IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

CONSOLIDATED REVISION NO. 903 OF 2019

BETWEEN

U.T.T. PROJECT & INFRASTRUCTURE DEVELOPMENT PLC..APPLICANT

AND

YUSUPH NASSOR...RESPONDENT

JUDGMENT

Date of Last Order: 01/10/2020

Date of Judgment: 27/11/2020

A. E. MWIPOPO, J.

The applicant namely U.T.T. Project and Infrastructure Development has filed the present application against the decision of the Commission for Mediation and Arbitration at Dar Es Salaam in Labour Dispute No. CMA/DSM/ILA/R.458/487 dated 10th December, 2018. The Applicant is praying for the following orders:-

1. That this Court be pleased to call from and examine the legality, correctness and proprietress of the Arbitral award issued by the Commission for Mediation and Arbitration at Ilala on 10th December,

2018 by Hon. William, R., Mediator in Labour Dispute No. CMA/DSM/ILA/R.458/487 on the ground that the award was unlawful and illogical because the Mediator/ Arbitrator acted illegally for failure to correctly interpret law and evaluate the evidence tendered before him and finally he erroneously ruled that the Respondent was unlawfully terminated.

2. That this Court be pleased to examine and revise the Arbitral award by the Commission for Mediation and Arbitration that the Respondent's being Public Servant's under Public Service Act, Cap. 298 R.E. 2002 read together with its Rules G.N. No. 168 of 2003.
3. That the Court be pleased to make any other order(s) as may deem fit.

That the Applicant's legal issues arising out of the Commission award are as follows:-

a. Whether there were valid and fair reasons for terminating the Complainant's employment.
b. Whether fair procedures were followed in terminating the Complainant's employment.
c. Whether the matter was properly before the Commission for Mediation and Arbitration.

d. Whether the Respondent was condemned unheard in circumstances of this case and the law applicable.

e. Whether the CMA properly and legally assessed the evidence tendered before it.

The brief background of the dispute is that the Respondent namely Yusuph Nassor was employed by the Applicant on 15th October, 2013 in the position of Principal Finance Officer. The Applicant terminated Respondent from employment for misconduct on 31st May, 2016. The Respondent was aggrieved by Applicant's decision and he referred the dispute to the CMA which delivered its award in Respondent's favour on 10th December, 2018. The Applicant was not satisfied with the Commission award and filed the present application for revision.

In this application both parties were represented, Ms. Nalindwa Sekimanga, State Attorney, appeared for the Applicant, whereas the Respondent was represented by Mr. Godfrey Tesha, Advocate. The hearing of the application proceeded by way of written submission following the Court's order.

The Applicant's Counsel submitted jointly on all legal issues. She argued that the disciplinary actions against employees employed by the Applicant is governed by UTTPID Staff Regulations of 2014. Regulation 7.1 (ii) provides

that the appeal against the decision of the Chief Executive Officer to be made to Board of Directors. The Regulations provides further in Regulation 7.10(i) that an employee aggrieved by the decision imposed by the Chief Executive Officer in formal disciplinary proceedings may appeal to the Board of Directors in writing with copy to the Chief Executive Officer stating the grounds of the appeal. The Respondent herein after termination from employment did not appeal to the Board of Director and decided to refer the dispute to the CMA. It is trite law that where there is specific law governing or providing from specific procedure to be followed in dealing with a particular matter then that procedure must be followed. Thus, the CMA had no jurisdiction to entertain the matter as the Respondent has not exhausted the remedy available under the specific law. In support of the position the Applicant cited case of **Medical Stores Department vs. Amini Mapunda**, Revision No. 183 of 2013, High Court Labour Division at Dar Es Salaam, (unreported) ; **Gideon Mwendwa vs. DED Njombe District Council and 3 Others,** Labour Dispute No. 44 of 2009, High Court Labour Division, at Dar Es Salaam, (Unreported); and **Rev. Jonathan M. Mwamboza vs. Bishop Dr. Stephen Munga and Another**, Labour Dispute No. 1 of 2011, High Court Labour Division, at Dar Es Salaam, (Unreported).

The Applicant submitted further that the Arbitrator failed to assess the evidence tendered before the Commission. The Arbitrator disregard the

evidence tendered when determining the matter. In support of the allegation the Applicant cited cases of **Coca Cola Kwanza Limited vs. Paul Kingazi**, Revision No. 5 of 2019, High Court Labour Division, at Mbeya, (unreported); and **Jeremiah Shemweta vs. Republic, [1985] TLR 228**. The Respondent was fairly terminated for misconduct as it was proved as the record shows. The Respondent knew the charge he was facing and he responded that the charges were not true.

Further, the Applicant averred that the Respondent was not cooperative during disciplinary hearing where he failed to appear despite being called several times which led to hearing to proceed in exparte. To support the position, the Applicant cited the case of **Tanzania Revenue Aithority vs. Andrew Mapunda**, Revision No. 104 of 2014, High Court Labour Division, at Dar Es Salaam, LCCD Vol. 1 of 2015. The Applicant prayed for the application be allowed and the CMA Award be revised and set aside.

In reply, the Respondent's Counsel submitted that the Arbitrator was right to hold that the termination of Respondent's employment was both substantive and procedurally unfair because the Applicant failed to prove that it was fair. The law allows the employee who was terminated to opt to appeal internally or refer the dispute of unfair termination to the CMA. Failure to appeal internally does not oust the CMA jurisdiction to entertain the matter. The Respondent was not a public servant falling under the Public

Service Act, as its employer is a public company limited by shares. Since the Respondent is not covered by the Public Service Act, then he is covered under the Employment and Labour Relations Act, 2004. The Labour Institutions Act, 2004, provides in section 14 (1) (a) (b) that the function of the Commission shall be to mediate and arbitrate any dispute referred to it in terms of any labour law. The Respondent supported the argument by citing the case of **Deogratius John Lyakwipa and Another vs. Tanzania Zambia Railway Authority**, Revision Application No. 68 of 2019, High Court Labour Division, at Dar Es Salaam, (Unreported).

The Respondent averred further that there is no provision of the law that requires the employee to appeal or exhaust internal appeal mechanism before referring the dispute to the CMA. The procedure to appeal internally to the Board of Director is optional, the employee may decide to appeal or not. This does not bar the employee's right to refer the dispute to the CMA according to law. Regulation 7.10.2 of the Staff Regulations use the word 'may' which show that it is optional for the employee to appeal or not to appeal to the Board of Directors. Also, the termination letter – Exhibit D9 did not give the Respondent right to appeal to the Board which is contrary to rule 10(3) of the G.N. No. 42 of 2007. The Respondent distinguished the cited the case of Applicant **MSD vs. Amini Mapunda**, (Supra), that the issue in **M.S.D. case** statute vested jurisdiction of dispute resolution

machinery to a different body. The Respondent distinguished the case of **Gideon Mwenda vs. DED Njombe District Counsel and 3 others,** (Supra), cited by the Applicant that in Gideon Mwenda case the issue fell under Public Service Act which is not the case in this application.

Regarding Applicant's submission that Arbitrator failed to anlyze, assess and evaluate evidence in record properly, it was submitted by the Respondent that the Applicant failed to show how the Arbitrator did not put into consideration the evidence in record. The Applicant cited criminal cases which are not relevant to the present application. The evidence available in record shows that the Applicant failed to prove the disciplinary offences charged to the Respondent. In the other hand the Respondent proved that he travelled to Manyara and Mikumi by submitting evidence such as safari imprest retirements and project reports to his supervisor. The other disciplinary offences were not proved at all.

The Respondent further, averred that the Applicant violated many procedures for termination such denying the Respondent right to be heard, principle against bias, no investigation was conducted, and the Disciplinary Committee was not properly constituted according to Staff Regulations – Exhibit D13 as the Secretary of the Committee was appointed contrary to the Staff Regulations. The Respondent prayed for the application to be dismissed.

The Applicant retaliated his submission in chief in rejoinder submission and emphasized that the Respondent failed to exhaust internal remedies availed by Staff Regulations hence the matter was instituted to the CMA prematurely. The Respondent decided not to attend in the disciplinary hearing then it can't be alleged that the he was denied right to be heard. The Applicant proceeded to submit in rejoinder that the DW1, DW2, DW3, DW5, DW6 and DW7 which were sufficient to prove disciplinary offences of dishonesty and insubordination. These witnesses their exhibit was not admitted by the Arbitrator without reasons.

From the submissions, pleadings and the Commission proceedings there are five issues to be determined. The issues are as following;

i. Whether the Commission have jurisdiction to entertain the matter.
ii. Whether the Commission followed the proper procedures in determination of the dispute before it.
iii. Whether reason for termination of respondent employment by the applicant was valid and fair.
iv. Whether the procedure for termination was fair.
v. What are remedies entitled to parties?

The Applicant submitted in regards to the first issue that the CMA had no jurisdiction to hear and entertain the dispute since the Respondent failed

to appeal to the Board of Directors against the CEO decision provided by UTTPID Staff Regulations – Exhibit D3. The matter was instituted to the CMA prematurely before the Respondent exhaust available internal remedies. In contention, the Respondent argued that the law allows the employee who was terminated to opt to appeal internally or refer the dispute of unfair termination to the CMA. Failure to appeal internally does not oust the CMA jurisdiction to entertain the matter.

The evidence available in record shows that the Respondent was terminated for misconduct on 20th May, 2016 according to termination letter. The termination letter was written by the Chief Executive Officer. According regulation 7.10.2 of the UTT Staff Regulations, the employee aggrieved by the decision of the Chief Executive Officer in formal disciplinary proceedings may appeal to the Board of Directors in writing. The Applicant in this application did not appeal to the Board. As submitted by the Respondent Counsel, there is no provision of the law in the present application that requires the employee to appeal or exhaust internal appeal mechanism before referring the dispute to the CMA. Appeal to the CMA against the decision of the employer is the right of the employee provided by labour laws especially to the employees not covered by the Public Service Act. The UTT being public Corporation limited by shares, is no among the public service

office covered under section 3 of the Public Service Act, 2002. The procedure to appeal internally to the Board of Director is optional as provided by regulation 7.10.2 of the UTT Staff Regulations. The employee may decide to appeal against the termination or not. This does not bar the employee's right to refer the dispute to the CMA according to the existing law. Thus, it is my finding that the Commission had jurisdiction to hear and determine the dispute which was before it and the dispute was properly before the Commission.

The second issue is whether the Commission followed the proper procedures in determination of the dispute before it. The Applicant submitted in relation to the issue that the Arbitrator failed to assess the evidence tendered before the Commission. The Arbitrator disregard the evidence tendered when determining the matter. In opposition the Respondent submitted that the Applicant failed to show how the Arbitrator did not put into consideration the evidence in record. The Respondent submitted further that the evidence available in record failed to prove that the Respondent was fairly terminated.

The Labour Institutions (Mediation and Arbitration Guidelines) Rules, G.N. No. 67 of 2007, provides in rule 27(3) for the content of the Award. The content of the award includes details of the parties, issue or issues in

dispute, background information, summary of parties' evidence and arguments, reason for the decision and the order (the precise outcome of the arbitration). As submitted by the Respondent, the Applicant did not explain in his submission in chief as to how the Arbitrator did not put into consideration the evidence in record, but provided some explanation in rejoinder that the testimony of DW1, DW2, DW3, DW5, DW6 and DW7 was not analyzed, assessed and evaluated properly. This denied the Respondent right to reply to Applicant submission. However, looking at the CMA award it is clear that the Arbitrator analyzed the evidence before him as he provided reasons for the decision as it is found from page 16 last paragraph to page 19 of the award. Despite the fact that the Arbitrator did not analyze each witness testimony, the evidence as a whole was analyzed before the Arbitrator reached the decision. For that reason, I'm of the opinion there is nothing to prove that the Arbitrator did not analyze the witnesses testimony. Therefore, the Arbitrator followed the procedures provided by the law.

The third issue is whether reason for termination of respondent employment by the applicant was valid and fair. The employment and Labour Relations Act, 2004 in section 37 (2) (a) (b) provides for the duty of the employer, in dispute for termination of employment, to prove that the reason for termination was fair. Section reads as follows:-

"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,

The above section requires employers to terminate employees on valid and fair reason. Failure of the employer to prove that the reason for termination was valid and fair makes the termination to become unfair.

In the present application, the Applicant submitted regarding this issue that the evidence available in record proved that the Applicant's termination was fair. The Applicant is of the opinion that the evidence from DW1, DW2, DW3, DW5, DW6 and DW7 is sufficient to prove the disciplinary offences against the Respondent. In the contrary, the Respondent is of the opinion that the Arbitrator properly held that the reason for termination was not fair. I have read the CMA proceedings, the evidence available in record shows that the Respondent was charged for four disciplinary offences before the Disciplinary Committee. The offences charged were three offences for dishonest behavior and one offence for insubordination. The dishonest behavior offences were for the act of the Respondent to receive per-diem and imprest amounting to shillings 2,197,500/= without travelling to Babati,

and shillings 545,500/= received as payment for travelling to Mikumi without actually travelling to Mikumi. The third dishonest offence was for failure to disclose that he was employed by Zanzibar Telecom Ltd before joining the Applicant. The insubordination offence against the Respondent was for uttering disrespectful words against employer and intimidating staff.

The evidence in record shows that the Respondent was charged for 4 disciplinary offences before the Commission. Three offences of dishonesty and one insubordination offence. Reading the evidence adduced by the Applicant's witnesses, there is no evidence whatsoever to prove the offence of insubordinations against the Respondent. Even the Respondent act which amount to insubordination was not stated.

Regarding the offences of dishonesty, the evidence from DW1 and DW3 proves that the Respondent was supposed to travel on official duties to Babati but he did not travel. Despite the Respondent's testimony that he travelled to Babati and he made retirement of the safari, the DW3 testimony did show that he informed the Respondent who was supposed to be team leader in the said trip what transpired and even handled to him receipt of the services used during the trip. Thus, through information and receipt given to the Respondent by DW3, the Respondent was in position to make

retirement and report of the safari. This evidence prove the offence on balance of probabilities.

Concerning the trip to Mikumi, the evidence is not sufficient to prove the offence. DW2 tendered visitors' book entry which shows that the Ulli K. Mtebe, Martin M.M, Saidi Mkomwa and Straton Rugaitika from U.T.T. visited the Conservator's office on 14th January, 2015 but the Respondent was not among the visitors. DW3 whom was stated by DW2 to be among the guest from UTT who visited the Conservator's office said nothing about the trip to Mikumi. This is strange since DW3 testified concerning Babati trip, why he said nothing about Mikumi trip if he travelled to Mikumi as the testimony of DW2 shows? I'm of the opinion that there is doubt on the evidence regarding trip to Mikumi and as result the offence was not proved against the Respondent.

Now turning to the remaining offence of dishonesty against the Respondent for failure to disclose that he was still employed by the Zantel from 4th October, 2010 up to 24th April, 2014, where he was terminated for misconduct. It was revealed during cross examination of Johanitha Mrengo - DW6 that the letter was written and signed by Frank Jackson who was acting Director Human Resources as DW5 was absent in office. Frank Jackson signed in the name of DW5. The evidence from DW5 and Exhibit

D11 - a letter from Zantel to UTT shows that the Respondent was employee of Zantel before his termination for misconduct in April, 2014.

The explanation about the misconduct (Statement of the offence) shows that during recruitment through misrepresentation the Respondent stated he was employed with the TSN Group and that the Respondent did not reveal that he was employed by ZANTEL where he was terminated for misconduct. However, there is no evidence on record to prove that Respondent did not disclose his former employment. There is no proof that the Respondent was asked to provide such information and he failed provide it. The 3rd offence was not clear that the Respondent was charged in the disciplinary proceedings for the offence of being employed by Zantel and UTT at the same time as the evidence adduced by DW5 appears to suggest. I'm of the opinion that apart from proving that the Respondent did not disclose the information, the Applicant was supposed to prove that the information was requested from the Respondent who decided not to disclose it. Also, the Applicant was supposed to prove that the Respondent was charged with disciplinary offence of being employed by two employers' at the same time according to the testimony of DW5. Thus, there is no evidence to prove that the Respondent was charged for the offence of being employed by two different employer's at the same time. From the four disciplinary

offences the Respondent was charged with, there is sufficient evidence to prove only one offence of dishonesty where the Respondent obtained per diem for official safari to Babati while he did not travel. Gross dishonesty is among the serious misconduct which when proved may justify termination according to Rule 12 (2) and (3) (a) of the Employment and Labour relations (Code of Good Practice) Rules, G.N. No. 42 of 2007 and the evidence is sufficient to prove the offence. As I find that there is sufficient evidence to prove that the Applicant has proved that the Respondent committed dishonesty offence, then there is valid and fair reason for termination. Therefore, I find the answer to the third issue is positive.

The next issue is whether the procedure for termination was fair. In the dispute concerning termination of employment, the employer has duty to prove that the employment was terminated in accordance with a fair procedure according to section 37 (2) (c) of the Employment and Labour Relations Act, 2004. The fair procedure for termination for misconduct is provided under rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007. The rule provides that, I quote:

> "13.-(1) The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held.

(2) Where a hearing is to be held, the employer shall notify the employee of the allegations using a form and language that the employee can reasonably understand.

(3) The employee shall be entitled to a reasonable time to prepare for the hearing and to be assisted in the hearing by trade union representative or fellow employee. What constitutes reasonable time shall depend on the circumstances and the complexity of the case, but it shall not normally be less than 48 hours.

(4) The hearing shall be held and finalized within reasonable time and chaired by a sufficiently senior management representative who shall not have been involved in the circumstances giving rise to the case.

(5) Evidence in support of the allegation against the employee shall be presented at hearing. The employee shall be given a proper opportunity at hearing to respondent to allegations, questions any witness called by the employer and to call witness if necessary.

(6) Where employee unreasonably refuses to attend the hearing, the employer may proceed with the hearing in the absence of the employee.

(7) Where hearing results in the employee being found guilty of the allegations under consideration, the employee shall be given the opportunity to put forward any mitigation factors before a decision is made on the sanction to be imposed.

(8) After the hearing, the employer shall communicate the decision taken, and preferably furnish the employee with written notification of the decision, together with brief reasons.

(9) A trade union official shall be entitled to represent a trade union representative or an employee who is an office-bearer or official of a registered trade union, at a hearing.

(10) Where employment is terminated the employee shall be given the reasons for termination and reminded of any rights to refer a dispute concerning the

fairness of the termination under a collective agreement or to the Commission for Mediation and Arbitration under the Act.

(11) In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with them. An employer would not have to convene a hearing if action is taken with the consent of the employee concerned.

(12) Employer shall keep records for each employee specifying the nature of any disciplinary transgressions. The action taken by the employer and the reasons for actions.

(13) In case of collective misconduct, it is not unfair to hold a collective hearing."

In the present application, the Applicant alleges that the procedure for termination was fair. On the other hand the Respondent submitted that the procedure was not fair. The evidence available in record shows that the Applicant was informed of the disciplinary hearing on 10th May, 2015 and the Respondent requested for the hearing to be adjourned on 11th May, 2015 on the grounds that he was taking care of his sick child. The Applicants decided to proceed with hearing for the reason that the Respondent reason has no merits since his ED was for 10th and 11th of May, 2015. The Committee heard all the witness and recommended to the employer to terminate the Respondent and on 20th May, 2015, the Applicant terminated the Respondent employment.

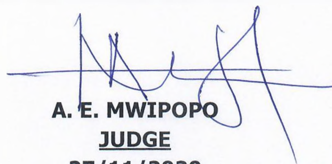
From this evidence, it is very clear that the Respondent requested the Committee to adjourn the hearing to 28th June, 2015, for the reason he was taking care of his sick child. Even though, the next hearing date proposed by the Respondent was too long, the Applicant was supposed to consider the Respondent situation and adjourn the hearing to another appropriate date. The evidence available proved that the Respondent was attending his sick child as the hospital receipt shows. Also the testimony of DW8 shows that the Respondent received the notice to attend disciplinary hearing on 10th May, 2015, while coming from hospital to attend his sick child. The facts that the Respondent ED was ending on 11th May, 2015, was not the only proof that the Respondent child was well and did not need the attention of the Respondent.

Under rule 13 (3) of G.N. 42 of 2007, the employee is entitled to a reasonable time to prepare for the hearing of not less than 48 hours. As the Respondent was attending his sick child, it is very clear that the Respondent would not be able to prepare himself. The same was stated by the Respondent in his testimony that the preparation time was not sufficient. The disciplinary committee was supposed to adjourn the hearing to another date in order to allow the Respondent to take care of his sick child and to prepare for the hearing. Thus, I'm of the same position with the Arbitrator

that the Respondent was denied the right to be heard by the act of the Disciplinary Committee to proceed with the hearing. As the result, the whole disciplinary hearing was a nullity. Further, there is no evidence in record which prove that the investigation was conducted to ascertain whether there are grounds for a hearing to be held as provided by rule 13 (1) of G.N. No. 42 of 2007. Therefore, I find that the Applicant failed to prove that the procedure for termination was fair hence the termination was unfair procedurally.

The last issue is what remedies are is entitled to the parties? The Arbitrator in this case ordered the Respondent be re-instated without loss of remuneration from the date of termination which is 20th May, 2016 to the date of delivery of the award on 10th December, 2018. The re instatement without loss of remuneration is awarded to the employee where the termination was unfair substantively and procedurally. In the present application, I have already find that the termination was not fair procedurally only. In procedural unfair termination, the employee is entitled to compensation as per Section 40 (1) (c) of the Employment and Labour Relations Act, 2004. In circumstances of this application, I'm of the opinion that the Respondent is entitled to compensation for 12 months' salary. As the Respondent basic salary was shillings 4,437,320/= per month, I order

the Applicant to pay a sum of shillings 53,247,840/= being a compensation for unfair termination. Consequently, the CMA decision is revised and the award is hereby set aside. Each party to take care of its own cost of the suit.



A. E. MWIPOPO

JUDGE

27/11/2020