IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 645 OF 2018

NISILE MWAISAKA.....APPLICANT

VERSUS

DAWASCO.....RESPONDENT

JUDGMENT

Date of last Order: 14/02/2020
Date of Judgment: 13/03/2020
Z.G.Muruke, J

Aggrieved by the award of the Commission for Mediation and Arbitration [herein after to be referred to as CMA] the applicant NISILE MWAISAKA, filed this application challenging CMA award in the labour dispute No. CMA/DSM/ILA/R.870/16/897, R.J. Katto, Arbitrator, dated 10th September, 2018 in favour of the respondent. The applicant calls upon this court to revise and set aside the whole CMA award, on the ground set forth in the attached affidavit and on material irregularity and errors of the law and determine the same in the manner it considers appropriate.

The application is supported by the sworn affidavit of the applicant Nisile Mwaisaka. The respondent filed a counter affidavit sworn by Florence Saivoye Yamat, the principal officer. Hearing was conducted by way of written submission, am grateful both parties complied with the schedule. The applicant enjoyed the service of Advocate Evans R. Nzowa, while the

respondent was represented by the Advocate from her legal department. In support of submission the applicant's counsel prayed to adopt the applicant's affidavit. He submitted on the 10 grounds for revision as stated in item 4(1-10) of the affidavit as follows:

On ground one, it was submitted that the arbitrator failed to take note that, the applicant was called in a disciplinary hearing without being charged. The applicant was only issued with a notice to show cause, Exhibit R2, which required him to submit his diffence on allegations mentioned on the said notice, referring Rule 13(2) and (3) of the Employment and Labour Relations (Code of Good Practice) Rules, GN 42/2007 (herein to be referred as the code). Notice to show cause is a precursor to investigation, while charge sheet is prepared after the investigation is complete and the employer decides to call for a disciplinary hearing. Serving to the employee a notice to attend disciplinary hearing without charges is fatal and it is violation of mandatory provisions of Rule 13(2) of the Code and paragraph 4(3) of the Schedule to the Code, referring the case of **Elia Kasalile and 20 others Vs. The Institute of Social Work,** Civil Appeal No. 145 of 2016 (unreported) CAT.

On the second ground, the applicant counsel submitted that the applicant was terminated on the new misconducts which he was never charged before or given an opportunity to be heard. Neither the notice to show cause nor during the disciplinary hearing, the applicant was charged with violating clause 7.4 of the Customer Service Code of Good Practice, standard and procedure "Mkataba wa huduma kwa mteja", and violation of

Rule 3 of the code. In Exhibit P.4, termination letter, the applicant was charged with new offence which he was not charged before;

> **"Kuomba na kuchukua mita stoo na kasha kutokwenda kuifunga kwa mteja STRABAG kinyume cha sheria"**

Applicant counsel insisted that the charges must be clearly specified so that the accused (employee) will be able to answer them. The employee cannot be expected to prepare diffence if is not aware of the charges. The employer is not allowed to add new charges during or in course or after the hearing begins or add new offence in the termination letter, referring cases of **Coca-Cola Kwanza Ltd Vs. Emmanuel Mollel** Rev. NO. 22 of 2008 and **Akiba Commercial Bank Ltd Vs. Florah Massawe** Revision No. 359 of 2013 LCCD 2014 – Part II, case No. 137 page 293.

Ground three, eight and nine were consolidated and argued that, the arbitrator failed to evaluate the evidence before him properly, as a result he arrived to erroneous decisions. He made reference at page 9-12 of the award and identified the errors reproduced below:-

(i) That, the major reason which leads to termination of the applicant's employment was failure to install water meter to the client which caused a loss to the respondent.

(ii) That, the applicant duty was to install meters to corporate customers and he is the one who had a file which have special forms for meter connection.

(iii) That the applicant had a duty to prove that he handed over a meter to Jumanne Ngemeka from Dawasco Magomeni.

(iv) That the fact that the applicant said he handed over mater to Jumanne Ngemela without handover notes, the respondent had no duty to follow fair procedure in terminating his employment as per Rule 13(11) of the Code of Good Practice.

(v) That, the applicant negligence contributed late installation of meter hence loss to the respondent.

The applicant counsel submitted that, in **Exhibit R3**, the applicant respondent to the allegation that, he was given a water meter and filed by his line manager Reginald Kessy, and instructed to give it to engineer Jumanne Ngelela of DAWASCO Magomeni and he did it as directed. The same was done before his Manager Mr. Kessy as seen in **Exhibit R5** testimony of Mr. Reginald Kessy. Despite the fact that Mr. Ngelela objected to have received the meter form the applicant, from his evidence given at the disciplinary hearing, he stated that he was instructed by his manager to install the meter, same is here reproduced.

MAELEZO YA USHAHIDI WA NGELELA:

"Ngelela alitoa maelezo kuwa, mimi sikupokea /sikukabidhiwa mita na Nisile, mita hiyo ilikuja magomeni na niliagizwa na manager kuwa niwafungie hii mita kwa sababu kitengo cha corporate hawana mafundi."

Applicant counsel insisted that, if the arbitrator could have properly evaluated the evidence, he could have found that, the person responsible for the installation of the meter, to the client and subsequent processes was Mr. Jumanne Ngelela and not the applicant. From the respondent's evidence DW1 and DW3 admitted that, the meter was installed by technician from Magomeni one Mr. Kapella, thus the applicant committed on offence. Moreover, the respondent failed to produce his staff Regulation and the Code of practice, standards and procedures, to show which rule did the applicant contravened, referring Rule 12(1) of the Code and the case of **James Leonidas Ngonge Vs. DAWASCO**, Rev. No. 382 of 2013 LCCD 2014 Part 1 No. 40 at page 201. The arbitrator was wrong to decide that the respondent has a valid reason to terminate the applicant and that, the respondent was exempted from following fair procedure, insisted applicant counsel.

On the fourth ground Mr. Nzoa submitted that the respondent did not conduct investigation. If the same was conducted then the applicant was neither involved nor served with a copy of the investigation report, equally same was not tendered before CMA, referring Rule 13(1) of the Code and the cases of **Fedrick Mizambwa Vs. Tanzania Ports Authority**, Rev No. 220 of 2013 (unreported), **TTCL Vs. James Mgaya and 3 others**, Rev. No. 30 of 2011, and the case of **Hamisi Jonathan John Mayage Vs. Board of External Trade** Civil Appeal No. 37 of 2009, CAT (unreported).

Further, on fifth ground it was contended that, the applicant was denied an opportunity to cross examine the respondent's witnesses. The arbitrator in his award failed to consider the same. According to clause 9 of

Exhibit R5, Mr. Reginald Kessy, Mvano Mandawa Mr. Ngelela and Muhsin Kiobya were recorded. However, according to the attendance list, only Mr. Ngelela was present at the meeting though he was not cross examined by the applicant. DW3 when cross examined, admitted not to have attended the disciplinary hearing. It is obvious that, their evidence was recorded outside the disciplinary hearing or the witnesses were examined through phones which is violation of the law, referring Rule 13(5) and paragraph 4(6) of the Code, complained applicant counsel.

On ground six, the applicant stated that, the arbitrator failed to take into consideration that, the proceeding of disciplinary hearing were vitiated by bias, as one member of the disciplinary committee was also a complainant who read charges in the hearing. The charge were read by Jack Mabeyo DW1, who was a complainant and also a member of the disciplinary hearing as per Exhibit R5 and DW2 evidence. Involvement of Jack Mabeyo vitiates the proceedings and was violation of natural justice, Rule against bias as stated in the case of **Jimmy David Ngonya Vs. National Insurance Corporation** Ltd 1994 TLR 28.

Regarding ground 7, it was argued that, the applicant was not afforded with an opportunity to put forward his mitigating factors. The applicant contravened the provision of Rule 13(7) and paragraph 4(8) of the Code. Finally on tenth ground it was submitted that if the arbitrator could have properly analyzed the evidence and testimony of the parties, could have found the termination null and void and both substantively and procedurally unfair.

Respondent on the other hand on 1st ground contended that, the respondent charged the applicant when he summoned him for disciplinary hearing, in letters dated 14th April, 2016 and 15th April, 2016 respectively. The applicant counsel misdirected himself in such assertion and the cited case of **Elia Kasalile and 20 others Vs. Institute of Social Work** is distinguished as in that case, the applicants were never charged with the charge and notice of the hearing.

On the 2nd ground the respondent counsel contended that, the arbitrator was right to hold that the termination was fair as there was no new misconducts. The applicant was terminated for contravening the provisions of Section 7.4 of the customer service code of practice, standard procedures "Mkataba wa huduma kwa wateja" the offence which was enshrined by the respondent's internal staff regulations Regulation 7,8 and 45 of the Corporation thus the offence were the same.

Replaying in consolidated ground three, eight and nine the respondent stated that, the arbitrator's finding that, the respondent had valid reason to terminate the applicant was correct. The applicant had a duty to ensure that the water meter was properly installed and registered in the system, because he was the one who conducted survey at the first instance and had meter installation form. The evidence shows that, the applicant never submitted it to anybody thus, causing loss of 1 billion arising from the unmetered water consumption by the customer STRABAG to the corporation and government at large. Referring DW3's evidence at page 26 and 27 of the typed proceeding.

In reply to ground four the respondent contended the assertion that investigation was never conducted is not true, investigation was conducted by one MUKHSIN KIOBYA – DW 3 and he was summoned to testify the disciplinary hearing as well as before CMA. The respondent insisted that Rule 13(10 of GN No. 42 of 2007 was complied with.

In reply to ground five, the respondent submitted that, the applicant's allegation that for witnesses were recorded but only one witness Mr. Ngelela attended the hearing is false. Applicant himself quoted evidence from other witnesses apart from Mr. Ngelela as evidenced at page 7 of his submission in chief when he referred the testimony of Mr. Reginald Kessy.

Equally it is not true that the matter was tainted with bias as one of the member to a disciplinary hearing committee was also a complainant who read charges to the applicant. Charges were read by Michael Konyaki who also signed the disciplinary hearing forms as a complainant, thus ground six lacks merits, submitted respondent counsel. With respect to ground seven the respondent strongly disputed the allegation that the applicant was not given an opportunity to mitigate, thus Rule 13(7) of GN No. 42 of 2007 was complied with.

In reply to ground ten it was submitted that the termination was procedurally and substantively fair. From the record, it is crystal clear that the respondent suffered a loss of about 1.2 billion following the applicant's failure to install water meter to the respondent's customers one STRABAG.

The respondent counsel submitted that, to vary the decision of the lower court will be going against the principal objects of the Employment and Labour Relations Act, No. 6 of 2004 as provided under Section 3 which is to promote economic development through economic efficiency, productivity and social justice. Under the circumstances of this case the respondent has managed to prove no balance of probabilities that the termination was fair both substantively and procedurally, thus urged this court to dismiss the application.

Having gone through submissions of the parties, this court is called upon to determine the following issues:

1. Whether the respondent had valid reason on terminating the applicant.
2. Whether the respondent complied with the procedure for termination as provided under the law.
3. What are the reliefs of the parties?

It is a principle of law that, termination of employment must be on valid and fair reasons and procedure. For the same 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 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 of service." [Emphasis is mine].

In the case at hand, the applicant was terminated for failure to follow procedure in performing his duties, contrary to Rule 7.4 of Customer Service Code of practice, standard procedures "Mkataba wa huduma kwa wateja" as explained under Section 45 of the Staff regulation and clause 3 of the Code.

The applicant alleged that, his termination based on the misconducts which he was not charged with or given opportunity to be heard. It was the arbitrator's finding that the respondent had valid reason for terminating the applicant since the applicant admitted to have received the file and

meter from his head if department, and he has failed to prove than the same were handled to Mr.Ngelela from Magomeni.

I have thoroughly gone through the records, In Exhibit P4, termination letter, the applicant was found guilty of the following offences:

1. **Kuomba na kuchukua mita stoo na kisha kutokwenda kuifunga kwa mteja Strabag kinyume cha sheria.**
2. **Ukiwa kama mfanyakazi mzoefu wa kuhudumia wateja wakubwa ambaye ulihusika moja kwa moja kwenye zoezi la kufanya survey kwa mteja STRABAG, hukutimiza wajibu wako kwa kuhakikisha mteja huyu anafungiwa mita na anaingizwa kwenye rekodi ya mfumo wa malipo ya Ankara kulingana na matumizi kama ulivyo utaratibu wa shirika.**

It is the respondent contention that, the applicant was terminated for contravening the Regulation 7,8 and 45 of staff Regulations which specifies the same misconducts charged to the applicant. That, both offences are referring to the same thing that, the applicant was irresponsible in performing his duties toward the customer Strabag while he had great experience in attending big customers. From records, Exhibit R5 clause 9 clearly states that, the applicant handed the said meter to Engineer Ngelela. This has been proved by Mr. Kessy, the applicant's head of department while responding to the question addressed to him during the disciplinary hearing. For clarity evidence of Mr. Kessy is hereby produced:

Q: **Ulijiridhisha vipi kama Nisile alimpatia mita kubwa Ngelela?**

A: Niliona kwa macho yangu Bwana Nisile akimpatia Ngelela mita tukiwa kwenye ofisi yetu emergency.

Now, let me assume that, the stated misconducts are the same, did the applicant executed his duty to prove the same? From the misconducts stated in termination letter, Exhibit P4, it had been clearly stated by DW3 that the said meter was taken from the store by Mr. Kessy and not the applicant. The same was handled over to Mr. Ngelela from Magomeni. This was after consultation made between the Cooperate Manager from Gerezani and the Manager from Magomeni Office. This has been stated by the applicant's head of department in Exhibit R5, and that the said client belonged to Magomeni area and not Corporate. From the evidence no doubt that, the said meter was handled to Magomeni Branch, and was installed by the technician from Magomeni. From the respondent's evidence, I find no where they have justified how the applicant was irresponsible in performing his duties. Since the installation was conducted by the Magomeni office, the person who installed was responsible to ensure that, after installation of the meter to the client, he/she fills the Installation form and hand it to the person responsible for other step of payment.

From the records, the said regulations which the applicant is alleged to violate, were neither explained nor tendered before the CMA, hence not easy to ascertain that the same were violated by the applicant as provided under rule 12(1)(a)(b) of the Code, that read as follows.

12-(1) any employer, arbitrator or judge who is required to decide as to termination for misconduct is unfair shall consider-

(a) Whether or not the employee contravened a rule or standard regulating conduct relating to employment;

(b) If the rule or standard was contravened, whether or not

(i) It is reasonable;

(ii) It is clear and unambiguous;

(iii) The employee was aware of it, or could reasonably be expected to have been aware of it;

(iv) It has been consistently applied by the employer; and

(v) Termination is an appropriate sanction for contravening it.

It was expected the respondent could have tendered the said staff regulations and customer service code of practice, standards and procedures (Kanuni za mkataba wa huduma kwa mteja) so as to persuade the court that the same were contravened by the applicant.

Though the burden of proof is on balance of probabilities, I find the respondent's evidence insufficient to prove the allegations against the applicant. It is trite the law that, he who alleges must prove the same.

In the case of **Abdul Karim Haji Vs. Raymond Nchimbi Alois and Joseph Sita Joseph** [2006] TLR 419, it was held that:

" It is an elementary principle that he who alleges it the one responsible to prove his allegations."

Also in the case of **Mosolele General Agencies Vs. African Inland Church Tanzania,** [1994] TLR 192 it was stated that:

> "But on our part, we are satisfied that the trial Judges view on the burden of proof were correct. Once a claim for specific item is made, that claim must be strictly proved..."

I thus fault the arbitrators finding that the respondent has a valid reason to terminated the applicant, there is no way the applicant was suppose to bring the documentary evidence concerning the handover of the file and meter to Mr. Ngelela, while the same has been proved by an eye witness **Mr.Kessy as seen in Exhibit R5. I** thus hereby quash the arbitrator's finding.

Regarding the 2nd issue on procedure for termination of the employee, I believe I need not labour on this, as from record there is no investigation report which was tendered by the respondent to show the finding of the investigation. Even in the DW3's evidence I have noted that, he didn't explain the finding of his investigation and more he had not attended the disciplinary hearing to submit the finding of the investigation. It is the requirement of the law that, the employer has to conduct investigation prior disciplinary hearing, the reason is to ascertain if there is a need of conducting the disciplinary hearing.Rule 13(1) of the Code provides that:

"The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held."

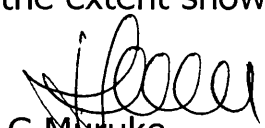
This was emphasized in various court decision including the case of **Mizambwa Vs.Tanzania Ports Authority**, Rev.No. 220 of 2013 (Unreported), **TTCL Vs. James Mgaya and 3 Others**, Rev. No. 30 of 2011. Therefore, failure by DW3 to attend disciplinary hearing, no investigation report was tendered either before the Disciplinary hearing or at CMA, it is hard to prove that the procedure for investigation was complied with. Applicant alleged that he was not afforded the right to cross examine the respondent's witnesses. It is a principle of evidence law that, in any case, a party shall be given a right to cross examine the other party's witnesses. And failure to do so, there will be no fair hearing.

I have thoroughly gone through **exhibit R5** which was the disciplinary hearing form, I have observed that the applicant witnesses were not examined by the applicant as no record of the same in the minutes of the meeting. Thus it's apparent that the respondent contravened the provision of Rule 13(5) read together with paragraph 4(6) of the Code.

Further the applicant alleged that he was not afforded with an opportunity to mitigate. It is a requirement of the law under Rule 13(7) read together with paragraph 4(8) of the Code, that the once the employee is found guilty shall be afforded with an opportunity to mitigate before imposing a sanction. From **exhibit R 5**, no where the applicant had mitigated before the recommendation that he shall be terminated for the said misconducts. On the basis of the foregoing discussions, I find the arbitrator has failed to critically analyze the evidence adduced before him

hence arrived to a wrong finding that the procedure for termination were fair. Having said so, I quash the same.

The applicant pray for reinstatement, the same won't be granted considering the time he has been out of the office, for some years now bearing in mind development of technology being not static. I therefore order the compensation of 12 months' salary, to the applicant. Thus, Commission for Mediation and Arbitration (CMA) decision is varied. Revision application is allowed to the extent shown above.



Z.G.Muruke

JUDGE

13/03/2020

Judgment delivered in the presence of applicant in person and Jumanne Lyenge for the respondent.

Z.G.Muruke

JUDGE

13/03/2020