IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAAM

REVISION NO. 106 OF 2019

BETWEEN

BATI SERVICES COMPANY LIMITED..... APPLICANT

VERSUS

SHARGIA FEIZI..... RESPONDENT

JUDGMENT

Date of Last Order: 28/08/2020

Date of Judgment: 31/08/2020

Z.G. Muruke, J.

This application has been filed under the provisions of Rule 24(1), 2(a),(b),(c),(d),(e),(f), 3(a),(b),(c) and (d) and Rule 28(1)(b),(c),(d) and (e) of the Labour Court Rules, 2007 GN No. 106 of 2007, read together with Section 91(1)(a),(2)(b) and (c) 94(1)(b) (i) of the Employment and Labour Relations Act Cap.366 RE 2019 [herein after referred to as Cap 366 RE 2019]. The applicant **BATI SERVICES COMPANY LIMITED** having been aggrieved with the CMA award dated 17th October, 2017, filed the present application seeking revision of the award.

The application is supported by an affidavit of the applicant's Managing Director, Benoit Durcame .The same was challenged by the

respondent's counter affidavit. The matter proceeded by way of written submission, whereby the applicant was served by Advocates from IMMMA Advocates, whereas the respondent enjoyed the services of Advocate Daniel B. Welwel.

The brief facts of this case are that, on March 2012 the respondent was employed by the applicant as Administration and Finance Manager. She performed her duties until 14th July,2012. While at the parking, lot, coming from the bank she was wounded by unknown armed persons and a sum of forty million shillings was stolen. Following the injuries, the applicant was granted a sick leave for 7 months. She was paid full salary for a period of four months and half salary for a period of three months.

Having exhausted her sick leave, the respondent did not resume her work despite of several consultations with the applicant. After more than five days of her absence, the applicant decided to charge the respondent for absenteeism. The issued notice was fruitless hence the disciplinary hearing was conducted exparte, as a result she was terminated on absenteeism. Being resentful with the termination, the respondent knocked the CMA's doors claiming for unfair termination. CMA's decision was on her side, consequently the applicant filed this application seeking revision of the impugned award.

I have gone through the submissions of both parties, I must admit that Counsels for the parties have written too long submissions, of which I will just transact on the relevant facts in cause of this judgment.

Submitting in support of the application, the applicant counsel's prayed to adopt the affidavit sworn by Benoit Durcame to form part of their submission. It was submitted that the arbitrator erred in law and fact in deciding that the termimation was substantively unfair. Once termination is based on the employees conduct, the law considers it to be fair, referring Section 37(2) of Cap 366 RE 2019. The respondent was terminated on absenteeism, after being absent from work formore than five (5) days without permission or justification. That after the incidence, the respondent was granted sick leave from July, 2014 to March 2015. The respondent did not came to the office until September, 2015.

It was further submitted that the arbitrator erred to rely her decision on the emails (Exhibit SF4) which shows communication between the applicant and respondent, without considering that through that communication the applicant was inquiring the respondent on when she will get back to work. The respondent requested for the applicant to make some adjustments in order for her to resume work. The adjustment sought included (i) termination of the security guard who were in duty on the date of the incident, (ii) the respondent to be moved to another office and (iii) her salary to be increased from USD 6,500 to USD 10,000. The applicant re allocated the security guards, increased the salary to USD 7000 and advised the respondent that the issue of new office was not possible due to the respondent 's nature of work and office space.

It was further submitted that the applicant took initiative to find a trauma Doctor who after evaluating the respondent he recommended

that the respondent can work up to six hours a day. Therefore that her absence was not authorized and even to work from home. That an employee is not automatically entitled to sick leave as must, there must be a medical certificate, referring section 32(3) (a) of Cap 366 RE 2019.

On procedural aspects, it was submitted that the arbitrator erred in law and fact in holding that the procedure for termination of the respondent was unfair. The applicant conducted investigation by obtaining a Trauma expert's report in order to find out if the respondent could resume work. After the trauma report was communicated to the respondent on 25th March ,2015 the respondent was obliged to procure such other reports to show why she could not resume work.

Learned counsel in regard to the composition of the disciplinary committee, argued that the law requires the hearing to be chaired by the sufficiently senior management representative not involved in the rise of the case. It did not state that the chair person should be the complaints reporting person, as held by the arbitrator. The respondent ought to prove that the chairperson isn't the senior manager, since the Chairperson was a Technical Manager. Further it was stated that the arbitrator misdirected himself in finding that the hearing was unfair just because Mr. Benoit in the meeting was recorded as a managing Director hence in that capacity cannot stand as a witness. As per Exhibit SF9 all the members were recorded according to their titles. Mr. Benoit as the management representative is the one who presented the allegations against the employee and the chairperson who is the one who decides.

It was further contended that the law allows the employer to proceed in absence of the employee when such an employee unreasonably refuses to attend the hearing. Notice was issued to the respondent on 4th September, 2015 and the hearing was conducted on 9th September, 2015. The respondent explained that she did not attend the hearing because she was worried about her safety as noted under page 38 of the proceedings. That the procedure for termination for misconduct are provided under Rule 13 of GN 42, they don't require for the employer to ask the employee to show cause why the disciplinary action should not be taken against an employee.

In regard to the relief, it was argued that the arbitrator erred to award the respondent with 36 months compensation contrary to the law. Section 40(1) (c) of Cap 366 provides for compensation of 12 months salaries for unfair termination, referring the case of **International Medical & Technological University Vs. Eliwangu Ngowi**, Rev. 54/2008. Also the arbitrator awarded the arrears of wages for the period that the respondent without any proof that she was working from home, referring the case of **Pius Sangali & others V Tanzania Portland Cement Co. Ltd**, Civil Appeal No. 100 of 2001 CAT.

It was further argued that the respondent was not entitled to severance pay since she was terminated for misconduct, citing Section 42(3)(a) of Cap 366 RE 2019. That according to Section 41 (7)(b) of Cap 366 RE 2019 an employer is allowed to terminate the employment

contracts without notice for any cause recognizes by the law. The respondent was terminated for misconduct hence not entitled to notice.

Responding to the applicant's averment, the respondent counsel submitted that the arbitrator was correct to decide that the termination was substantively unfair as it based on the evidence and facts on record. That the applicant was aware of the reasons for the respondent's absence. This was evidenced by **exhibit SF4** as the parties were communicating negotiated on the adjustments to be made in order for the respondent to resume work. The respondent at page 34 of the proceedings required an office which was downstairs because she was using crutches and that office could be close to the washroom which was crucial, considering the injury caused by the gunshot hence, her absence was authorized by applicant. Respondent was also working from home from March, thus the requirement to tender authorization or evidence to work from home is invalid.

Again it was submitted that the parties agreed that respondent would see the applicant's doctor, but the applicant would also procure the reports from therapist and psychologist in order to attain a full report on the respondent's physical, mental and psychological health. The respondent only based on Dr. Muhina's report which was problematic and unreliable as it was only based on physical examination and the same was not signed. In order to reach the decision that the respondent was fit to resume work, the recommendation that she can work for six hours was based on respondent's verbal response and not physical evaluation. Therefore the

said expert opinion Exhibit **SF6 was invalid** and unfit basis for the respondent to resume work. The applicant had a duty to investigate and take into consideration the seriousness of the injury of the respondent referring Rule 19(5), (7) of GN 42. Therefore the arbitrator was correct to conclude that the proposed adjustments were fair for the respondent's wellbeing physical and psychological.

On procedural aspect the respondent counsel contended that in order to ascertain whether there are grounds for convening a disciplinary hearing a complete investigation shall be conducted. In this matter investigation was incomplete for failure to obtain psychologist and physiotherapist report. In absence of the same the applicant neither had basis to demand the respondent to resume work nor to convene a disciplinary hearing, citing the case of **Huruma H. Kimambo v Security Group**, Rev.412/2016 (unreported).

Moreover, it was submitted, that the Chairperson of the Disciplinary meeting was not a senior member as the entire applicant's business has to pass through her. Again Mr. Benoit with a title of managing director attended the disciplinary hearing as a member of the Committee and is the one who gave evidence for the applicant as per exhibit SF9. Due to that, there was a risk that he could influence the findings of the committee irrespective of whether the chairperson is the one who makes the final decision, referring the case of **Cooper v Wilson & others** [1937]2KB 309,and the case of **Onael Mpeku v National Bank of Commerce Ltd**,Rev. 461/2019

Moreover the respondent's counsel argued that the disciplinary hearing was conducted in the respondent's absence while the applicant was aware that the respondent could not attend the hearing for the stated reasons that was contrary to the principle of natural justice. In regard to the reliefs, it was argued that the arbitrator complied with the law in awarding the respondent 36 months' salary compensation as considered all relevant factors as stated in Rule 32 (5) of Labour Institution (Mediation and Arbitration) guidelines GN.67/2007. It was lawful for the arbitrator to award arrears since the applicant was still the applicant's employee and she was working from home.

In rejoinder the applicant's counsel mostly reiterated their submission in chief. In addition it was stated that, the arbitrator erred in law and fact in finding that the adjustments were justified. The respondent's reason for the same were not the one stated before CMA. The respondent never informed the applicant about her problem with stairs and a need to be close to the washroom. It is clear that the respondent demanded adjustments for her comfort since no health reason was advanced to justify the adjustments, referring **exhibit SF4** (email dated 10th February, 2015 and responded by the respondent on 25th march, 2015)

On procedural aspect, it was further submitted that the case of **Huruma Kimambo v Security Group**, Rev.412/2016 is distinguishable from the present case. In this case investigation was conducted before disciplinary hearing. It was the respondent's duty to prove that she was not in a position to resume work contrary to DR. Mhina's finding. Further it

was stated that the case of **Cooper v Wilson** & others is distinguishable in this case, since I this case there is no evidence that Mr. Benoit was present when the chairperson was determining the matter. They thus prayed for the revision of the CMA's award.

After carefully consideration of the parties' submissions, records and the relevant laws, issues for determinations are:

i. Whether the applicant had valid reason for termination of the respondent

ii. Whether the termination was procedurally fair

iii. Reliefs entitled to the parties.

In regard to the first issue, it is a principle of law that, termination of employment must be on valid and fair reasons and procedure. For termination to be considered fair, it should be based on valid reasons and fair procedures. There must be substantive and procedural fairness of termination of employment as provided for in **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].

This was also emphasized in Article 4 of Convention 158 which provides that:-

"Article 4: ***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 or services."*
[Emphasis is mine].

This has been insisted in various case decisions including the case of **Tanzania Revenue Authority V. Andrew Mapunda**, Labour Rev. No. 104 of 2014, where it was held that:-

"(i) It is the established principle that 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, Section 37(2) of the Act.

(iii) I have no doubt that the intention of the legislature is to require employers to terminate employees only basing on valid reasons and not their will or whims."

Also in this court in case of **National Microfinance Bank Vs. Saphet Machumu**, Rev. No. 710/2018 (unreported) it was held that:-

*"Termination of employment must be first substantively fair with fair and **valid reasons** putting in regard that the concept of right to work as a component of human rights, is so fundamental...."*

In the matter at hand, the respondent was terminated for absenteeism, absconding from work for more than five days as Exhibit SF 11 (termination letter).CMA found that the applicant had no valid reason for terminating respondent. From records it is undisputed that after the said incidence the applicant was afforded with a seven months sick leave, and after expiry of the said leave, the respondent neither requested for the extension of leave nor went to resume her work. Central issue is whether her absence was legal or authorized by the applicant.

It is from records that the applicant was the one who inquired the respondent on her return back to work. In her reply dated 10th February,2015 the respondent set some conditions to be fulfilled by the applicant to wit she asked for the following, I quote;

i. **If there is going to be a new security/guards?**

ii. **Where I will be allocated in the office since I cannot be in the same office as before**

iii. **What will be my package (salary, insurance etc.)"**

The same was replied by the applicant in his email dated 20th February,2015, as seen under exhibit SF4. Same is reproduced for clarity.

Dear Shargia,

In reply to your email.

3. **New office**

You know well the configuration of our office, in which office you want to be shifted? Do you want to be alone in your office, or nearby your team? This exercise will not be easy as we do not have free space.

4) **Salary package**

I will keep my word given beginning 2014 about salary i D + vehicle.

5) **All cash transactions have been cancelled since the day of your accident.**

Thank you

Kind regards

Benoit Ducarme

Managing Director

On 25th March, 2015 the respondent replied the above email by inserting her comments in the applicant's reply as follows, the same was not responded by the applicant. It is party reproduced;

Dear Benoit

Please find below the comments to your emails received on 20th March, 2015;

...

1. Security guards;

Comment:

If we come to an agreement, then those askaris should not be present while I am working. This condition is non-negotiable.

3. <u>New office</u>

Coment:-

I would like to be in my own private office with my new title. If space is the issue, Joevic Pub next door to your office has an empty room and if you really plan to have me back, you will find a solution.

4.Salary package

Coment;

While I appreciate the office made at the beginning of 2014, before I was shot, this figure is no longer acceptable as compensation. This increase will not even cover my ongoing therapy costs. I attend three sessions per week at $50 a session. So far the cumulative costs from the 24th of July 2014 is +/- 21,000 USD with no contribution from Bati to date. The minimum package I will accept is 10,000 USD net salary under our old agreement, or 8,000 USD officially with the company paying 20% NSSF on the gross salary.

.....

Thank you

Kind regards

Shargia Feizi (Ms)

It is from records that the applicant complied with some of her conditions for her return to work including the issue of salary adjustment, only the issue of a separate office was not fulfilled. It was the CMA's finding that the applicant failed to provide the respondent with a new office as she requested hence made the respondent's working environment intolerable. Basing on the above evidence **<u>Exhibit SF4,</u>** communication between the parties, there is nowhere the respondent in her demand expressed how the old office was affecting her health as resulted from the

injury, she only stated that she only need a private office. I am of the view that the issue of stairs and other health complications resulted from the injury were not communicated to the applicant for him to have considered how he can accommodate the respondent depending on her situation.

Again it is undisputed that the applicant was evaluated by Dr. Muhina as per the **exhibit SF6**. That was the applicant's initiative to ensure the welfare of the respondent. **However, the respondent faulted the findings of the report verbally without any tangible evidence because the respondent is the one who was sick, she could be the one to produce her medical reports from her Doctor's who were attending her informing the applicant that she was unfit to resume her work but she neither did so**.

I must admit that the employer has taken considerations on her demands but the respondent was unaccommodated on her own reasons. The fact that the respondent was injured while executing her job and at the office premise, does not mean that the employer is subjected to any kind of conditions contrary to the employment agreement.

Basing on the above finding I totally differ with arbitrator on the sense that the respondent had a duty to prove that her absence after expiry of the leave, was caused by her unfit conditions to resume her work since nothing was tendered to prove contrary to Dr.Muhina's report. I

therefore find her absence was unlawful, hence the applicant had valid reason for terminating the respondent on absenteeism.

On the second issue, I have cautiously gone through the records and found that the Disciplinary hearing was conducted exparte as the respondent failed to enter appearance on the said date despite of being served with a notice (Exhibit SF8). It is apparent that the corum for that meeting was composed of three members including Mr. Benoit Durcame who is a Managing Director, who was also applicant's witness in that hearing in terms of Exhibit SF9 (the disciplinary hearing minutes). He also signed the termination letter of the respondent. In the minutes, there were no reasons for the recommendation of termination of the applicant and the same was not signed by the members of the committee.

It is my view, that in the disciplinary hearing there was no impartiality. The presence of Managing Director as a member of the hearing committee and also the witness of the applicant interferes with the principle of natural justice. Taking into consideration that Mr. Benoit in his title as a Managing Director of the Company, was the one who entitled to act on tne recommendations of the Chairperson of the committee which were resulted from the same Disciplinary hearing, he participated as a member and a witness therein. It is my opinion that fair hearing should not carry any doubt of unfairness, or biasness. There are various decision which restated the position of the case of **NBC Ltd Mwanza v Justa Kyaruzi** Rev. No 79/2009 which decided that the procedures for termination shall not be observed in a checklist fashion, but the act of the

Managing Director being a member of the Disciplinary Committee, applicant's witness and the one decided to terminate the applicant by signing the termination letter, who just gives recommendations that was contrary to principles of natural justice, hence it vitiated the whole proceedings. This was also the position in the case of **Onael Moses Mpeku Vs. National Bank of Commerce,** Rev.No.461/2019. Basing on that finding, I find no need to fault the arbitrator's finding that the procedure for termination of the respondent were unfair.

In regard to the reliefs of the parties, it is from records that CMA awarded the respondent compensation of 36 months' salary for unfair termination both substantively and procedurally, severance pay of three years and six months, and salary compensation from March 2014 to September 2015 and three months' notice as agreed in the employment contract.

Section 40 (1)*(c) of Cap 366 provides for compensation of not less than 12 months' salary compensation for unfair termination. It is true the arbitrator has mandate to award above the twelve months, however the same must be justified (reason to be recorded). The arbitrator awarded the same on the ground of the respondent's sufferings as a result of the injury. It is my view that the law is very clear that compensation is for unfair termination basis to wit substantively and procedurally unfairness. Therefore that relief is not provided for covering the outcome of the incidence as applied by arbitrator. Having said so, as it is also the finding of this court that termination was procedurally unfair, I quash and set aside

the arbitrator's order of 36 months' salary compensation and reduce the same to twelve (12) months' salary compensation for procedurally unfairness, to the tune she was receiving prior the adjustment made.

For severance pay since the procedural aspect was not fair, and the respondent was still the applicant's employee till termination, I find no need to fault the arbitrator's order in regard to severance pay. In regard to salary compensation it is unjustified that the applicant was working from home, there was no evidence to that effect therefore the order of salary compensation is hereby quashed and set aside. I uphold the arbitrator's order as to notice payment.

Basing on the above findings, the revision application is hereby partly allowed, to the extent shown.

It is so ordered.

Z.G.Muruke
JUDGE
31/08/2020

Judgment delivered in the presence of Airen Ruchaki for the applicant and Mohamed Nyenye holding brief of Blandina Kihampa for the respondent.

Z.G.Muruke
JUDGE
31/08/2020