IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DAR ES SALAAM

REVISION NO. 639 OF 2019

BETWEEN

THE BOARD OF TRUSTEES OF
NATIONAL SOCIAL SECURITY FUND ..... APPLICANT

VERSUS

PROSPER OGOLA ..... RESPONDENT

JUDGEMENT

Date of Last Order: 03/05/2021

Date of Judgement: 26/05/2021

Aboud, J.

The applicant, filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (herein CMA) delivered on 14/11/2018 by Hon. Massay, A. Arbitrator in Labour Dispute No. CMA/BUK/02/17/159. The application is made under section 91 (1) (a), 94 (1) (b) (i) and section 91 (2) (b) (c) of the Employment and Labour Relations Act [CAP 366 RE 2019] (herein referred as the Act) read together with Rule 24 (1) 24 (2) (a) (b) (c) (d) (e) (f) 24 (3) (a) (b) (c) (d) and Rule 28 (1) (c) (e) of the Labour Court Rules GN. No. 106 of 2007 (herein referred as the Labour Court Rules).

Briefly; on 19/10/2015 the respondent was employed by the applicant as a Senior Accountant on permanent and pensionable terms at NSSF - Njombe. Later on, 01/01/2016 the respondent was transferred to NSSF - Karagwe in the same capacity. On 30/11/2016 the respondent was terminated from his employment contract for misappropriation of funds and monies and deliberate failure to follow NSSF procedures/regulations. Being dissatisfied by the termination he referred the matter to the CMA claiming for unfair termination. The Arbitrator found that the applicant had valid reason to terminate the respondent, however, on the procedural aspect he did not avail the respondent the right to mitigate. Following such finding the Arbitrator awarded the respondent four months remuneration of Tshs. 9,690,572/= as compensation for unfair termination on the procedural aspect.

Aggrieved by the CMA's award the applicant filed the present application and invites the Court to determine only one ground to wit:-

(i) That the Commission erred on point of law and facts by failure to analyze the evidence on record adduced before it

hence arriving in wrong conclusion that the procedure for termination was not followed.

The matter was argued orally where Ms. Halima Omary, State Attorney was for the applicant and Mr. Elibahati Akyoo, Learned Counsel was for the respondent.

Arguing in support of the application it was submitted that the respondent's termination was both substantively and procedurally fair. The Learned Counsel stated that the applicant followed the required procedures as stipulated under Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules GN. 42 of 2007. It was submitted that, as per the award the Arbitrator was of the view that the termination did not follow fair procedure to the extent that the respondent was denied the opportunity for mitigation.

It was further submitted that, the hearing form which was tendered and admitted at the CMA has exhibits which shows that the respondent was given the chance to mitigate and he brought forward his mitigation factors as reflected at paragraph 4 page 3 of the relevant document. The Learned Counsel submits that the respondent pleaded to the hearing Committee to recommend to the Appointment and Disciplinary Committee for leniency while deciding his case. It

was also argued that, the hearing form was signed by the respondent evidencing that all what is written in relevant form is what transpired before the sanction was imposed to him.

It was also submitted that, what is reflected in the hearing form is that the respondent did in fact put forward his mitigation factors before sanction was imposed on him as it is required under Rule 13 (7) of GN. 42 of 2007. To support her submission, she referred the Court to the case of **Coca Cola Kwanza Ltd. Vs. William Mhando**, Rev. No. 40 of 2017 HC DSM. On the basis of her submission, she prayed for the Arbitrator's award to be quashed and set aside.

Responding to the application Mr. Elibahati Akyoo submitted that, it is not true that the respondent's termination was substantively and procedurally fair. He stated that the termination was because of misappropriation of funds, however, there was no actual misappropriation.

As regards to procedural fairness it was submitted that, according to Rule 13 of GN. 42 of 2007 the respondent was not given the right to mitigate. He stated that, the said hearing minutes (exhibit D10) does not show exactly whether the chance for mitigation was given to the respondent or not. On that basis he argued that there is

no doubt the respondent was not fairly heard before termination from his employment.

It was further submitted that the case of **Coca Cola Kwanza Ltd.** (supra) is distinguishable to the case at hand. The Learned Counsel argued that, the case law cannot overrule the substantive law that is section 37 (1) (2) of the Act. He stated that the essence of that provision is to the effect that once the employer decides to terminate the employment contract of an employee he has to comply with both substantive and procedural requirements. He added that the referred case is distinguishable because the employer did follow the required procedures while in this matter the position is not the same as the termination procedures were not followed. He therefore prayed for the application to be dismissed and the CMA's award be upheld.

In rejoinder Ms. Halima submitted that the cited case is on the same position as this case as the respondent was given chance to mitigate. She strongly submitted that the respondent was availed with the opportunity to mitigate. She therefore prayed for the application to be allowed.

Having gone through parties' submissions, relevant provisions of the Labour laws, CMA and Court records with eyes of caution, I am of the view that the issues for determination are; whether the respondent was availed with the chance to mitigate at the Disciplinary hearing and what reliefs are the parties entitled.

Before embarking on the main issue in the application at hand I find it worth to state the following on the substantive fairness of termination. The respondent alleged that the applicant did not prove the misconduct levelled against him. However the records levels that, at the disciplinary hearing the applicant tendered documentary evidence to prove the misconducts levelled against the respondent. In his reply to the show cause letter (exhibit D7) the respondent did not deny the allegation but he admitted the same and pleaded for forgiveness. Furthermore at the same disciplinary hearing the respondent admitted his claims but he pleaded for forgiveness on the ground that the misfortune occurred while he was on 3 days bed rest. The misconducts committed by the respondent are reflected in item 22 and 30 of the applicant's Disciplinary Code (exhibit D1) where the sanction provided thereto is termination in both misconducts. For

easy of reference I quote the relevant items:-

> *'Item 22. An employee who deliberately or repeatedly failed to follow laid down procedures/regulations relating to work.*
> *Item 30. An employee who misappropriate, withholds or improperly uses Funds monies or makes false financial records, returns or statements'.*

Therefore, on the basis of the foregoing discussion it is my view that the applicant had a valid reason to terminate the respondent as rightly found by the Arbitrator. It is also my view that termination was the proper sanction in the application at hand because the respondent breached the applicant's Code repeatedly. The record shows clearly the respondent did not bank the monies received on 03/03/2016, 07/03/2016, 08/03/2016 and 12/03/2016 as reflected in the show cause letter dated 06/05/2016 (exhibit D6).

Turning to the main issue of the case as to whether the respondent was availed with the chance to mitigate at the disciplinary hearing, the Court notes that, the requirement to mitigate before sanction is imposed against the charged employee is provided under

Rule 13 of GN. 42 of 2007 which states as follows:-

> *'Where the hearing results in the employee being guilty of the allegations under consideration, the employee shall be given the opportunity to put forward any mitigating factors before a decision is made on the sanction to be imposed'.*

The Arbitrator found that the respondent was not afforded the right to mitigate. I have gone through the disciplinary hearing minutes (exhibit D10) in the summary of evidence the employee pleaded the following:-

i. *'The employee admitted to having receipted Tshs. 607,300/= contributions collection on 3rd March, 2016, 7th March, 2016, 08th March, 2016 and 12nd March, 2016. He failed to bank the collections in Fund account as per Fund procedure.* ***Mr. Ogola explain away the omission by asserting that for the period of March he was sick having 3 days bed rest and he was new to job and inexperienced.***

ii. *Further, the employee stated the collections were banked on 20th August, 2016 after the audit exercise, the audit*

conducted helped him to gain experience on how to handle contribution collection.

iii. ***While testifying on his reply to the fund in Appendix III, the employee stated that he confessed and pleaded for forgiveness.***

iv. ***The employee further mitigated the charge against him by pleading to the committee to recommend to the ADC for leniency while deciding his case and his fate at the fund.'***

[Emphasis is mine].

From the respondent's evidence quoted above as testified at the disciplinary hearing it is my view that in the bolded words the respondent mitigated his case. Therefore, I find no justifiable reasons for the Arbitrator to state that the respondent was not afforded with the right to mitigate.

It has to be noted that, the procedures should not be adhered in a checklist fashion, what is paramount important is for the rules of natural justice to be followed of which it was observed in the application at hand. This was also the position in the case of **Justa Kyaruzi V. NBC Ltd.**, Rev. No. 79 of 2009 Lab. Division at Mwanza,

where it was stated that:-

> *'What is important is not the application of the Code in the checklist fashion, rather to ensure the process used adhere to the basics 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'.*

I have also observed other procedures for termination and they were duly followed. The respondent was summoned at the disciplinary hearing on 18/11/2016 as evidenced by the hearing minutes (exhibit D10) where he was afforded the right to be heard and documentary evidence was presented to prove the allegation levelled against him.

Therefore, on the basis of the above discussion it is crystal clear that, in the circumstance of this matter the termination procedures were followed as stipulated under Rule 13 GN. No. 42 of 2007 read together with Guideline 4 of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures from the same GN. No. 42 of 2007.

On the last issue as to parties' reliefs. At the CMA the respondent prayed for reinstatement without loss of remuneration. The Arbitrator found that the respondent was unfairly terminated procedurally and awarded him four months remuneration as compensation. On the basis of the above discussion, as it is found that the respondent's termination was fair both substantive and procedurally it is my view that he is not entitled to compensation as wrongly awarded by the Arbitrator.

In the result I find the applicant had valid reason to terminate the respondent and the procedures thereto were followed. I hereby quash and set aside the Arbitrator's award of four month's remuneration to the respondent as compensation for unfair termination. Thus, the application has merit and is allowed accordingly.

It is so ordered.

I.D. Aboud

JUDGE

26/05/2021