IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO.473 OF 2019

BETWEEN

BOLLORE AFRICA LOGISTICS TANZANIA LTD..... APPLICANT

VERSUS

MAGRETH LUTHER SHUMBI..... ..... RESPONDENT

JUDGMENT

Date of Last Order: 20/11/2020
Date of Judgment: 30/11/2020

Z. G. Muruke, J.

BOLLORE AFRICA LOGISTICS TANZANIA LTD the applicant, being aggrieved by the decision of the Commission of Mediation and Arbitration [herein to be referred as CMA] in the Labour Dispute No. CMA/DSM/KIN/R.281/16 dated 10th September, 2018 which was in favour of the respondent, filed this application seeking for the following orders:

i. That this Honorable court be pleased to revise, quash and reverse the ruling of the CMA at Kinondoni dated 10th September, 2018 delivered by Hon. Mwaikambo K.V Mediator in labour Dispute No. CMA/DSM/KIN/R.281/16

ii. Any other orders that this court may deem just and fit to grant.

The application is supported by the affidavit sworn by the applicant's Legal Manager, Angeline Kavishe Mtulia. Challenging the application, the respondent filed her counter affidavit.

The brief facts of the case are that; on 5th February, 2016 the respondent was employed by the applicant as a Customer Service Officer. The respondent worked with the applicant until 3rd March, 2016 when she was terminated on ground of misconducts of gross negligence and dishonesty. It was alleged that while performing her duties the respondent had been giving privileged information to external party without prior approval or knowledge of her manager, she also asked the invoices of Maersk to be amended by Safmarine employees, while knowing that the free period indicated on the invoice was correct.

Aggrieved with the termination, the respondent referred the matter to CMA, where there decision was on her favour, that she was unfairly terminated. Being resentful with the decision the applicant filed the present application seeking revision of the award on the following grounds:

i. Whether or not the CMA has jurisdiction to determine the rights and obligations of the parties under a collective /voluntary agreement.
ii. Whether or not the reason(s) for termination of the respondent can be said to be invalid and unfair since no state authorities were involved in the investigation process.
iii. Whether or not the respondent's right to be heard was infringed for the reason that she voluntarily chose to exercise such right by way documentary.

Both parties were represented by the learned counsels. Mr. Emanuel Joachim Msengezi represented the applicant, while the respondent was

served by Mr. Odhiambo Kobas. With leave of the court, the application was disposed of by way of written submissions. I appreciate both parties for complying with the scheduled hence this judgment.

Submitting in support of the application, on the 1st ground the applicant's counsel submitted that CMA had no jurisdiction to determine the matter raised in the Voluntary agreements after failure of mediation, referring Section 74(a), (b) of Employment and Labour Relations Act, Cap 366 RE 2019. That, in the award the arbitrator raised the issues of Voluntary Agreement and confirmed them by granting reliefs as per the same. Learned counsel further submitted that, the respondent referred the complaint of unfair termination and not implementation of the Voluntary Agreement. Therefore CMA could not grant the reliefs which were not prayed in the CMA F.1.

On the 2nd ground, Mr.Msengezi contended that, the respondent was afforded with a right to be heard and produced evidence as testified by DW1. That during Disciplinary hearing the applicant was represented by two members of a trade union as reflected under the attendance register of the Disciplinary hearing.

In regard to the 3rd ground, the applicant's counsel submitted that, the arbitrator misdirected himself into finding that there was no any investigation which was conducted by the applicant only because the same was not conducted by the other authorities competent on investigation contrary to Rule 13(1) of Employment and Labour Relations (Code of Good Practice), GN42/2007 (GN.42/2007) which requires investigation to be conducted by the employer.

It was further submitted by learned counsel that, the reasons for terminating the respondent was gross negligence and lack of trust which are purely civil in nature hence, only requires the proof on balance of probability. DW2 testified that he had conducted investigation and tendered exhibit D12 to -D17 which were not considered by the arbitrator, citing the case of **NIC v Sekulu Construction Co. (**1986) TLR 157. He therefore prayed for the application be allowed.

In reply on the 1st ground the respondent's counsel averred that, the nature of dispute before CMA, is on unfair termination which falls under their jurisdiction and not concerning application, interpretation and implementation of the Voluntary agreement. That the provision of Section 74 of the Cap.366 RE 2019, can only be invoked when there is a dispute concerning the application, interpretation and implementation of a collective agreement. Further learned counsel submitted that, the arbitrator was correct to award the respondent with the reliefs which were already agreed by the parties in their collective agreement.

In regard to the 2nd ground, Mr. Odhiambo submitted that the arbitrator was correct into his finding that, the applicant ought to have conducted investigation by involving other investigation authorities taking note of nature of the allegations. That the allegations involves the issue of embezzlement which emanated from the said forged receipt, electronic evidence and cybercrime for deleting entries into the computerized system.

Respondent's counsel further argued that the applicant as the respondent's employer, have not conducted any investigation concerning the allegations contrary to Rule 13 (1) of GN.42/2007. DW2 who is not the

applicant's employee conducted investigation on affairs of his employer Nyota Tanzania Limited who is the applicant's client. That the applicant's failure to conduct investigation amounts to unfair termination, referring the case of **Tanzania Revenue Authority v Andrew Mapunda**, Rev. No.104/2014 (unreported)

Moreover, it was submitted by the respondent's counsel that DW2's evidence did not implicate the respondent on theft or misappropriation, the same was done by the Nyota employees. There is no proof that the respondent's emails facilitated the embezzlement, the respondent was not the one who generated the invoices, issued the receipt, and she had no any access to Nyota Tanzania's computerized system. Learned counsel further argued that the emails were sent in ordinary course of performing her work. The information she provided through email was not privileged information and was given in good faith. Therefore the applicant had failed to prove the existence of a valid reason of terminating the respondent.

Regarding the 3rd ground, it was the respondent's counsel contention that, the applicant denied the respondent with a right to be heard in a disciplinary meeting. That the respondent and her representatives were not given a chance to cross examine the applicant's witnesses contrary to Rule 13 (5) of GN.42/2007 and the same is reflected in exhibit A7 the hearing form. That the respondent was not given a chance to state her case than replying to the questions raised by the Chairperson and the applicant's exhibits were admitted without being examined by the respondent. The respondent's counsel finalized his submissions by praying for dismissal of the application for want of merit.

In rejoinder, the applicant's counsel reiterated their submission in chief. Further it was submitted that the case of **Tanzania Revenue Authority v Andrew Mapunda** (supra) cited by the applicant is distinguishable from the circumstances of this case, since all the information were gathered and investigation established a case to answer as per exhibits D11-D17. Learned Counsel insisted the prayers in submission in chief.

After careful consideration of the parties submissions, records and the relevant laws, here are the issues for determination;

i. **Whether the applicant had valid reason for termination**

ii. **Whether the procedure for termination were adhered**

iii. **To what relief parties are entitled to.**

Before addressing the stated issues, I must briefly state that CMA had jurisdiction to entertain the matter at hand, since it was for determination of fairness of termination of the respondent and not interpretation of the Voluntary Agreement. I concur with the respondent's counsel arguments in regard to the same and even the applicant's counsel is aware of the same. What the arbitrator did in his award, was to insist the entitlement of the respondent which were agreed by the parties in their Voluntary Agreement (exhibit C4).

With regard to the first issue, whether the applicant had valid reason for termination, it is a principle of law that employers should only terminate employees basing on fair and valid reasons.

The concept of a valid reason is elaborated under Section 37 (2) of the Act, which provides:-

> "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."

This court in the case of **National Microfinance Bank V. Japhet Machumu,** Rev. No. 710/2018 (unreported) stated 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..."

Also in the case of **Tanzania Revenue Authority V. Andrew Mapunda**, Labour Rev. No. 104 of 2014,Aboud, J 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.
>
> (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."

In the matter at hand, the applicant the applicant was charged with the offence of gross negligence resulting to the client's loss of property and dishonesty contrary to clause 9.2.1 of the Bollore Disciplinary code.

I find it worth to understand first what gross negligence means. Rweyemamu J (as she then was) in the case of **Twiga Bancorp(T) Ltd V David Kanyika Labour Revision No. 346**/2013 DSM Registry, defined Gross negligence to mean: **A serious carelessness, a person is gross negligent if he falls far below the ordinary standard of care that one can expect. It differs from ordinary negligence in terms of degree".**

The general principles of law on negligence, liability arises where:-

i. There is a duty of care, and a person breaches that duty as result of which the other person suffers loss or injury.
ii. A person acts negligently, when he fails to exercise that degree of care which a reasonable man /person of ordinary prudence would exercise under the same circumstances.
iii. Negligence is opposite of being careful or diligence.

For the offence of gross negligence to stand the elements identified (supra) must be proved by the one who alleges. In the matter at hand the applicant charged the respondent with the offence of gross negligence, however after carefully perusal of the records and submissions I did not came across the evidence showing how did the respondent acted negligently, what duty of care has been breached taking into consideration that the information were shared to the employees who deal with both companies Saf marine and Maersk, what kind of loss has been faced by

the said clients and how did the respondent. Under the circumstances as the respondent was performing her daily basis activities, it is hard to establish the evil intention of the other side. In that regard I find the applicant has failed to prove the offence of negligence against the respondent.

Regarding the issue of dishonesty it was alleged that the respondent in performing her duties, shared some client's privileged information with the third party and the same was done without informing or copying her manager and the other senior personnel on the other part. The shared information were misused by the client's employees and as a result there was misappropriation of the client's funds. The respondent does not dispute the issue of sharing the said invoices to Charles Stephen and William Massawe but she stated, it was in good faith and the same were sent in course of her daily work performance. On the issue of copying her manager she contended that there is no guideline which requires her to do so.

This court is of the view that, it is not necessary for the directive of copying an email to your head of department to be expressed in a job description or expressly to be provided in a written form. In the networking business the issue of copying emails is very crucial to ensure transparency on the daily performed activities. I have cautiously gone through those emails (Exhibit D4) and found that, the same do not carry information on what the respondent needed to to be clarified or any concern to be taken care by the other part. She just sent the attachments to the said personnel's without copying her supervisor as it was done by her other

fellows on their daily activities. For instance the issue of amending the grace period as per email dated 5th February, 2015 the invoice were sent to Stephen Charles and were copied to William Massawe while the applicant was processing the payment. The same was done without copying or notifying her supervisor, even if there was no any regulation requiring her to copy them for the issue which goes to the business interest, was supposed to be addressed in a transparent manner. I have also noted through the same Exhibit (D4 collectively) it was a normal practice of their daily work transactions, where emails were copied to the other team from the applicant and the client's side.On that basis this court finds that, the offence of dishonest has been established bearing in mind the standard of proof is on balance of probability. As it was stated in the case of **G4 Security (T) Ltd v Peter Mwakipesile**, Rev. No.68/2013 LCCD 2014 that, the offence of dishonesty is a misconduct which is very severe enough to justify termination. I thus fault the arbitrator's finding that the applicant had no valid reason for termination.

Regarding the 2nd issue, 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 Cap 366 R.E 2019. The procedures for termination are provided under Rule 13 of GN 42/2007 as which amongst others it requires investigation to be carried out, employee to be informed of the allegations, to be given reasonable time to prepare for defense, the employee to be given an opportunity to respond to the allegations, questions and to call witness if any etc.

In the present matter, the respondent alleged that she was not afforded with a right to be heard as she was not given a chance to state her case and even to cross examine the applicant's witnesses and the documentary evidence. I have cautiously gone through the Disciplinary hearing form (Exhibit A7) and found that after the applicant had stated their case, then the Committee started to examine them and thereafter followed the recommendations. There minutes does not reflect at what time the respondent was given a chance to defend herself at the disciplinary hearing even to cross examine the applicant and their exhibits tendered during hearing.

On that aspect this court join hands with the arbitrator's finding and the respondent's counsel that there was no fair hearing. The right to be heard is so fundamental and once the same is not given sufficiently then the result is injustice. The fact that the applicant was questioned by the chairman of the disciplinary committee, does not mean that the respondent defended herself as it is apparent from the records that, she was not rendered with a chance to do so and that was contrary to Rule 13(5) of GN.42/2007

In the case of **NBC Ltd Mwanza v. Justa B. Kiyaruzi** Revision No. 79/2009at Mwanza, (Unreported) it was held that;

> "Ingredients of fair hearing are the right to be made aware of the charge, and given reasonable time to prepare **and be heard in defense; an opportunity to cross examine employers witness (the accusers) and in the context of the act,** the right to be assisted at the hearing by a union representative or a friend what is important is not an application of the code in the checklist fashion,

rather to ensure the process used to adhere to basics of fair hearing in the Labour Content depending on the circumstances of the parties, so as to ensure the act to terminate is not reached arbitrarily"
[Emphasis added]

Also in the case **of National Microfinance Bank V Rose Laizer**, Labour Rev. No. 167/2013 at Arusha, Rweyemamu J (as she then was) held that:

> **"Failure to afford an employee a right to properly defend the charge is a fundamental procedural irregularity."**

Concerning investigation, it was the arbitrators finding that the applicant ought to have involved the investigation authorities because of the criminal nature of the offences. I am on a different view because what transpired on the applicant's company was never disputed by the respondent herself. The issue of embezzlement was done on the client's side. And the same was done by their employees. Therefore there was no need of the applicant to invite the investigation authorities taking into consideration the charge posed against the respondent. In view of the above I find that the respondent was not afforded with a fair hearing, hence I uphold the arbitrator's finding on the procedure for termination.

In regard to the 3rd issue, the respondent in her CMA F1 prayed for compensation of 6 years' salary to a tune of Tshs.82,695,600/= for being unfairly terminated. The arbitrator ordered reinstatement without loss of remuneration or payment of salary from the date she was terminated to the date of payment, compensation of 12 months' salary Tshs.13,782,000/=, severance pay Tshs.1,855,269.23/= and other benefits

as per voluntary agreement between the parties. This court having found that the respondent was substantively fairly terminated, quash and set aside the arbitrator's order in regard to the reliefs. For termination being procedurally unfair this court orders the applicant to pay the applicant six (6) months' salary compensation to a tune she was receiving on her termination date. Also the respondent be paid her other statutory if any.

On basis of the above finding the application is allowed to that extent. It is so ordered.

Z.G.Muruke

JUDGE

30/11/2020

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BOLLORE AFRICA LOGISTRICS TANZANIA LTD. ..... APPLICANT

VERSUS

MAGRETH LUTHER SHUMBI ..... RESPONDENT

Date: 30/11/2020

Coram: Hon. S.R. Ding'ohi, DR.

Applicant:
For Applicant: Ms. Zubeda Mushi, Advocate

Respondent:
For Respondent: Ms. Zubeda Mushi for Advocate Odhiambo Kobasi.

CC: Halima

Court: Judgment delivered this 30th day of November, 2020.

S.R. Ding'ohi
DEPUTY REGISTRAR
30/11/2020