**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION NO. 625 OF 2018**

**BETWEEN**

**MARTIN KENANI KAPOLESYA & ANOTHER ..... APPLICANTS**

**VERSUS**

**SBC (T) LIMITED ..... RESPONDENT**

**JUDGMENT**

*Date of Last Order: 11/05/2020*

*Date of Judgment: 12/06/2020*

**S.A.N. Wambura, J.**

Aggrieved by the award of the Commission for Mediation and Arbitration [herein after to be referred to as CMA] which was delivered on 10/09/2018, the applicants **MARTIN KENANI KAPOLESYA & ANOTHER** have filed this application under the provisions of Rules 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d) and 28(1)(c)(d)(e) of the Labour Court Rules GN No. 106 of 2007 and Sections 91(1)(a)(b), (2)(a)(b)(c) and 94(1)(b)(i) of the Employment and Labour Relations Act No. 6 of 2004 [herein referred to as ELRA] praying for the Orders that:-

*(i). That, this Honourable Court be pleased to call for and examine the proceedings and the subsequent award of the Commission for Mediation and Arbitration at Dar es Salaam in Labour Dispute No. CMA/DSM/ILA/R.594/13/817 dated 10th day of September, 2018 for appropriateness of the said decision and the award issued therein.*

*(ii). That, the Honourable Court be pleased to revise and set aside the said decision as a result of discrimination and oppressive on part of the applicants and further declare that the applicants herein was unfairly terminated from their employment.*

*(iii). That, this Honourable Court be pleased to clarify on the payment of the applicants be reinstated with all employment rights or remuneration and other benefits from the date of unfair termination to the date of reinstatement or to the final payments and compensation of unfair termination.*

The application was supported by their joint sworn affidavit.

The respondent **SBC (T) LIMITED** through their Principal Officer Patric David swore a counter affidavit challenging the application.

With leave of this Court the application was disposed of by way of written submissions. I thank both parties for their submissions which were filed as scheduled.

The brief facts of this matter are that the applicants were both employees of the respondents whereas the 2nd applicant was employed in 2003 the 1st applicant was employed in 2008. Both were at Managerial positions. In 2013 they were both terminated on allegation of forging medication receipts. It was also alleged they caused a loss of Tshs. 32,000,000/= which they could have foreseen.

They were thus charged, heard and found guilty by the disciplinary committee and therefore terminated.

Dissatisfied, the lodged a labour dispute at CMA. However CMA found in favour of the respondent. Aggrieved the applicants have now filed this application on the following grounds:-

*(i). That the Arbitrator erred in law and fact for failing to properly evaluate the evidence adduced by the parties.*

*(ii). The Arbitrator erred in law and fact for failing to consider evidence adduced by the parties.*

*(iii). That the Arbitrator erred in law and facts for reaching to an award which is not supported by the evidence adduced during the arbitration.*

*(iv). That the Arbitrator erred in law and fact reaching to a conclusion and did not awarding on reinstatement which have no legal basis or foundation.*

*(v). That the Arbitrator erred in law and fact for failing to realize the lies presented by the applicants.*

*(vi). That the Arbitrator erred in law and fact by failing to summarize, evaluate and record the key issues presented by the parties.*

*(vii). That the Arbitrator erred in law and facts for not giving reasons for this decision as required by the law and the respondent's regulations.*

*(viii). That the Arbitrator erred in law and facts for issuing an award which is incompetent and incapable of determining rights of the applicants.*

They raised the following legal issues:-

That no investigation was conducted in this matter and the Arbitrator has not faulted the respondent for such unfair procedure. They submitted that the respondent was duty bound to make through investigations as per Rule 13(1) and (5) of the Code od Good Practice GN No. 42 of 2007 of the ELRA so as to be able to ascertain whether there was a reason for termination or that the offence was so grave as to warrant termination.

That the Arbitrator erred as he wrongly interpreted Rule 13(8) of the Code of Good Practice GN 42 of 2007 of ELRA. The Arbitrator failed to state that by the applicants signing the disciplinary hearing form it did not mean that the applicants admitted the allegations against them. Therefore the Arbitrator contravened Section 37(2) and Section 41(3) of the Employment and Labour Relations Act No. 6 of 2004 and Rule 13 of the Code of Good Practice GN 42 of 2007 in holding that termination of the applicants was lawful thus fair termination.

That the Arbitrator erred as he interpreted wrongly Rule 12(2) of the Code of Good Practice GN 42 of 2007 of ELRA No. 6 of 2004. That the applicants had no former warnings. Therefore the Arbitrator contravened Section 37(2)(a)(b) and (c) of ELRA and Labour Relations Act No. 6 of 2004.

They submitted that the Arbitrator failed to consider that the applicants could just be warned to correct the negligence as provided for under Rules 11 and 12 of the Code of Good Practice GN 42 of 2007, citing Revision No. 346 of 2013 between **Twiga Bancorp (T) Ltd and David Kanyika** to that effect.

That the Arbitrator misdirected himself to admit "Exh B8" which does not show who prepared it and has no name and signature of the person who prepared the documents. There was no legal authority to prove that the applicants forged the said documents.

That the Arbitrator failed to note that the applicants had the right to work and the said right is a constitutional one as provided under Article 22 of the Constitution of the United Republic of Tanzania, Article 4 of ILO Convention on Termination of Employment and Article 23 of the Universal Declaration of Human Rights 1948. The applicants submitted that the importance of protection of the right to work, under the labour parlance and practice, is so much advocated. That termination of an employee must be substantively fair, with fair and valid reasons.

That the applicants in this dispute had not committed any offence during the period of the employment with their employer in regard to the said disciplinary measure. Citing Revision No. 213 of 2014 between **Stamili M. Emmanuel Vs. Omega Nitro (T) Ltd** and Revision No. 70 of 2009 at DSM between **Bidco Oil and Soap Ltd Vs. Robert Matonya & 2 Others** to that effect.

They have thus prayed that this application for revision and orders sought be granted.

The respondents in return submitted that:-

That the investigation report was lawfully admitted in evidence and marked Exhibit D8. The applicants did not object to its admissibility. In particular, the respondent suspended the applicants by way of letters admitted in evidence as Exhibits D1 collectively. Once investigations were complete, the applicants were issued with letters inviting them to the disciplinary committee hearing (Exhibit D2). This is sufficient proof on the balance of probability that indeed the employer undertook investigations as required by law and further produced investigations report that was produced in evidence before CMA. That the question regarding submission

of investigation report was not averred in the affidavit. It is thus an afterthought which has been raised by the applicants' legal representative through the written submissions. It is improper to raise a new ground of revision at the stage of written submissions.

That the applicants did not identify any material piece of evidence which the Arbitrator disregarded and which had the potential of changing the decision as captured in the award. Thus, it is not possible to tell which material piece of evidence the Arbitrator ignored as alleged.

That the applicants did not give the particulars of hearsay evidence which the Arbitrator allegedly gave weight to. It is further not clear if during hearing, the applicants raised any objection to the admissibility of such hearsay evidence. They submitted that no objection was raised against admissibility of any hearsay evidence and that no hearsay evidence was adduced at CMA as alleged by the applicants.

That first, it is clear that both applicants signed the disciplinary hearing forms on 03rd August, 2013. Thus, they admitted the allegations of forgery of medical reimbursement claims and negligence leading to loss of

PET soda stock. Thus, the applicants are estopped from disowning their admissions now.

Secondly, the 1st applicant expressly admitted loss of PET soda stock under his managerial supervision. He further admitted to signing fraudulent requisition claim forms for reimbursement of medical costs.

In equal measure, the 2nd applicant as well had admitted PET soda stock losses and approving fraudulent claims for reimbursement of medical costs to staff.

Thus, both applicants clearly and unequivocally admitted committing offences for which they were charged.

That the disciplinary committee found the applicants guilty; and recommended for the termination of their employment contracts.

That the letters of termination were issued on 10th August, 2013. However, the applicants declined to pick their respective letters. Thus, they were only able to receive them during CMA's proceedings.

That given the gravity of the offences committed, the employer lost PET soda stock worth Tshs. 32,000,000/= due to negligence of the

applicants. More funds were lost by reason of fraudulent claims for reimbursement of medical costs. Both applicants were Managers and their positions were critical in the business of the respondent. Given the seriousness of the offences committed, it was submitted that termination was the most appropriate penalty.

It was further submitted that Section 99 of ELRA and Rule 13(4) of the Code of Good Practice Rules, 2007 were not violated as alleged by the applicants. The letters inviting the applicants to appear at the disciplinary committee hearing dated 25th July, 2013 were signed by Dominica Mallya, Acting Human Resource Manager. Nonetheless, termination letters were signed by the Human Resources Manager Ireneus Mushongi. The applicants were terminated due to gross misconduct and failure to handle their roles and responsibilities.

That the circumstances leading to the dispute arose in Yard and Store Department in which the 1st applicant was the Yard and Stores Manager while the 2nd applicant was the Shift Manager in Yard and Stores Department.

The disciplinary committee did not consist of any Officer from Yard and Stores Department. The committee was largely constituted by Officers from Human Resource Department and they were not involved in the circumstances giving rise to the dispute.

As a result, the committee was properly constituted within the meaning of Rule 13(4) of the Employment Code of Good Practice Rules, GN No. 42 of 2007.

It was further submitted that at the termination of employment, the applicants were paid their terminal benefits as required by law. In particular, the applicants were paid accrued salaries up to 10th August, 2013 and notice pay. That neither of the applicants had any outstanding annual leave at the material time. As a result, annual leave allowance was not payable. In addition, severance pay was not payable to the applicants by reason that they had been fairly terminated from employment. In particular, an employee whose contract of employment has been fairly terminated shall not be entitled to severance pay in terms of Rule 26(2)(b) of the Employment Code of Good Practice Rules, GN No. 42 of 2007. That the claim for severance pay was legally baseless.

They thus prayed for the application to be dismissed for lack of merit.

I believe I have to resolve the following issues:-

**(i). Whether the respondents had a valid reason in terminating the applicants' employment.**

**(ii). Whether the respondents adhered to the procedures in terminating the applicants.**

**(iii). The reliefs entitled to the parties?**

**1. Did the respondent have a valid reason for terminating the applicants' employment?**

As submitted by the applicants, it is an established principle that for termination of employment to be considered to be fair it should be based on valid reasons and fair procedure. This is provided for under Section 37 of ELRA which states thus:-

> *"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 intention of the Legislature was to ensure that employers terminate their employees basing on valid reasons and not upon their will or whims. This is emphasized in Article 4 of the ILO Convention 158 of 1982 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].*

Employers are thus required to examine the concept of unfair termination on the basis of the employee's conduct, capacity, compatibility

and or operation requirements prior to terminating the employment of their employees.

In the cases of **Twiga Bancorp (T) Ltd V. David Kanyika** (supra) and **Lulu A. Wamunza V. National Bank of Commerce**, Lab, Div., DSM, Rev. No. 458 of 2017, the Court held that there was a fair termination. However in the cases of **Afritea Coffee Blenders [1963] Ltd V. Cosmas Swai and James Mollel**, Lab. Div., Rev. No. 58 of 2013 and **Akiba Commercial Bank Ltd V. Flora Massawe**, Lab. Div., DSM, Rev. No. 359 of 2013, it was held that there was unfair termination for want of a valid reason or non-compliance to the procedures in terminating the employees.

In the matter at hand the applicants were suspended as per Exhibit D1 then charged of gross misconducts as evidenced in Exhibit D4 that:-

" *1. **Being Responsible for the reporting missing PET stock** of about 5500 cartons between April and May where it was revealed that by virtue of their positions **they made un-authorized endorsement of PET load outs** without your subordinates consent. This included documents endorsement of*

*the job done by both RGB and PET store keepers. There is of proof that their signatures justified the job done by both Store Keepers when the consignment involves RGB & PET load out.*

2. ***Huge amount of stock being declared daily as Breakages, missing and drinkages****. This has been proved by the forged signatures of forklift operators allocating them with the same numbers. This implies poor control of breakages which has resulted into the daily company loss of about 125 cases per day estimated to cost of One (1) million shillings a day.*
3. *a)* ***Forgery of Medical Reimbursement****: this has been proved beyond reasonable doubt that the "prescription" and "receipts" are forged; which is great violation of company policy.*

   *b)* ***Endorsing Medical Reimbursement*** *of your subordinates which has same document as yours."*

   *[Emphasis is mine].*

This was after they filed their responses as per Exhibit D3. According to Exhibit D5 the 1st applicant pleaded guilty of forging staff medical

refunds and for endorsing the same for his subordinates as he believed all was well. It was found that he was negligent in handling operational matters by trusting his junior staff and transporters to handle the same and lack of close follow up. He was thus terminated.

The 2nd applicant pleaded guilty to issuing false information in the medical report documents and failure to control breakages but refused to have anything to do with PET issues. It was found that he was negligent in executing his daily stock and did not make follow-ups of his subordinate staff as well.

He was also terminated for failure to honour his position and forgery allegations.

All applicants signed on the disciplinary hearing forms dated 03/08/2013. However they have alleged that they signed the same not because they admitted the charges but it was to accept receiving the same. As stated by the respondents, the signatures were a confirmation on what took place at the disciplinary hearing. The applicants were Senior Officers so there is no doubt that they knew and understood what they were signing and it cannot be said to be ignorance. Since they admitted

committing the offence, the respondent cannot be faulted in stating that they had valid reasons for terminating the applicants. I therefore uphold CMA's findings.

**2. Did the respondent adhere to the procedures in terminating the same?**

Applicants have challenged the procedures saying they were unfair as they had even not been served their letters of termination. If that is true it means that they had prematurely filed the same at CMA. But the same was stated at the disciplinary hearing forms and were paid their terminal benefits.

It is also on record that the applicants were advised to file their appeals to the CEO within five (5) working days or file a complaint at CMA. I would say that the respondents complied with all the procedures and even granted leave to the respondents to appeal to the CEO. The appeal was however found not to have merit. They thus filed a complaint at CMA.

As for the unserved letters of termination, it is on record that they had to handover all office equipments in their possessions but they filed a complaint before doing so. The respondent can therefore not be faulted on

the procedure for due to this. More so because they were aware of the termination on the very day they attended the disciplinary hearing. I thus hold that the procedures in terminating the applicants were adhered to accordingly and cannot be faulted.

**3. What are the reliefs entitled to the parties?**

Having found as CMA did that the termination of the applicants was both substantively and procedurally fair, then I believe the applicants cannot be reinstated as prayed. They are only entitled to their terminal benefits if they had not been paid. I thus uphold CMA's award and dismiss the application for want of merit.

S.A.N. Wambura
**JUDGE**
12/06/2020

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**VERSUS**

**SBC (T) LIMITED ..... RESPONDENT**

**Date: 12/06/2020**

Coram: Hon. F.A. Mtarania, Deputy Registrar

Applicants: } Absent

For Applicants: }

Respondent:

For Respondent: Mr. Nsajigwa Bukuku Advocate

CC: Tabitha

**COURT**: Judgment delivered today in presence of Mr. Nsajigwa Bukuku Advocate for the Respondent and absence of the Applicants.

F.A. Mtarania

**DEPUTY REGISTRAR**

12/06/2020