**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**LABOUR REVISION NO. 802 OF 2019**

**BETWEEN**

**ZAMBIA CARGO & LOGISTICS LIMITED.....APPLICANT**

**VERSUS**

**KULWA HASSAN MATAULA.....RESPONDENT**

**JUDGEMENT**

Date of Last Order: 16/06/2020

Date of Judgement: 07/08/2020

**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 17/09/2019 in Labour Dispute No. **CMA/DSM/TEM/311/2017/157/18** by Hon. M. Batenga, 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 his application by the affidavit of Aprina George Chuma, applicant's Principle Officer. On the other side the respondent challenged the application through his counter affidavit.

The facts leading to the present application are as follows; on 01/01/2008 the respondent was employed by the applicant as a Container Clerk. On 21/10/2015 he was elevated to the position of Bulk Cargo Supervisor of Operations of the Applicant's Company. On 11/05/2017 he was terminated from employment for the charges namely; use of abusive language against a fellow employee, character assassination of a fellow employee, bullying a subordinate employee and serious breaches of organizational rules or policy which have an effect of causing an irreparable breakdown in the employment relationship. Aggrieved by the termination he filed the dispute to the CMA where the award was delivered on his favour after the Arbitrator found that, the termination was based on unfair reasons and procedures. The respondent was awarded severance pay amounting to Tsh. 2,232,166.84/= as well as Tsh. 11,054,540.52/=

being 12 months salaries compensation for unfair termination. Being resentful of the said Arbitrator's award the applicant filed the present application for it to be revised on the following grounds:-

i. That the trial Arbitrator erred in law and fact by confirming the termination was unfair while the respondent admitted to the charged offences during both disciplinary hearing and during hearing at CMA.

ii. That the trial Arbitrator erred in law and fact by holding that the applicant did not follow the procedure of terminating the respondent for failure to conduct the investigation prescribed under the law contrary to both oral and documentary evidence adduced during hearing at CMA.

By leave of the Court the matter proceeded by way of written submission and both parties were represented. Ms. Regina Anthony Kiumba, Learned Counsel was for the applicant while Mr. Lucas Nyagawa, Learned Counsel was for the respondent.

Arguing in support of the application Ms. Regina Anthony Kiumba submitted that, the respondent committed serious offences during the subsistence of his employment. She said the respondent was charged with 6 serious offences contrary to the labour laws and

applicant's Code of ethics and conduct. She added that all the charged offences have a penalty of termination.

Ms. Regina Anthony Kiumba went on to submit that the respondent admitted to charges number one and two on record as reflected in exhibit Z4. As to the remaining charges the Learned Counsel submitted that, they were proved during both disciplinary hearing and at the CMA.

On procedural fairness Ms. Regina Anthony Kiumba submitted that, the applicant followed all procedures in terminating the respondent as stipulated under Rule 13 of the Employment and Labour Relations (Code of Practice) GN. No. 42 of 2007 (herein GN No. 42 of 2007). The Learned Counsel argued that, after the HR received a written complaint (Exhibit Z3) from one Gerald Shayo he asked the respondent to respond to the accusations levied against him. She stated that the respondent admitted to the charges levelled against him (Exhibit Z3), he was then served with a charge sheet and summoned to a disciplinary hearing where all the charges levelled against him were proved.

Ms. Regina Anthony Kiumba further submitted that, the respondent's admission was enough to commence disciplinary measures for the offences he admitted. The learned Counsel argued that, CMA insisted to have investigation against the respondent to the facts already admitted while each case has its own circumstances and not all cases are the same. Ms. Regina Anthony Kiumba therefore prayed for the relief sought in the application to be granted and the CMA award set aside.

In reply to the application Mr. Lucas Nyagawa submitted that, there is no where during the disciplinary hearing or arbitration hearing indicating the respondent admitted to use abusive language of "thief, stupid person without brains" as he was charged. The learned Counsel argued that, Taasisi ya Uchambuzi ya Kiswahili (TUKI) Kiswahili - English dictionary defined the word fool (mpumbavu) as the person who acts unwisely, therefore, it is not an abusive language as rightly defined by the respondent on paragraph 1 page 8 of the award.

Mr. Lucas Nyagawa added that, even if the respondent admitted the alleged offence still his admission was equivocal because he raised a defence that there was confrontation between

him and PW2- Gerald Shayo. Therefore in the circumstance the applicant had an obligation to prove that the reason for termination was fair and valid. Mr. Lucas Nyagawa submitted that, the applicant before imposing penalty was supposed to take into consideration of Rule 12 (1) (b) (v) and 12 (4) (a) of GN. No. 42 of 2007. The learned Counsel argued that, termination was not an appropriate sanction to the circumstances of this case because there was no any evidence tendered to prove the alleged offences.

Mr. Lucas Nyagawa further submitted that, Gerald Shayo who alleged of being abused by the respondent was a subordinate employee; therefore the proper procedure that was supposed to be followed was grievances procedure as stipulated under GN. No. 42 of 2007 but not the misconduct procedures applied by the applicant. Mr. Lucas Nyagawa went on to submit that even the procedure for misconduct opted by the applicant were not followed. He said the applicant was a judge of his own case which is contrary to the principle of natural justice and the rule against bias.

The Learned Counsel argued that, PW1 was the prosecutor who charged the respondent as per exhibit Z5 but he was also a member of the disciplinary Committee as reflected at exhibit Z6. He added

that after hearing the respondent and his representative were required to go outside and left the Committee to reach its decision. Mr. Lucas Nyagawa further disputed that, the decision was delivered by the chairman and members of the Committee including PW1. Therefore, the employer acted against the principle of natural justice. He also argued that, the applicant denied the respondent to present his mitigating factors. He added that, even the charges were duplicated to form six offences while there was only one conduct. To support his argument he cited the case of **Augustino Kalinga vs. National Bank of Commerce**, Rev. No. 169 of 2006.

Mr. Lucas Nyagawa went on to submit that, the Arbitrator was right in her reasoning that the applicant had an obligation to conduct investigation. He therefore prayed for the application to be dismissed.

In rejoinder Ms. Regina Anthony Kiumba reiterated his submission in chief and strongly submitted that, the respondent admitted the charges levelled against him. She added that, the applicant applied the termination procedures in terminating the respondent's employment. The Learned Counsel further stated that, the respondent was represented at the disciplinary hearing by Mr. Lucas Nyagawa who is also his representative before this Court.

Ms. Regina Anthony Kiumba referred the court to the case of **Nickson Alex vs. Plain International,** Rev. No. 22 of 2014, where it was held that, if an employee admits the misconduct, disciplinary hearing may be dispensed with. She therefore prayed for the application to be allowed.

Having gone through and considered the Court's records, labour laws and practice as well as submissions by both parties, it is my view that the issues for determination before the Court are whether the applicant had valid reasons to terminate the respondent's employment, whether the termination procedures were properly followed and, lastly is whether the arbitrator properly awarded the respondent.

On the first issue, as to whether the applicant had valid reasons to terminate the respondent's employment, it is an established principle that for the termination of an employee to be considered fair it must be on the basis of valid and fair reason. The concept of a valid reason is well elaborated under Section 37 of the

Act which is to the effect that, I quote: -

> "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"
>
> (Emphasis is mine).

The above provision is in line with Article 4 of the Convention No. 158 of International Labour Organization which provides inter alia that: -

> "**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 the operation requirements of the undertaking, establishment of services."

[Emphasis is mine].

The aim of the legislature in the above provision is to require employers to terminate employees on a valid reason and not on their own whims. In the instant case the applicant was terminated for four offences namely, use of abusive language against a fellow employee, character assassination of a fellow employee, bullying a subordinate employee and serious breach of organizational rules or policy which have an effect of causing an irreparable breakdown in the employment relationship. The Arbitrator in her decision held that the applicant had no valid reason to terminate the respondent's employment on the reason that the applicant did not prove the charges levied against the respondent.

It is on record that on 14/02/2017 the respondent verbally confronted his fellow employee one Gerald Shayo of stealing his reflecting vest in front of other employees and such confrontation resulted to exchange of abusive language between the respondent and his fellow. The applicant submitted that the offences levied

against the respondent were against the applicant's Code of Ethics and Conduct (Exhibit Z2).

In my view the charges levied against the respondent falls within the category of misconduct. The labour laws do not specifically mention all the offences which fall within the category of misconduct. However the term misconduct is defined in a legal dictionary to mean:-

> "...a forbidden act, resulting from violation of some set rule of action indicating a wrong or improper behavior. An omission or commission may equally constitute misconduct."

In the application at hand as stated above the employer set the minimum standard of behaviors required to be adhered by employees. The respondent at hand was charged because he acted contrary to the behaviors set by the employer.

In determining if termination under misconduct is fair the judge or Arbitrator is required to consider the factors set under Rule 12 of the GN. No. 42 of 2007 which is to the effect that:-

> "Rule 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 was contravened, whether or not

(i) it is reasonable;

(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."

In the application at hand it is specifically provided in the applicant's Code of Ethics and Conduct that employees should avoid words intend to ridicule either subordinates or supervisors. From the record it is crystal clear that the respondent called his subordinate

Mpumbavu. This is evidenced by the respondent's testimony where he testified that:-

"Nilimwambia basi na mimi siongei na mpumbavu".

In his defense the respondent claimed that the word fool (in Swahili Mpumbavu) is not an abusive language it only means the person who acts unwisely. I have considered the respondent's defense, however in my view taking into account on the cultural norms and practice of the Tanzanians the word *"Mpumbavu"* is normally used as an insult, therefore it suffice to say that the respondent used abusive language.

The rule also required employees to respect each other. The respondent disrespected his fellow by calling him Mpumbavu in front of his fellows. The respondent went further by accusing his fellow a thief without any proof which in my view amounts to character assassination because his fellow employee were likely to believe that Gerard Shayo is a thief. The rule also demanded the employee to obey the Company's rules and regulations which the respondent contravened them.

The rule of standard set by the employer was clear and the respondent as a supervisor he ought to have been aware of the

applicant's disciplinary Code which he contravened. Under the circumstance of the case, termination was the right sanction imposed to the respondent in accordance with rule 12 (4) (a) (b) of GN. No. 42 of 2007, which is to the effect that:-

> "12(4) - In determining whether or not termination is the appropriate sanction, the employer should consider:-
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> (a) the serious of the misconduct in the light of the nature of the job and the circumstances in which it occurred, health and safety, and the likely hood of repetition or
>
> (b) the circumstance of the employee such as the employee's employment record, length of service, previous disciplinary record and personal circumstance".

On the basis of the foregoing discussion it is my view that, the applicant had a valid reason to terminate the respondent's employment and discharged his duty to prove offences against

employee as required by section 39 of the Act which is to the effect that:-

> "In any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair".

As discussed above the applicant proved all the misconduct levied against the respondent. Taking into consideration that the respondent had previous disciplinary records, then termination was an appropriate sanction as rightly imposed to him by the applicant. In other words, the applicant termination was substantially fair as required under section 37 of the Act. Therefore, I find the Arbitrator arrived at a wrong finding that the applicant had no valid reason to terminate the respondent's employment.

On the second issue of termination procedures, the Arbitrator in his findings observed that, the procedures in terminating the respondent were not followed because the applicant ought to have applied the grievance procedures. The Arbitrator misdirected herself in the award and was not certain as to the procedures ought to have been followed by the applicant in terminating the respondent's

employment. At page 9 of the award she expressly stated that, the procedures ought to be used by the applicant were grievance procedures as they are provided at page 74 of GN. No. 42 of 2007. At the same time at page 10 of the award the Arbitrator held that the applicant did not conduct investigation as one of the misconduct procedures provided under Rule 13 of GN. No. 42 of 2007.

As discussed above the offences levied against the respondent fall within the category of misconduct, therefore the procedures to be followed were the procedures for termination of an employee charged with misconduct. 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 applicant. The Arbitrator found that the applicant did not conduct investigation. On the record, at page 11-13 of the award the Arbitrator stated as follow:-

> "Si hivyo tu bali mlalamikiwa hakufanya uchunguzi kama ilivyoongozwa na wala hakuita mashahidi au kutoa ushahidi kwenye kikao cha nidhamu kuthibitisha tuhuma dhidi ya mlalamikaji".

However, the Arbitrator's finding was contrary to the testimony of the respondent where he testified that the victim, Gerald Shayo appeared before a disciplinary hearing and testified on his charges. The respondent also testified that he brought his witnesses at the disciplinary meeting. This is evidenced at page 37 of the award, I quote his testimony during cross examination for easy of reference:-

"S: kwenye kikao ulienda na shahidi?

J: Ndiyo, Selemani, Hassan na Hamis".

Loosely translation of the quotation is that, the respondent was asked if he brought his witnesses at the disciplinary hearing and he replied yes and mentioned his witnesses as Selemani, Hasan and Hamis. Therefore, from the respondent's testimony it is evident that the witnesses were brought at the disciplinary hearing to disapprove the charges against the respondent. Hence, the Arbitrator was wrong to conclude that there were no witnesses at the disciplinary hearing.

The Arbitrator also found that, the respondent was not afforded an opportunity to mitigate. I have gone through the respondent testimony at the CMA; the termination procedure contested by him was that his representative was not allowed to cross examine witness

because he was using his phone while disciplinary hearing was conducted. However, the respondent also testified that he examine the witnesses himself. Therefore his allegation on non adherence of such procedure is baseless. In the situation, Arbitrator suo motto discussed the procedure of mitigation in his award without affording the parties the right to be heard on that aspect.

I have also observed other procedures in terminating the respondent were followed by the applicant. The respondent was notified to attend disciplinary hearing on 03/03/2017 as per the notice to attend disciplinary hearing (exhibit Z5). Respondent appeared before the Disciplinary Hearing Committee on 07/03/2017 as per Hearing Form (exhibit Z6); represented by Mr. Lucas Nyagawa when charges against him were levied and he admitted to have called his fellow employee "mpumbavu". The disciplinary Committee found him guilty of the offences charged and recommended that, the respondent be terminated from his employment. Dissatisfied with the Committee's findings the respondent appealed against such decision on 10/03/2017 (Exhibit Z7) and, on 11/05/2017 the Appeal Committee upheld the disciplinary Committee result (Exhibit Z8). On

11/05/2017 the respondent was terminated from employment (Exhibit Z9) and was paid all of his dues.

It has to be noted that, the procedures should not be adhered in a checklist fashion, what is paramount important is for the rules of natural justice to be followed. This was also the position in the case of **Justa Kyaruzi V. NBC Ltd,** Rev. No 79 of 2009 Lab. Division at Mwanza, where it was stated that:-

> "What is important is not the application of the Code in the checklist fashion, rather to ensure the process used adhere to the basics of fair hearing in the labour context depending on the circumstances of the parties, so as to ensure the act to terminate is not reached arbitrarily. Admittedly, the procedure may be dispensed with as per Rule 12(11) of the Code. "

Therefore, on the basis of the above discussion it is crystal clear that, in the circumstance of this matter 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

read together with Guideline 4 of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures.

On the last issue as to respondent's award, it is on record that, the Arbitrator awarded the respondent twelve (12) months salaries compensation after he found that the applicant had no valid reason and did not follow procedures for terminating the respondent's employment.

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].

As I have discussed above that the court found the respondent's termination of employment was both substantively and procedurally fair; therefore he is not entitled to any of the remedies stipulated under section 40 of the Act. Thus, Arbitrator wrongly awarded the respondent the compensation of 12 months salaries.

Is my view that the respondent is also not entitled to the award of severance pay because he was fairly terminated on the ground of misconduct. This is in accordance with sections 42 (1) 42 (2)(a) (b) and 42 (3) of the Act, where it is specifically provided that, the payment of severance pay should not apply to an employee who is fairly terminated on the ground of misconduct. For easy of reference I quote:-

"42 (1) For the purposes of this section "severance pay" means an amount at least equal to 7 days' basic wage for each completed year of continuous service with the employer up to a maximum of ten years.

(2) An employer shall pay severance pay on termination of employment if:-

(a) The employee has completed 12 months continuous service with an employer; and

(b) Subject to the provisions of subsection (3), the employer terminates the employment.

(3) **The provision of sub-section (2) shall not apply:-**

**(a) To a fair termination on grounds of misconduct**."

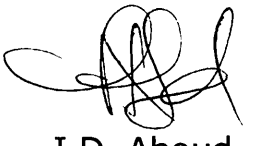
[Emphasis is mine]

On what I have attempted to discuss above, I have no flicker of doubt that there was valid reason (s) for the employer, the

applicant to terminate the employment of the respondent. The applicant did also follow the procedural fairness procedures before terminating the respondent as reflected above. Since the employer's sanction was reasonable and backed with legal justification, in the circumstances the Arbitrator had no good reason to interfere with.

In the event and on the foregoing, I find the present application has merit because the respondent was fairly terminated both substantively and procedurally. I allow this revision application, quash the arbitration award of the CMA and set aside any other orders thereto.

It is so ordered.



I.D. Aboud

**JUDGE**

07/08/2020