IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DAR ES SALAAM

CONSOLIDATED REVISION NO. 626 & 817 OF 2019

BETWEEN

JOHN KANJELI ..... APPLICANT/RESPONDENT

VERSUS

TANZANIA REVENUE AUTHORITY.....RESPONDENT/APPLICANT

JUDGEMENT

Date of Last Order: 09/06/2020

Date of Judgement: 24/12/2020

Aboud, J.

The two Revision Applications were filed in this Court against the decision of the Commission for Mediation and Arbitration (herein CMA) in Labour dispute No. CMA/DSM/ILA/R.900/14/329 delivered on 26/09/2018 by Hon. Muhanika, J. Arbitrator. Revision No. 626/2019 was filed by **JOHN KANJELI** (herein referred as the employee) whereas Revision No. 817/2019 was filed by **TANZANIA REVENUE AUTHORITY** (herein referred as the employer). The Court heard the two revision applications separately but decided to consolidate them in judgement as they originate from the same CMA award contested before it.

MR. JOHN KANJELI in Application for Revision No. 626 sought for an order of revision basing on the following grounds: -

(a) That the Arbitrator acted illegally or with material irregularity in the exercise of her jurisdiction in holding that the employee did not made sure that the rent was paid before allowing the goods to go to the bonded warehouse.

(b) That the Arbitrator acted illegally or with material irregularity in making a finding that it was the Commissioner's condition precedent that the rent should be paid prior to taking the goods to the bonded warehouse.

(c) That the Arbitrator acted illegally or with material irregularity in awarding him twelve months compensation only despite her finding that the reason for termination was unfair.

(d) That the Arbitrator acted illegally or with material irregularity in awarding him twelve months compensation only based on the basic wage only instead of twelve months remuneration.

TANZANIA REVENUE AUTHORITY in Revision Application No. 817, sought for an order of revision basing on the following grounds: -

(i) That the Honourable Arbitrator erred in law and fact in holding that the employee is entitled to compensation amounted to Tshs. 35,836,977.6/= out of the cause of action of unfair termination of employment.

(ii) That the Honourable Arbitrator erred in law and fact by not considering the evidence tendered during disciplinary hearing to substantiate that all procedures were followed before terminating the employee.

(iii) That the Honourable Arbitrator erred in law and fact by holding that the procedures were not followed in view of the evidence tendered.

Briefly the two revision applications arouse out of the following context; Mr. John Kanjeli (herein referred as the employee) was employed by TANZANIA REVENUE AUTHORITY (herein referred as the employer) as Customs Officer on 24/10/1996. On 22/10/2014 the employee was terminated from employment on the ground of misconduct to wit, gross negligence for clearance of 9 containers of

galvanized and corrugated steel sheets imported from China by Kwema Trust (T) Ltd. without adhering to Customs procedures which govern transfer of goods from one warehouse to another. It was alleged that the employee authorized transfer of the consignment from Ubungo Inland Container Depot (ICD) to Bonded Ware House No. 472 where the said container did not reach the intended destination, as a result he caused loss of Tshs. 193,851,153.70 as tax and warehouse rent of Tshs. 26,743,700/=. The Disciplinary Committee found the employee guilty of the offence charged and he eventually terminated him employment.

Aggrieved by the termination the employee referred the matter at the CMA claiming for unfair termination. The CMA decided on the employee's favour and awarded him twelve months salaries compensation for unfair termination as amounting to Tshs. 35,836,977.6/=. Dissatisfied by the CMA's decision, both parties filed their applications before this court on the grounds stated above.

The applicants in both applications were ordered to proceed by way of written submissions and parties were represented by Learned Counsels. Ms. Jacqueline Chuga was for the employer where as Ms.

Stella Simkoko was for the employee. I commend both parties for adhering to the schedule.

Arguing in support of the revision application no. 626/2019 Ms. Stella Simkoko, Learned Counsel for Mr. John Kanjeli submitted that, her client was terminated on the ground that, on 02/08/2013 while on duty as the Officer in charge of Ubungo ICD negligently cleared nine containers containing galvanized corrugated steel sheets imported from China by Kwema Trust Ltd. without observing the procedure governing transfer of goods to another warehouse. The Learned Counsel submitted that, at the disciplinary hearing meeting TRA did not bring any witness to prove its case but proceeded to terminate her client. With due respect to the Learned Counsel for Mr. John Kanjeli, she just reproduced the testimonies of witnesses at the CMA of which I see no relevance to reproduce the same in this judgment.

As to the reason of termination the Learned Counsel submitted that, the Arbitrator did not understand the evidence tendered before her and reached to erroneous decision that, the employer had valid reason to terminate the employee. She strongly submitted that, her client complied with all the required procedures regarding payment of

the rent and if any loss had occurred it was not his fault or negligence as alleged. She added that, her client informed the TRA that the goods were already secured as the release order and that at such time it was allowed for customers to take goods without paying rent first and the payment could be effected while the goods are in the bonded house.

As to disciplinary procedures, the Learned Counsel submitted that, since the Arbitrator had already made a finding that the disciplinary committee terminated Mr. John Kanjeli without having any evidence to prove the charges against him it meant that the reason for termination was also unfair.

Regarding the award she submitted that, where the reason has been unfair it has been a settled position of the law and practice to reinstate the employee to the same position he was prior to the termination despite of the discretion given to the Arbitrator under section 40 (1) of the Act. To strengthen her submission, she referred the Court to the case of **Bugando Medical Centre vs. Dr. Salvatory Ntubika**, Lab. Div. MZA, Rev. No. 10 of 2015. It also strong submitted that, employee was entitled to be reinstated. It was argued that, the Arbitrator acted with material irregularity in

awarding the employee twelve months compensation only based on the basic wage instead of twelve months remuneration. She therefore prayed for the employee's application to be allowed.

Responding to the Revision Application No. 626, the Learned Counsel for the employer stated that Ms. Simkoko's submission is vague and irrelevant to the application at hand. It was submitted that regarding the reason for termination it was revealed during hearing that, the employee was a Senior Customs Officer and the Officer in charge for Ubungo Inland Container Depot responsible for maintaining containers receiving and releasing procedures at that depot. The Learned Counsel argued that as testified two TANSADS contained nine containers, one with R. No. 75840 and the other with R. No. 75863 with corrugate iron sheet were released from Ubungo ICD with the intention of being taken to Customs Bonded Warehouse No. 472 operated by Rasco Commission Agent Ltd. The Learned Counsel went on to submit that, during hearing it was revealed, the containers in question did not reach the destination which caused the employer to suffer loss of the expected collected taxes therefrom and the storage charges.

It was further submitted that, the employee agreed to have released the containers in question and alleged to have followed all the required procedures. He added that the two Cargo receipts signed by the employee both dated 26/07/2013 collectively as exhibit D4, bear his signature and stamp showing that he is the only person who dealt with such relevant documents. He argued that had the containers reached the intended destination the documents would have been signed by the person who received them at the destination, bond. It was also submitted that, at the hearing the employee admitted that the containers did not reach the intended destination however he evaded his responsibility by stating that his duty was just to release the containers after being directed to do so. The Learned counsel strongly submitted that, the employee released the containers without being directed to do so and when he was asked why he initiated the removal of the containers without receiving directives from his superior, he just said he worked on the basis of the letter he received from Saida.

It was also submitted that, the investigator for misconduct, DW1 testified that TANSAD with R. No. 75840 which were used to remove the consignment in question was for a Copper Cathods

consignment to whose declarant was Bravo Logistics Ltd. and, that TANSAD R. No. 75863 was for motor vehicle. He strongly argued that, had the respondent transferred the nine containers by adhering to the procedures he would have been exonerated from liability but the fact that he acted without being authorized he has to bear the consequences of his actions whether acted intentionally or negligently.

Furthermore, it was contended that, the letter of the Commissioner provides conditions that, Warehouse rent must be paid before the transfer of the containers from one Bonded Warehouse to another however, the employee disobeyed such procedure as a result caused loss of Government revenue amounting to Tshs. 193,851,153.70 as tax and Warehouse rent of Tshs. 26,743,700.

Regarding to termination procedures the Learned Counsel submitted that, they were all followed as in accordance with Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules GN. No. 42 of 2007 (here in GN. 42 of 2007). He stated that, the employee was notified of his charges and summoned to disciplinary hearing as evidenced by Exhibit D8. He thereafter responded to the charge as reflected by Exhibit D9. He added that,

the employee was also given an amended charge and responded thereto as indicated in Exhibit D10 and D11 respectively.

It was further submitted that, the employee was afforded an opportunity to state his case before the Disciplinary Committee when he was called for hearing and on the basis of the evidence placed before him was found guilty. In conclusion it was submitted that, since the employer had valid reason to terminate the employee and the procedures thereto were followed then revision no. 626/2019 has no legs to stand and should be dismissed for lack of merit.

In rejoinder Ms. Stella Simkoko, Learned Counsel for the employee reiterated her submission in chief.

Submitting on the above grounds for revision No. 817, the Learned Counsel for the employer reiterated his reply submission in Revision No. 626/2019, thus, I see no relevance to reproduce the same.

Responding to the Revision no. 817/2019 Ms. Stella Simkoko added that, in his defense to the charge sheet in Exhibit D9 and D11 as well as before the CMA as recorded from page 35-35 of the proceedings, the employee testified that, he acted upon the letter of

the Commissioner brought to him by his fellow employee, Sauda Said Abeid. She added despite the fact that the said letter of the Commissioner was neither copied to the employee nor did it bear a handwritten endorsed directive to him to deal with the containers, he was not at fault to deal with it because of the following reasons:-

> '(a) *That no evidence was tendered or witness testified that the said employee, Sauda Said Abeid was not an employee of TRA.*
>
> (b) *That no evidence was tendered to prove that it was wrong for the employee to act upon a letter given by his fellow employee.*
>
> (c) *That the said Sauda Said Abeid was not brought as a witness to deny to have given the said letter to Mr. John Kanjeli to act upon it.*
>
> (d) *That the employer did not dispute the validity of the Letter of the Commissioner that he had authorized the consignment to go to the bonded warehouse'.*

The Learned Counsel went on to submit that, the employee did not testify to have acted upon a letter addressed to the Managing Director Petty Logistics instead he testified to have acted upon a letter addressed to Mohamed Abeid Kwema Trust Ltd. She added that, the testimony of DW1 that upon investigation they found the

system contained TANSAD 75840 and 75863 were of copper cathode and motor vehicle, is not sufficient evidence to incriminate the employee because he was not dealing with the system as testified by DW1. The Learned Counsel was of the view that under the circumstances it is obvious that the system was tempered but the employer did not prove involvement of the employee in question in tempering tempered with the system.

It was strongly submitted that, the employee transferred the containers according to the proper procedures where clarence was supported by the issuance of relevant supporting documents to wit the Cargo receipt, the Release Orders and the Query sheet. Ms. Stella Simkoko also disputed the submission that the letter of the Commissioner provided a condition that, the warehouse rent must be paid before the transfer of the container to the bonded warehouse, she stated that the consignment was entered in warehouse under 1M7 and, under such regime no taxes are collectable. It was firmly submitted that, the employee complied with all procedures for customs clearance for warehousing before the auction as instructed by the Commissioner's letter (Exhibit P2).

In respect to termination procedures the Learned Counsel submitted that, they were unfair as correctly found by the Arbitrator. She therefore prayed for the application to be dismissed.

In rejoinder the Learned Counsel for the employer reiterated his submission in chief.

Having considered parties submissions in these cross applications, court records as well as relevant applicable labour laws and practice with eyes of caution, I find the key issues for determination are as follows; whether the employer had valid reason to terminate the employment contract of the employee and if he followed stipulated procedures and to what relief are the parties entitled.

On the first issue of whether the employer had valid reason to terminate the employment contract of the employee and if he followed stipulated procedures, it is a well-established principle of law that, for termination to be fair must be based on valid reason and fair procedures as provided under section 37 of The Act. I quote: -

> *'37 - (1) It shall be unlawful for an employer to terminate the employment of an employee unfairly.*

(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 employer'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'.

It is also a well-established principle of law that in any proceeding concerning unfair termination of the employment by the employer, the burden of proof lies on the employer to prove that the termination is fair as per requirement of section 39 of the Act, I quote: -

'39. in any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair'.

In this application the employee was terminated for breach of schedule 2 (18), 2 (25) and 2 (21) of TRA Staff Regulations of 2009,

Revised Edition 2009. The Arbitrator after examining the record found out that the employer had valid reason to terminate the employment of the employee on the ground that the later did not adhere to procedures governing transfer of goods to another warehouse. The Learned Counsel for the employee strongly disputed the fact that he did not follow the procedures in question. On the other hand the employer strongly submitted that, the procedures were not followed and that, the employee in question was not authorized to approve the transaction in question. In response to such allegation Ms. Stella Simkoko for the employee firmly submitted that her client was authorized to approve such transaction as evidenced by the Commissioner's letter (Exhibit P2).

I had a glance on the disputed exhibit P2 and observed that, as rightly submitted by the Learned Counsel for the employer the said letter was not directed to the employee in question. Reading the content of such letter (Exhibit P2) it is apparent that the letter was the communication between TRA and owner of the goods in question Mr. Mohamed Abeid as reflected by the Arbitrator at page 16 and 17 of the award. I have read word by word of the letter in question and

noted that, there is no any statement conferring power to the employee at hand to approve transfer of the disputed goods.

In my view if at all Mr. John Kanjeli was a prudent employee and committed to protect the employer's properties he would have not acted upon such letter unless he had received an extra internal communication from his Superior. However, he did not do so and proceeded to act upon such letter which caused loss to his employer, the TRA. Therefore, I have no hesitation to say that, the employee wrongly acted upon the letter which was not addressed to him. According to the above discussion the employee also alleged that, as per the letter (Exhibit P2) in question it was not a mandatory requirement for rent to be paid first. In my view this argument is baseless because the record reveals that the employee knew exactly the rent was supposed to be paid before the goods were transferred. This is evidenced by employee's his own testimony that when he found out rent was not paid yet he wrote a query shit to notify his Superior on such issue. Thus, if the rent was not necessary as claimed he would have not be worried about it and there was no reason to raise his concern as he did.

However, apart from that analysis it is a trite law that employers are required to prove the charges against employee at the disciplinary hearing and not otherwise. Any evidence that, the employer has against an employee should be tendered at such particular stage but not at the CMA level. What the CMA is required to do is to scrutinize and analyses the evidence and procedures applied during the Disciplinary hearing. This is also the position in law as is provided under Rule 13 (5) of GN. 42 of 2007. The relevant provisions provides as follows:-

> *'Evidence in support of the allegations against the employee shall be presented at the hearing. The employee shall be given a proper opportunity at the hearing to respond to the allegations, question any witness called by the employer and to call witnesses if necessary'.*

In the matter at hand, I find the employer to have a good case against the employee, they have tendered strong evidence at the CMA which implicated him with the charges of negligence. Unfortunately, nothing has been found in record to prove that such strong evidence was tendered at the disciplinary hearing and the employee was afforded an opportunity to question such evidence as the law requires. At the CMA, the employer tendered a hearing form

(Exhibit D14) which does not state specifically if the employer brought evidence or witness to prove the charges against the employee.

Though the employer has analyzed some of the procedures stipulated under Rule 13 of GN. 42 of 2007 were followed, in my view the disciplinary hearing minutes were relevant document to be tendered at the CMA so as to enable the Court to ascertain if the disciplinary hearing procedures were dully followed. In absence of such relevant document I have no option but to join hands with the Arbitrator that the employer did not follow proper procedures in terminating the employee's employment contract, to wit no witness was called before the disciplinary hearing and no evidence was tendered in support of the allegation against the employee.

On the last issue as to what relief are parties entitled, in Revision No. 626 the employee prayed to be reinstated to his employment. On the basis of the above finding it is my view that under the circumstances of this case, as the employer had valid reason to terminate the employee I find reinstatement is not a proper remedy. It is an established principle that an order of reinstatement is granted where the employee is unfairly terminated both

substantively and procedurally. However, that is not the position in the matter at hand where the employer only failed to prove that he followed proper procedures in terminating the employee's employment. Thus, the prayer of reinstatement cannot stand.

The employee further alleged that, the Arbitrator wrongly awarded him compensation of 12 months salaries only without remuneration. Remuneration is defined under section 4 of the Act, that:-

> *'Remuneration means the total value of all payments, in money or in kind, made or owing to an employee arising from the employment of that employee'.*

I cross checked the CMA form 1 the employee only prayed for an order of reinstatement. Throughout the CMA's proceedings the employee did not state any remuneration earned before his termination. He only disclosed his basic salary. However, in my view the fact that remunerated comprises of all payments included in the termination of contract as well as statutory payments, even if were not included in the CMA Form No. 1, the employee has the right to be awarded. I therefore find the Arbitrator wrongly awarded him compensation of his 12 months salaries only, he ought to have

awarded him according to the wording of section 40 (1) (c) of the Act.

As to the prayers of the employer in Application No. 817 I find the same to have no merit. As stated above the employee was unfairly terminated procedurally thus, the Arbitrator was right to decided award the employee save to the changes discussed above.

In conclusion I find the Revision Application No. 626 has merit to the extent that the employee is awarded compensation not less than twelve month's remuneration and not 12 months' salary only.

And as regard to Revision Application No. 817 I find it to have no merit, the Arbitrator correctly found that the employee was unfairly terminated on the basis of unfair procedures.

It is so ordered.

I.D. Aboud

JUDGE

24/12/2020