IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 238 OF 2018

BETWEEN

JANETH DAVID MASHINGIA ..... APPLICANT

VERSUS

NATIONAL HOUSING CORPORATION ..... RESPONDENT

JUDGMENT

Date of Last Order: 26/05/2020

Date of Judgment: 05/06/2020

S.A.N. Wambura, J.

Dissatisfied with the award of the Commission for Mediation and Arbitration [herein after to be referred to as CMA] the applicant **JANETH DAVID MASHINGIA** has filed this application under the provisions of Sections 91(1)(a)(b), (2)(a)(b)(c), (4)(a)(b) and 94(1)(b)(i) of the Employment and Labour Relations Act No. 6 of 2004 as amended from time to time [herein to be referred to as ELRA], Rules 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d) and 28(1)(c)(d) and (2) of the Labour Court Rules, GN No. 106 of 2017 praying for Orders that:-

1. *This Honourable Court be pleased to revise and set aside the award of the Commission for Mediation and Arbitration (Alfred Massay) the Arbitrator in Labour Complaint No. CMA/DSM/ILA/209/12/299 dated 19th May, 2014 at Dar es Salaam.*
2. *Any other order that the Court may deem fit to grant.*

The application was supported by the sworn affidavit of the applicant.

Ndigwako Joel, a Principal Officer of the respondent **NATIONAL HOUSING CORPORATION** filed a counter affidavit challenging the application.

At the hearing the applicant was represented by Mr. Michal Kasungu Advocate whereas Ms. Regina Kiumba Advocate represented the respondent.

According to the grounds filed it was submitted by Mr. Kasungu Advocate that:-

(i). **As to whether the applicant was terminated while there was a criminal case.**

The Arbitrator failed to address the fact that the applicant had a criminal offence pending at the Police Station which is similar to the offence charged by the respondents that led to her termination. This was contrary to Section 37(5) of ELRA read together with Rule 27(5) of the ELRA Code of Good Practice GN 67/2007. That these provisions prohibit an employer from taking disciplinary measures on an employee charged of a criminal offence citing the case of **Mathias Petro Vs. Jandoo Construction and Plumbers**, Rev. No. 175/2014 Part 2 LCCD 2015 page 216/7. So the Hon. Arbitrator had misdirected himself in issuing an award in favour of the respondent.

(ii). **As to whether the rules of natural justice were adhered to.**

The respondent did not adhere to the same as no one can be a judge in his own cause. That the disciplinary committee's composition involved a number of officials who were involved in the report submitted by the applicant. Therefore it was very unlikely for the officials to afford a fair hearing to the applicant.

That during the hearing at CMA one Daniel Nkya DW1 testified to the effect that the meeting was attended by employees and Directors of the respondent.

It was his submission therefore that the applicant was not afforded a fair hearing during the disciplinary hearing.

(iii). **As for the Ground for termination.**

That the applicant was terminated for committing a misconduct. However there was no evidence or Police report proving the criminal liability to date. They relied on the applicants admission while she was threatened by both the Director General and Police Officers. It is unknown as to who wrote the email that led to her termination.

He thus prayed that the award of CMA be revised accordingly.

In response Ms. Kiumba Advocate for the respondent argued that:-

(i). They do not dispute that an employee cannot be terminated while there is a pending criminal case. However in respect of this matter, this ground is not applicable and the cited case is distinguishable. This is because there is no criminal case against the applicant on this subject matter pending in any Court in Tanzania. So this ground cannot be sustained for want of merit and proof.

(ii). As to the principles of natural justice not being adhered to. She submitted that the disciplinary committee was appropriately constituted according to the law and procedure. That the applicant admitted to the charges facing her and asked for forgiveness. She could have challenged the composition at the hearing as she was assisted by TAMICO leaders to do so. She cannot raise the same now. As all the rules and principles of natural justice were adhered to, she thus prayed that this ground is refused for want of proof.

(iii). As for the ground for termination which has been said to have not been proved, she submitted that the applicant admitted to the charges facing her as seen at page 8 of the award. That there was no threat nor was she forced by anyone to admit the same. Her representatives from TAMICO were also present. The applicant was thus afforded with the said right, so she cannot challenge the same now.

She thus prayed that the application be dismissed for want of merit and uphold CMA's award.

In rejoinder Mr. Kasungu submitted that:-

(i) It is not necessary that a criminal case is in a Court of law. Once the incidence is reported to the Police who begin to indulge in investigations, other proceedings should not take place. The applicant was arrested and was granted bail then escorted by Police from Mtwara to Dar es Salaam. So the Arbitrator had not considered this fact.

(ii) As for the letter of apology written by the applicant, there is no dispute in respect of that letter. But insisted that the admission was made under force and threat by the Director General. This was very legible as seen at page 4 of the award. That they were not handwriting experts to prove that she was not under duress. He thus prayed that the award of CMA be revised and set aside.

It is on record that the applicant was employed sometime in July, 2008 as an Estate Officer. She was terminated in March, 2012 after being found guilty of a misconduct of using insulting and abusive language against the respondents Director General and other employees as well as disclosing prejudicial information of the respondent's company to unauthorized persons. It is alleged that she pleaded guilty of the misconduct at the disciplinary hearing but she has refused alleging that she

was under duress as she was threatened by both the Director General and the Police Officers.

In resolving this matter I believe it is necessary for this Court to address the following issues:-

(i). Whether there was a pending matter reported at the Police Station.

(ii). Whether the respondent had a valid reason for terminating the applicant.

(iii). Whether the procedures for terminating the applicant were adhered to by the respondent.

(iv). Reliefs entitled to the parties.

1. Was there a pending matter at the Police Station?

It is on record there was a complaint filed at the Police for investigations but the applicant has not been charged in a Court of law. It is also on record that TAMICO leaders urged the Management not to pursue the criminal charges. So in as long as the respondent opted to take disciplinary measures instead it means the complaint at the Police had or has to be withdrawn. She can therefore not be charged of the said offence.

2. Did the respondent have a valid reason for terminating the applicant?

Termination is said to be fair if it complies to Section 37 of ELRA which provides 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."***
>
> *[Emphasis is mine].*

Article 4 of ILO Convention also 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].

In the case of **Tanzania Revenue Authority V. Andrew Mapunda**, Labour Rev. No. 104 of 2014 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 reasons and fair procedure. In other words there must be substantive fairness and procedural fairness of termination of employment, Section 37(2) of the Act.

(ii) 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."

The applicant was terminated for allegedly committing a misconduct, that is use of abusive language to the Director General, other Principal Officers as well as other employees.

Now under Rule 12 (3) (a) and (f) of ELRA (Code of Good Practice) GN 62/2007 a misconduct is a good ground for termination. It provides that:-

> *"Rule 12(3) The acts which may justify termination are-*
>
> *(a) gross dishonesty;*
>
> *(f) gross insubordination.*

This was so emphasized in the cases of **Saganga Mussa V. Institute of Social Work**, Lab. Div., DSM Consolidated Lab. Rev. No. 370 of 2013 and **Institute of Social Work V. Saganga Mussa**, Consolidated Labour Rev. No. 430 of 2013.

In the instant matter there is no doubt that the allegations against the applicant amounted to a misconduct. Therefore the respondent had a valid reason for terminating the applicant after finding her guilty of the misconduct.

3. Did the respondent adhere to the procedures in terminating the applicant?

The applicant has challenged that the same was unfair because;

(i). She was forced to write a letter of apology.

(ii). The composition of members the disciplinary committee was unfair constituted.

(i) Was the applicant threatened to write a letter of apology?

I will not labour much on this issue as it is not in dispute that it was the applicant who wrote the same. She is only claiming that she did so as she was threatened. Unfortunately in civil matters the Arbitrator could not hold a trial within trial to rule on the same. The Arbitrator only had to rely on the credibility of the witnesses.

It is on record that the applicant sought the assistance of TAMICO leaders who sought an audience with the Director General and she wrote the letters in their presence. They also negotiated to have the criminal charges dropped. Therefore in so long as the applicant admitted to have written the said apology letter, I take it that it was the applicant who wrote the same freely and it cannot be said it is unknown as to who wrote the abusive report.

There is no doubt that she may have been tired, sick and hungry but according to Exhibit D4A she has stated that she was not forced to do so. That nobody assisted her in doing so an evidenced in Exhibit D2. She could thus not claim to have been under duress.

(ii) Was the composition of members of the disciplinary committee fairly constituted?

It has been alleged that the disciplinary committee was improperly constituted as officials stated in the said report sat in the committee.

It is true that there are elements which tend to raise a number of questions in respect of the composition of the disciplinary committee and during the disciplinary hearing such as:-

(a) Why was the Committee not formulated at Mtwara so that the applicant would go to the Headquarters for appeal purposes?

(b) If some members were indicated in the abusive report why did they sit in the Disciplinary Committee?

(c) Was the Director General the Chair of the disciplinary hearing while he was the main victim and complaint of the charges against the applicant?

Though in the cases of **NBC Ltd Mwanza and Justa B. Kyaruzi,** Rev. No. 79 of 2009 and **Bernard Gindo & 28 Others Vs. TOL Gases Ltd**, Rev. No. 18 of 2012 it was held that the procedures in terminating the employees not need to be adhered to on a checklist fashion, I believe that the sitting of the officials who were mentioned in the report (if any) leading

to the applicants charge of misconduct at the disciplinary hearing vitiated the procedure in terminating the applicant. This is because one cannot be a judge of his own cause. Unfortunately the titles of the members of the disciplinary hearing are unknown. So claims by the applicant can be true and justice must not only be done but must be seen to have been done.

4. What are the reliefs entitled to the parties?

Having found that there was a valid reason for terminating the applicant but the procedures in doing so were vitiated, I herein quash the award of CMA and grant the applicant six (6) months' salary as compensation. It should be the last salary which she was receiving before being terminated. I note that she ought to have been paid her other terminal benefits. The same should be so paid if it has not been done.

S.A.N. Wambura
JUDGE
05/06/2019

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VERSUS

NATIONAL HOUSING CORPORATION ..... RESPONDENT

Date: 05/06/2020

Coram: Hon. S.R. Ding'ohi, Deputy Registrar

Applicant:

For Applicant: Mr. Michael Kasungu Advocate

Respondent:

For Respondent: Mr. Fredrick Massawe Advocate

CC: Lwiza

COURT: Judgment delivered this 05th day of June, 2020.

S.R. Ding'ohi
DEPUTY REGISTRAR
05/06/2020