IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 179 OF 2020

BETWEEN

ARDHI UNIVERSITY..APPLICANT

AND

JEROME KESSY..RESPONDENT

JUDGMENT

Date of Last Order: 12/04/2021

Date of Judgment: 21/05/2021

A. E. MWIPOPO, J.

The Applicants here in namely **ARDHI UNIVERSITY** has filed the present application against the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/KIN/R.713/16/9. The Applicant herein is praying for the orders of the Court in the following terms:-

1. That this Honorable Court be pleased to call for records in labour Dispute No. CMA/DSM/KIN/R.713/16/9 delivered by Hon. Alfred Massay, Arbitrator, dated 9th October, 2019.
2. That this Honourable Court be pleased to set aside the decision of the Commission for mediation and Arbitration dated 9th October, 2019.

The Application is supported by the Affidavit of Essau S. Swilla Applicant's Director of Human Resource Management and Administration. Paragraph 4 of the Affidavit contains Applicant's two legal issues arising from material facts. The respective legal issues are as follows:-

i. That, the award delivered by Hon. Alfred Massay, Arbitrator, is illegal for failure to consider that reasons for termination of the Respondent employment were justifiable as the Respondent himself admitted to leave for studies without permission from his employer, misuse of research fund and all procedures prior to his termination were adhered too.

ii. The Commission for Mediation and Arbitration has acted without jurisdiction as the Applicant has internal mechanism established for handling disputes and appeal.

The background of the dispute in brief is that; the Respondent namely Jerome Kessy was employed by the Applicant in the position of Tutorial Assistant on 9th September, 2009. He was promoted to the post of Assistant Lecturer on 27th May, 2013. The Respondent was terminated from employment for misconduct on 18th December, 2014. The Respondent referred the dispute to the Commission for Mediation and Arbitration (CMA) together with application for condonation on 13th March, 2017. The Commission delivered its award on 9th October, 2019 in favour

of the Respondent. The Applicant was aggrieved by the Commission award and instituted the present revision application.

Both parties to the application were represented. The Applicant was represented by Mr. Benson Hoseah, State Attorney, whereas the Respondent was represented by Mr. Andrew Miraa, Advocate. By consent of the parties herein, the hearing of the application proceeded by way of written submissions.

The Applicant's Counsel submitted in regard to the first ground that the reasons for the Respondent's termination were justifiable as the Respondent himself admitted to leave the Country for studies without permission from his employer and misuse of research fund. He stated that Arbitrator erred in law and facts by relying on Exhibit D5 - a letter from university to Tanzania Commission for Universities - TCU dated 5th February, 2013, which recommended that if the Respondent will get scholarship he will be granted permission to attend the studies. The letter is considered by the CMA as a prior agreement of study leave between the parties. At page 16 paragraph 3 of the award the Arbitrator made his findings regarding the Applicant's reasons for not granting study leave to the respondent until allegation on the misuse of research funds were cleared. Also, the principle of estoppel cannot apply in this matter as there was no any agreement between the parties on the same.

It was further submitted that there is no dispute that Respondent absconded from his employment by going to his PhD studies without leave and the Commission wrongly interpreted Exhibit D5 - a letter from the Applicant to TCU by assuming on the same that it constitute prior agreement. He stated that Exhibit D5 is the letter of assurance to TCU and not the agreement between the University and the respondent. There was a genuine reason for not granting leave to the respondent which was a misuse of research fund. The Respondent ought not to travel until the study leave is granted, but he did not follow the University procedures before leaving for PhD studies.

In regards to the second legal issue, the State Attorney submitted that the Commission for mediation and arbitration has acted without jurisdiction as the applicant has internal mechanism established for handling disputes as per Regulation 25(6) of the University Charter of 2007. He stated that the staff Appeal Disciplinary Committee has a mandatory jurisdiction as an appellate body over all decision of disciplinary nature relating to termination including Respondent's termination. Rule 10 of the Labour Institution (Mediation and Arbitration) Rules, G.N. No. 64 of 2007 provides two circumstances of which an employee may lodge the complaint before the Commission for Mediation and Arbitration. The first one is where there is no any remedy to the employee after being

terminated and the second circumstance is for employment which provides remedy of appeal to the employee after being terminated. For the present matter to be lodged before Commission for Mediation and Arbitration there must be a final decision confirmed by the appellate board. Therefore, the Respondent is required to exhaust available remedy for the Commission to have jurisdiction to entertain the matter. To support his position, he cited the case of **Paris A.A. vs. Jaffer and 2 Others** [1996] TLR 116. He thus prayed for the revision be allowed and the Commission award to be set aside.

The Respondent's Counsel submitted in reply that the Applicant failed to prove that the termination of Respondent's employment was substantively and procedurally fair. The Respondent never admitted the charges leveled against him before the Disciplinary Committee or before the Commission. The evidence available shows that it was the Applicant who initiated Respondent scholarship process, was well aware of his travelling plans, did not submit to him training bond for signing thus he cannot terminate his employment as the result of his inactions. Under section 37(2) (a) and 39 of the Employment and Labour Relations Act, Cap. 366, R.E. 2019 the employer has duty to prove that the termination of an employee by an employer is for valid and fair reason. To support the position the Counsel cited the case of **Fredrick Mizambwa vs. Tanzania**

Ports Authority, revision No. 220 of 2013, High Court Labour Division, at Dar Es Salaam, (Unreported).

The reason for termination as stated in the termination letter is that the Respondent was absent from duty without leave or reasonable cause, insubordination, unlawfully receiving research imprest and using consent of the authority unlawfully to obtain research fund.

The Counsel submitted on first disciplinary offence that the Respondent was terminated for being absent from duty without permission from 29th September, 2013 up to 12th December, 2014 the offence which is serious misconduct. The Respondent applied for scholarship for Doctoral studies in Germany offered by DAAD in collaboration with the Ministry for Education and Tanzania Commission for Universities. Among the prerequisite condition for scholarship to be granted is the submission of covering letter from the institution the applicant originates confirming to release him upon obtaining the scholarship. The Applicant supported the Respondent a condition which enabled the Respondent to be awarded the said scholarship. This is proved by a letter dated 5th February 2013. The Respondent informed the Applicant through a letter dated 23rd September, 2013 that he will be travelling to Germany to attend the studies from 30th September, 2013 up to 1st September, 2017. While in Germany, the Respondent received a letter from the Applicant dated 21st October, 2013

stating that his request for permission to pursue Doctoral Studies in Germany was not approved and required him to provide explanation within 21 days as to why disciplinary measures should not be taken against him for abandonment from duty.

The Counsel averred that the Applicant's letter dated 5th February, 2013 assured the sponsor that if the Respondent gets admission and scholarship he will be granted study leave. The letter answering his application for study leave was communicated to him on 21st October, 2013 while he was already in Germany. The testimony of respondent witness stated that the permission to attend studies was withheld until misuse of research fund was cleared. The evidence in record shows that the allegation was cleared after the Respondent paid in fully the monies in 2014. Despite the fact that the monies were cleared still the Respondent was not given the said permission. On such basis he is of the view that the applicant failed to honour his promise contrary to Section 2(1) of the Law of Contract Act, Cap 345 R.E 2019 and Section 123 of the Evidence Act, Cap 6 R.E 2019. To support his argument, he cited different cases including the case of **Pickard vs. Sears** [1837] 6AD &EI 469,474.

It was further submitted that the reasonable excuse means an excuse that an ordinary and prudent member of the community would accept as reasonable in the circumstance. He stated that for any prudent

man, education is something very vital thus being absent from duty as a result of taking further studies amount to reasonable cause as stipulated under Rule 61(1) of the Ardhi University Rules, 2007. Therefore, the Applicant's decision to terminate Respondents is contrary to her policies.

On second offence of insubordination, Respondent's Counsel argued that the reason which made him not to sign the training bond before he left for further studies was due to the fact that he received the visa late and he was supposed to travel immediately. There was no order from the Applicant to the Respondent informing him not to travel. In such circumstance one cannot allege insubordination was committed.

On third offence of receiving research imprest which was not requested by him, the Counsel argued that the money was advanced to the Applicant as a member of research team on the fact that Prof. Alphonse Kyessi who was a team leader had another imprest which was not retired yet as stated at paragraph 3 of the Exhibit D15. Thus, the Respondent became in possession of the research fund by coincidence.

On fourth offence of misusing the research fund, the Respondent's Counsel argued that it is on record that the research monies were not utilized as planned due to misunderstanding between members of research team. He stated that the applicant after receiving the fund he was waiting for instruction from team leader who respondent negatively after being

informed as evidenced at paragraph 5 of Exhibit D10. The alleged research monies were paid in full as indicated at page 4 of Exhibit D20. Therefore, terminating Applicant on the same offence is double punishment. To back up his position he cited the case of **Namuddu vs. Uganda** [2004] 2EA 207.

Regarding the legal issue of the fairness of the procedure for termination, the Respondent's Counsel argued that Section 37(2) (c) of the Employment and Labour Relation Act, Cap 366 RE 2019 provides legal duty to the employer to prove that the termination was fair. He stated that the disciplinary proceedings was improperly conducted as the Respondent was not given a chance to call his witnesses, to cross examine Applicant's witness during disciplinary hearing and to be given opportunity to mitigate after he was found guilty by Disciplinary Committee. Also, the Respondent was not served with the outcome of Disciplinary Hearing. The denial of full participation in the disciplinary hearing is the same as the denial of the right to be heard. To strengthen his submission, the Respondent Counsel cited the case of **Tanzania Telecommunication Company Ltd vs. Augustine Kibandu, Revision No. 122 of 2009, High Court Labour Division, at Dar Es Salaam, (Unreported).**

The Respondent's Counsel submitted further that there is misconception on the part of the applicant regarding the meaning of Rule

10(1) of Labour Institution (Mediation and Arbitration) Rules, G.N. No.64 of 2007. The Counsel is of the view that the rule does not bind the Respondent to appeal or exhaust all internal remedies before filing the matter to the Commission. It is on record that the disciplinary hearing was held on 18/12/2014 and its result was served to the respondent on 27/7/2015. This means that there was a delay of more than five (5) months in delivering the results. In such circumstance, the Respondent lost trust on the Applicant's disciplinary machinery and he finds that there is no need to appeal to Staff Disciplinary Appeals Committee rather than filing the same to the Commission. Supporting this stand, the Counsel cited range of cases including the case of **Jeremiah Mwandi vs. Tanzania Posts Corporation, Labour Revision No. 6 of 2019, High Court Labour Division, at Dar Es Salaam, (Unreported).**

Lastly it was submitted by the Respondent's Counsel that as the termination was both substantively and procedurally unfair the arbitrator was right in his decision to order reinstatement as per Rule 32 of the Labour Institution (Mediation and Arbitration Guidelines) Rules, G.N. No. 67 of 2004 and Section 40(1) of the Employment and Labour Relation Act, Cap 366, R.E. 2019. In bracing his position, he cited the case of **Bidco Oil and Soap Ltd v. Robert Matonya & 2 Others,** Revision No. 70 of 2009. The Respondent's Counsel prayed for the application to be dismissed.

In rejoinder the Applicant reiterated his submission in chief.

Having heard parties' submissions in this matter and the affidavit for and against the application, there are four issues for determination. The issues are as follows:-

i) Whether the CMA had jurisdiction to entertain the dispute.

ii) Whether the reason for Respondent's termination from employment was valid and fair.

iii) Whether the procedure for termination was fair.

iv) What are the reliefs entitled to parties?

Starting with the first issue as to whether the Commission had jurisdiction to entertain the matter, the Applicant argued that the Respondent has not exhausted the internal remedies by filing the application to the Commission for Mediation and Arbitration before appealing the same to the Staff Appeal Disciplinary Committee. As a result, the matter was filed before the Commission prematurely. On other hand the Respondent submitted that his failure to exhaust internal remedies was resulted from the delay of delivering outcome of the disciplinary hearing for five months in such circumstance the Respondent lost trust on the Applicant's disciplinary machinery.

Having gone through party's submission and CMA's record I noted that the facts shows that the Applicant had its own machinery of

administering dispute relating to termination. The machinery or the process includes the Appellate Body known as Staff Appeals Disciplinary Committee as per rule 25(6) of the Ardhi University Rules, 2007 which is the 1st Schedule to Ardhi University Charter, 2007. Also, it is undisputed that the Respondent referred the matter to the CMA before appealing to the respective Appellate Body. His reason for referring the dispute to the Commission before exhausting internal available remedies was that he lost trust to the internal dispute resolution mechanism since it took five months from the date of concluding disciplinary hearing for the Respondent to give him information on the outcome of the disciplinary hearing.

I'm of the view that when the internal dispute resolution mechanism provides for remedies the same has to be exhausted before the party decides to refer the dispute to other external machinery such as the Courts or tribunals which provides for other remedies. In the case of **PC Sunday Simon Mwaikwila vs. Inspector General of Police and A.G., Civil Case No. 29 of 2007, High Court of Tanzania, Dar Es Salaam District Registry, at Dar Es Salaam, (unreported),** the Court held that since there exist a statutory dispute resolution machinery vesting jurisdiction in different body governing parties, resorting to Court prior to exhausting the said statutory machinery was improper and therefore the Court lacks jurisdiction to entertain the matter.

The same position was stated by the High Court in the case of **Jonatas Mgendela vs. Inspector General of Police and Two Others, Miscellaneous Civil Application No. 24 of 2019, High Court of Tanzania, Main District Registry, at Dar Es Salaam, (unreported),** where the Court struck out the application for failure of the Applicant to exhaust the internal remedies before coming to Court.

The Respondent's opinion that he lost trust to the Applicant's internal dispute resolution machinery has no basis since the appellate body is different machinery which its composition is made up of members different from Disciplinary Authority. The staff Appeals Disciplinary Authority Chairman is appointed by the Chancellor and the other members are appointed by the Council according to rule 25(2) (a) (b) (c) (d) (e) (f) and (g) of the Ardhi University Rules, 2007 which is the 1st Schedule to Ardhi University Charter, 2007. Thus, I'm of the opinion that the Applicant was supposed to exhaust the internal remedies available which is to refer the appeal to the Staff Appeals Disciplinary Committee before referring the same to the CMA. As a result the Commission and the Court have no jurisdiction to entertain the matter.

Therefore, I find that the application has merit and is allowed. The CMA proceedings and award is quashed and set aside accordingly. Each

party has to bear its own cost of the suit. As the first issue disposed of the matter, I find no need to belabor on the remaining issues.

A. E. MWIPOPO
JUDGE
21/05/2021