IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 267 OF 2019

BETWEEN

MANTRA TANZANIA LIMITED ..... APPLICANT

VERSUS

DANIEL KISOKA.....RESPONDENTS

JUDGMENT

Date of Last Order: 30/11/2020

Date of Judgment: 14/12/2020

Z.G.Muruke, J.

The applicant filed present application calling upon this court to revise the CMA's award on the grounds stated under clause 4 of the affidavit in support of the application. The affidavit was sworn by Dua Mbapila Rwehumbiza, Applicant's legal Manager. In challenging the application the respondent's counter affidavit was filed.

It is on records that, from 1st November, 2015 the respondent was employed by the applicant as an accountant until 29th August, 2017 when he was terminated. The respondent was found guilty of five offences namely, unauthorized possession of companies property, misuse or misappropriation of company funds, property or resources, commits any act amounting to dishonest in performance of duty and breach of Section

13 of his employment contract. It was alleged that one of the respondent's duties as an accountant was to keep Company's fund through petty cash. Sometimes in July, 2017 after a surprise cash count they have realized that a sum of 9,450,000/= and USD 4000 was missing out of 10,260,500/= and USD 4688. The same was done by comparing the cash amount and the figures in General ledger. The applicant was found guilty and he was terminated.

Being dissatisfied with the termination, the respondent referred the dispute to the CMA claiming to have been unfairly terminated. The decision was on his favour. The applicant was aggrieved with the CMA's award hence filed this application seeking for revision and set aside of the same.

With leave of the court the matter was argued by way of written submission. Both parties were represented by advocates, where Advocates from Lawfront Advocates represented the applicant while, Mr. Edward P. Chuwa, Anna Lugendo and Jailos Mpoki represented the respondents.

Arguing in support of the application the applicant's counsel submitted that, the arbitrator erred in law and fact on failure to consider the evidence on record as a result she found that, the applicant had no valid reason for terminating the respondent despite the evidence on record. It is on record that the applicant admitted the loss of the said cash under his custody and his defense that using the employer's money for his personal use was not enough admission of the misconduct.

Applicant's counsel further submitted that, the arbitrator erred in law and fact by discussing and relying on the issue of investigation report

which was not even tendered at the trial. She failed to realize that not all disciplinary issues investigation need to be conducted. In this case there was no dispute that there was missing cash which was in respondent's custody as per exhibit D3 and DW1's evidence. It was her finding that the applicant adhered to the procedure for termination but she concluded by stating that the procedure for termination were not adhered.

On regard to reliefs learned counsel submitted for the applicant that, the arbitrator erred in law by awarding relief which were contradictory and not provided under the law. The relief for unfair termination are provided under Section 40 of Employment and Labour Relations Act, Cap 366 RE 2019. At page 22 of the award, the arbitrator on item a) awarded Tshs. 58,000,000/= as twelve month's salary compensation, on item f) she awarded 83,300,000/= as salary arrears from date of termination to the date of the award while there was no order of reinstatement. In addition the arbitrator ordered the applicant to pay 197,573,885 for terminating the respondent illegally, the questions comes if the same is addition to what she ordered in (a- g) as she termed them as compensation for unfair termination. They thus prayed for application to be allowed.

In response, the respondent's counsel prayed to adopt the counter affidavit to form part of their submission. He submitted that, the applicant had no valid reason of terminating the respondent while allegation of theft were still under police investigation which ended up in criminal prosecution. The purpose of reporting the matter to the police was for the matter to be investigated and to wait for the verdict of the criminal court. Even both

DW1 and DW2 do not dispute the fact that, the allegation of theft was that money was stolen on 25th July,2017 the day when the respondent was out of the working station for he was sick as evidenced by ED sheet admitted at CMA. The applicant failed to tender any evidence to prove that the applicant was given that money as petty cash, no alleged vouchers, General ledger either were tendered before CMA to prove the validity of the reason for termination. Failure to produce a document attracts and adverse inference to be drawn against the party who fails to do so , citing the book of Law of Evidence,17th Edition, Vol.3 by Sir John Woodroffe & Syed Amir Ali. Vol.3.

Learned counsel submitted for the respondent that, the applicant's counsel wants to mislead the court as at page 20 of the award the arbitrator granted reinstatement as relief to the respondent. Therefore the award of salary arrears was proper and legal. As regards to payment of Tshs. 197,573,885/= is a total of what are enshrined in items (a to g) at page 21-22 of the award. As for the award of bonus payment, since he applicant was unfairly terminated both substantively and procedurally the bonus was one of his entitlement as held in the case of **KCB (T) Ltd v. Dickson Mwikuka**, Rev. No. 132/2013, 2013 LCCD. The respondent's counsel prayed for dismissal of the application.

Having considered the parties submissions, CMA records and relevant laws, this court finds the following issues for determination;

1. Whether or not the applicant had a valid reason for terminating the respondent.

2. Whether or not the procedures for terminating the applicant were adhered to.
3. The reliefs entitled to the parties.

It is a tenet of law that, for termination to be considered fair, it should be based on valid reasons and fair procedures. There must be substantive and procedural fairness on 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].

In the matter at hand the respondent was charged of various misconducts namely unauthorized possession of companies property, misuse or misappropriation of company funds, property or resources, commits any act amounting to dishonest in performance of duty and breach of Section 13 of his employment contract as a result a sum of Tshs. 9,450,000/=and USD 4000 were missing.

On records, the following facts are undisputed, that the safe is controlled by the respondent and the finance manager, that the respondent was on sick leave for fourteen (14) days as per (ED exhibit AP1), also it is undisputed that after cash counting on 25th July, 2017 there was a missing balance of Tshs. 9,450,000/=and USD 4000 were missing and no reconciliation which was done.

I have gone through records there is no evidence which show that, reconciliation was done after they have found there were missing amount from petty cash money in custody of the respondent. The records shows that cash counting was conducted on 25th July,2017 and the respondent was suspended on 27th July,2017 up to 31st July,2017. Thereafter followed the disciplinary hearing which was held on 17th July, 2017. Now, how could the applicant establish that there was embezzlement of the said amount while there was no reconciliation which was done? What if the reconciliation would have established the said difference? There is no proof that even after suspension came to an end on 31st July, 2017, the respondent was given a chance to get back in the office and do reconciliation since there were pending procedural action against him. On

that basis this court is of the view that, the applicant had failed to establish the validity of a reason for the respondent's termination hence no need to fault the CMA's finding on that aspect.

In regard to the 2nd issue on procedure for termination, it a principle of law that termination must be on fair procedure as provided under Section 37 (2) (c) of Cap 366 RE 2019 (supra). It was the CMA's finding that the applicant failed to adhere to the procedure for termination, as there was no investigation which was conducted before terminating the respondent.

It is apparent that the applicant complied with other procedures as per Rule 13 of the Employment and Labour Relations (Code of Good Conduct) GN.42/2007 except for the issue of investigation. This was also noted by the arbitrator in her finding in regard to procedure. The question to ask ourselves is whether all the procedures stipulated under Rule 13 (1-12) must be complied with.

There are various court decisions where it was decided that, the procedure for termination shall not be observed in a checklist fashion. What shall be taken into account is the concept of fair hearing which includes a right to be heard and defend the claim. In the case of **Justa Kyaruzi V. NBC Ltd,** Rev. No 79 of 2009 Lab Division at Mwanza it was stated that:-

> "What is important is not application of the code in the checklist fashion, rather to ensure the process used adhere to the basic of fair hearing in the labour context depending on the circumstances

of the parties, so as to ensure the act to terminate is not reached arbitrarily. Admittedly, the procedure may be dispensed with as per Rule 12(11) of the Code."

Also in the case of **Metal Products Ltd Vs. Mohamed Mwerangi & 7 Others,** Revision No. 148/2008(unreported) Madam Rweyemamu, J. (as she then was) pointed out that the various stages itemized under Section 38 are not meant to be applied in a check list fashion. That means the procedures provided under Rule 13 GN 42/2007 are not to be followed on a checklist fashion, the employer may depart from some of the procedures depending on the circumstances of each case.

Therefore basing on that position, this court finds that the applicant adhered to the principles of fair hearing.-I thus depart from the Arbitrators finding that the procedures for terminating the respondent were unfair.

On the relief of the parties, the arbitrator reinstated the respondent and ordered payment of a total sum of 197,000,000/= being payment of leave, 2 years severance pay, annual bonus, 12 months' salary as compensation if the applicant decides not to reinstate the applicant ,and unpaid salaries from the date of termination to 31st January,2019.

This court finds that the award was erroneously made as the same was contrary to Section 40 (1) of Cap 366 RE 2019. The arbitrator ordered reinstatement without loss of remuneration and also payment of unpaid salaries from the date of termination. If the applicant opt not to reinstate the respondent then he could be double paid. On that regard this court quash and set aside the arbitrators order on reliefs to the parties and order

that, the respondent be paid twelve (12) months' salary compensation for substantive unfairness, his statutory benefits as per Section 41 of Cap 366 RE 2019.

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

Z.G. Muruke

JUDGE

14/12/2020

Judgment delivered in the presence of Godfrey Ngassa for applicant and Anna Lugendo for respondent.

Z.G. Muruke

JUDGE

14/12/2020