IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT MOROGORO

REVISION NO. 54 OF 2019

BETWEEN

ALLIANCE ONE TOBACCO TANZANIA LIMITED.....APPLICANT

AND

GRAYSON MCHARO.....RESPONDENT

JUDGMENT

Date of Last Order: 17/05/2021

Date of Judgment: 01/06/2021

A. E MWIPOPO, J

The applicant namely **ALLIANCE ONE TOBACCO TANZANIA LIMITED** has filed the present application for revision against the award of the Commission for Mediation and Arbitration (CMA) in the Labour Dispute No. CMA/MOR/143/2018 which was delivered on 4th December, 2019. The Applicant is praying for the Orders of the Court in the following terms:-

1. The Honourable Court be pleased to set aside the award of the Arbitrator (Hon. Matalis, R.) dated 4th December, 2019, in Dispute No. CMA/MOR/143/2018.
2. Cost of this application be provided for.

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3. Any other order(s) or relief the Honourable Court may deem fit and just to grant.

The background of the dispute in brief is that: the Applicant employed the Respondent namely Grayson Mcharo for specific period of time contract on 1st June, 2009, in the position of the Computer Operator. The employment contract was renewed several times and the last contract was for three years which was entered on 2nd May, 2016 and was supposed to end on 30th April, 2019. The Respondent was terminated from employment on 21st June, 2018 for misconduct. Aggrieved by the employer's decision, the Respondent referred the dispute to the CMA which held that the termination was unfair substantively. The Commission awarded the Respondent to be paid 10 months' salary being the remaining salary in the employment contract as compensation for unfair termination. The Applicant was not satisfied with the CMA award and he filed the present Application for Revision.

The application is supported by sworn affidavit of Sabatho Musombwa, Principal Officer of the Applicant. The affidavit contains legal issue in paragraph 5(i) that the arbitration award was manifestly unreasonable and improperly procured. The Respondent filed counter affidavit to oppose the Application.

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In this Application, both parties were represented. The Applicant was represented by Mr. Shukrani Elliot Mzikila, Advocate, whereas the Respondent was represented by Mr. Emmanuel Zongwe, Personal Representative from TPAWU. By consent of the parties, hearing of the application was disposed of by way of written submissions.

In supporting of the application, Mr. Shukrani Elliot Mzikila, Advocate, submitted that the Arbitrator erred to hold that the Respondent was terminated for allowing empty tobacco bales into computer receiving system, negligence in performing his duty and to allow clerks to use one password contrary to procedures, while the termination letter shows that the termination was for a reason of being unethical, dishonesty and untrustworthy. These offences are common law offences which occurred when the employee breached common law duty of acting in good faith. To support the position the Counsel cited the case of **National Microfinance Bank Plc vs. Aizack Amos Mwampulule, Revision Application No. 6 of 2013, High Court Labour Division, at Lindi, (Unreported).**

The Counsel submitted further that the misconduct are provided by rule 12(3) (a) and (d) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007 where gross dishonesty and gross negligence were listed among the acts which may justify termination.

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The overall evidence adduced by the Applicant proved that the reason for termination was fair. He was of the view that the termination letter was not supposed to be read in isolation to conclude substantive fairness by the Applicant to terminate Respondent's contract.

The Applicant's Counsel submitted on procedural aspect of the termination that the Arbitrator erred to hold that termination was procedurally unfair for the reason that the Applicant did not comply with rule 13(1) of the G.N. No. 42 of 2007. The Arbitrator was supposed to consider all procedures provided in rule 13 (1) – (13) and weigh all together in order to determine if procedural fairness was followed as a single rule cannot determine procedural fairness. He cited the decision of this Court in the case of **National Microfinance Bank Plc vs. Aizack Amos Mwampulule, (supra)** in support of the position. Thus, on balance of probabilities, the Counsel is of the view that the Applicant proved that the procedure for termination was fair.

In reply, the Respondent's Personal Representative submitted that the evidence adduced by the Applicant through exhibits and witnesses proves that the Respondent was terminated for allegations which were not presented and proved during disciplinary hearing as it was held by the Arbitrator. This proves that the Applicant had no valid reason for

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termination. To cement his view the Representative cited the case of **Elia Kasalile and 20 Others vs. The Institute of Social Work, Civil Appeal No. 145 of 2016, Court of Appeal of Tanzania, at Dar Es Salaam, (Unreported).** The Representative went on to state that the Applicant failed to prove and justify allegation that the Applicant had valid reason to terminate the Respondent for gross dishonest and gross negligence which are among the acts that constitute a valid and fair reason for termination. The misconduct were not presented, proved or justified during disciplinary hearing. DW1 and DW3 testified during cross examination that they were not called to testify during disciplinary hearing. This is contrary to rule 13(5) of the G.N. No. 42 of 2007. To support the position he cited the case of **Nisile Mwaisaka vs. DAWASCO, Revision No. 645 of 2018, High Court Labour Division, at Dar Es Salaam, (Unreported).**

The Respondent Representative distinguished the case of **National Microfinance Bank Plc vs. Aizack Amos Mwampulule, (supra),** cited by Applicant that in that case the Applicant failed to prove the allegations for misconduct against the Respondent.

Further, the Respondent Counsel submitted that the Applicant did not comply with procedures for termination. The Applicant failed to tender

investigation report before the Commission and during disciplinary hearing to prove that the investigation was conducted. This is contrary to rule 13(1) of the G.N. No. 42 of 2007. It is the requirement of the law for the employer to conduct investigation prior to disciplinary hearing to ascertain if there is a need of conducting the disciplinary hearing as it was held by this Court in the case of **Nisile Mwaisaka vs. DAWASCO, (supra).** The Respondent Counsel prayed for the application be dismissed for lack of merits.

The Applicant did not file any Rejoinder.

From the submission, there are two issues for determination. The issues are as follows:-

1. Whether the reason for termination of Respondent employment was valid and fair.
2. Whether the procedure for termination was fair.

In determination of the first issue, the relevant law for determination of the issue is Section 37 of the Employment and Labour Relations Act, Cap. 366 of the laws, R.E. 2019. The Act provides in section 37 (1) that it is unlawful for an employer to terminate the employment of an employee unfairly. The Act provides further in 37 (2) that the termination has to be on the basis of

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valid reason and fair procedure. The respective section reads as follows, hereunder:-

> *"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."*

From above section, it is the duty of the employer to prove that the termination of employment is fair. And for the termination of employment to be considered fair it should be based on valid reason and fair procedure. In the case of **Tanzania Railway Limited V. Mwajuma Said Semkiwa, Revision No. 239 of 2014, High Court, Labour Division, at Dar Es Salaam**, (Uneported), this Court held that;-

> *"It is established principle that for the termination of employment to be considered fair it should be based on valid reason and fair procedure. In other words there must be substantive fairness and procedural fairness of termination of employment".*

In the present application the Applicant submitted that the Arbitrator erred to hold that the Respondent was terminated for offences of allowing empty tobacco bales into computer receiving system, negligence in

performing his duty and to allow clerks to use one password contrary to procedures while the termination letter shows that the termination was for a reason of being unethical, dishonesty and untrustworthy, the offences which he proved on balance of probabilities. The Respondent on his part is of the view that there is no evidence at all to prove the alleged misconduct.

Reading the evidence available in record especially the letter dated 9th June, 2018 informing the Respondent to appear and defend in the disciplinary hearing and the hearing form it shows that the misconduct the Respondent was alleged to commit are three. The first disciplinary offence is to allow subordinate clerks to use one password the act which allowed empty tobacco bales to be received by computer system; the next offence is negligence; and the last one id to enter into computer system empty tobacco bales. The evidence prove that these acts were contrary to policy and procedure of the Applicant. The hearing form shows that the Disciplinary Committee relied on several documents to convict the Respondent. The documents includes tobacco receiving documents, bales receipt, TOPS report and statement of Asha Kambi. In her recorded statement, Asha Kambi denied to commit any misconduct and stated nothing regarding to the part played by the Respondent in doing the

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Offence. This evidence is not sufficient to prove the alleged misconduct committed by the Respondent.

The termination letter stated that the Respondent was found guilty for the offence of unethical behavior and dishonesty which are totally different from the offence which the Respondent was charged with in the disciplinary hearing. This means that the Respondent was terminated for misconduct which he was never charged with in the disciplinary proceedings. The Applicant allegation that the reason for termination provided in the termination letter were proved have no basis since there is no evidence at all adduced by Applicant to prove the disciplinary offence of unethical behavior and dishonesty against the Respondent. Thus, I'm of the same position with the Arbitrator holding that the Applicant failed to prove that the reason for termination was valid and fair.

The second issue for determination is whether the procedure for termination was fair. In the dispute concerning termination of employment, the employer has duty to prove fairness of procedure for termination of employment according to section 37 (2) (c) of the Employment and Labour Relations Act, 2004. The fair procedure for termination for misconduct is provided under rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007. The rule provides that, I quote:

> *"13.-(1) The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held.*

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(2) Where a hearing is to be held, the employer shall notify the employee of the allegations using a form and language that the employee can reasonably understand.

(3) The employee shall be entitled to a reasonable time to prepare for the hearing and to be assisted in the hearing by trade union representative or fellow employee. What constitutes reasonable time shall depend on the circumstances and the complexity of the case, but it shall not normally be less than 48 hours.

(4) The hearing shall be held and finalized within reasonable time and chaired by a sufficiently senior management representative who shall not have been involved in the circumstances giving rise to the case.

(5) Evidence in support of the allegation against the employee shall be presented at hearing. The employee shall be given a proper opportunity at hearing to respondent to allegations, questions any witness called by the employer and to call witness if necessary.

(6) Where employee unreasonably refuses to attend the hearing, the employer may proceed with the hearing in the absence of the employee.

(7) Where hearing results in the employee being found guilty of the allegations under consideration, the employee shall be given the opportunity to put forward any mitigation factors before a decision is made on the sanction to be imposed.

(8) After the hearing, the employer shall communicate the decision taken, and preferably furnish the employee with written notification of the decision, together with brief reasons.

(9) A trade union official shall be entitled to represent a trade union representative or an employee who is an office-bearer or official of a registered trade union, at a hearing.

(10) Where employment is terminated the employee shall be given the reasons for termination and reminded of any rights to refer a dispute concerning

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the fairness of the termination under a collective agreement or to the Commission for Mediation and Arbitration under the Act.

(11) In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with them. An employer would not have to convene a hearing if action is taken with the consent of the employee concerned.

(12) Employer shall keep records for each employee specifying the nature of any disciplinary transgressions. The action taken by the employer and the reasons for actions.

(13) In case of collective misconduct, it is not unfair to hold a collective hearing."

The Applicant alleged that the Arbitrator erred to hold that termination was procedurally unfair for the reason that the Applicant did not comply with rule 13(1) of the G.N. No. 42 of 2007 and that he was supposed to consider all procedures provided in rule 13 (1) – (13) and weigh all together in order to determine if procedural fairness was followed. The Respondent on his part was of the view that the Applicant did not conduct investigation to ascertain if there are ground for hearing to be hear and did not call witness in the disciplinary hearing. These acts are contrary to rule 13(1) and (5) of the G.N. No. 42 of 2007.

As it was submitted by the Respondent, the Applicant failed to prove that he conducted investigation to ascertain if there are ground for hearing to be hear. The Applicant failed to tender the respective investigation

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report and also did not supply it to the Respondent before disciplinary hearing was conducted. This means that the Respondent was denied right to defend himself as he was denied to the basis of his disciplinary charges (see the case of **Severo Mutegeki and Another vs. Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA), Civil Appeal No. 343 of 2019, Court of Appeal of Tanzania at Dodoma**). Also, it is in record that the Applicant did not call any witness before the disciplinary hearing as a result the Respondent was denied his right to question them. These omission are fatal as they infringe Respondent rights for fair hearing. Thus, I find that the procedure for termination was not fair. This means that I find the Respondent's termination was unfair both substantively and procedurally as it was heard by the Commission.

Therefore, the revision application is devoid of merits and I hereby dismiss it. The Commission arbitral award is upheld. Each party to take care of its own cost of the suit.

A. E. MWIPOPO
JUDGE
01/06/2021

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