminating the respondent.

On the last issue as to what reliefs are the parties entitled, it is on record that before the CMA the respondent was awarded with reinstatement and 12 months remuneration. It is my view that having found that the respondent's termination was both substantively and procedurally fair, he is thus not legally entitled to the remedies stipulated under section 40 of the Act. The Arbitrator wrongly awarded him according to section 40 (1) (a) of the relevant Act.

The applicant also prayed for revision of the ruling delivered on 12/09/2018 which struck out his application for correction of the award. However, the applicant did not put forward any grounds for the said ruling to be revised. He further prayed for the revision of corrected award, as discussed in the first issue the Arbitrator's decision to correct that award suo motto was properly made. Hence, this court finds no need to fault the Arbitrator's decision.

In the result I find that the respondent's termination was fair both substantively and procedurally. Thus, the application has merit

and I hereby revise and set aside the CMA award to the respondent accordingly.

It is so ordered.

I.D. Aboud

JUDGE

19/06/2020