IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 587 OF 2019

BETWEEN

HYATT REGENCY, THE KILIMANJARO HOTEL.....APPLICANT

VERSUS

JOSEPH CHISUMO.....RESPONDENT

JUDGEMENT

Date of Last Order: 28/04/2021

Date of Judgement: 07/05/2021

Aboud, J.

The applicant, **HYATT REGENCY, THE KILIMANJARO HOTEL** filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (herein CMA) delivered on 24/05/2019 by Hon. Msina, Arbitrator in labour dispute No. CMA/DSM/ILA/R.901/17/929. The application is made under section 91 (1) (a), 94 (1) (b) (i) and section 91 (2) (c) of the Employment and Labour Relations Act [CAP 366 RE 2019] (henceforth as the Act); Rule 24(1) 24 (2) (a) (b) (c) (d) (e) (f) 24 (3) (a) (b) (c) (d) of the Labour Court Rules GN. No. 106 of 2007 (herein referred as the Labour Court Rules).

The application emanates from the following background. The respondent was employed by the applicant as a Hygiene Officer from 01/12/2015 and later on 20/09/2016 he was promoted to the position of Training Manager until when he was terminated on 11/08/2017. The termination of the respondent's employment resulted from the incident that took place on 24/07/2017. On the material date after being searched by the security officers the respondent was found in possession of unauthorized five bottles of wines, eleven pieces of cookies and one apple in his bag. It was also alleged that on the same date the respondent attempted to bribe the security officer on duty by giving him Tshs. 5,000/= so that he can be allowed to leave the hotel premises without being searched contrary to the applicant's policy. After conducting an investigation, the applicant was satisfied that the respondent committed the mentioned misconducts thus, he terminated him on 11/08/2017 for dishonesty and committing the above mentioned offences.

The respondent was aggrieved by the termination and referred the dispute to the CMA. At the CMA the matter was determined in favour of the respondent where the applicant was ordered to pay him a total sum of Tshs. 18,430,844/= being 12 months salaries

compensation for unfair termination and severance pay and he was given a clean certificate of service. The applicant was dissatisfied by the CMA's award and he filed the present application urging the Court to determine the following grounds:-

i. That, the Arbitrator erred in law and fact by holding that the respondent conduct only amounted to breach of organizational rules while there was evidence to show that the same amounted to dishonesty and major breach of trust and unauthorized possession of the applicant's property.

ii. In the alternative to ground (i) above, that the Arbitrator erred in law and fact by disregarding the applicant's evidence showing that the respondent's conduct amounted to unauthorized possession of property and dishonesty and/or major breach of trust of property.

iii. That, the Arbitrator erred in law and fact by changing the standard of proof in labour matter to that beyond reasonable doubt by holding that theft/unauthorized possession of the applicant's properties was not proved merely because the applicant had not reported the loss to the relevant authorities

and that there was no report to show loss of bottles of wines in its premises.

iv. That, the Arbitrator erred in law and fact by awarding the 12 month's salaries as compensation and severance pay after finding that the respondent was in breach of the organizational rules.

v. That, the Arbitrator erred in law and fact by failing to analyze the evidence on record hence coming to wrong conclusion.

The matter was argued orally. At the hearing Mr. Jonathan Wangubo, Learned Counsel holding brief for Samah Salah, Learned Counsel appeared for the applicant while Mr. Kurubene Pasensa, Learned Counsel was for the respondent.

The application is supported by the affidavit of Iddah Mushi which has raised five (5) grounds of revision as shown in the chamber summons for purpose of time I will address each ground separately.

On the first ground it was submitted that, the Arbitrator erred in law and fact by holding that the respondent conducts only amounted to breach of organizational rules. It was stated that, there was

evidence to show the respondent's conduct amounted to dishonesty and major breach of trust and, unauthorized possession of the applicant's property. It was also submitted that at page six (6) of the typed award shows the respondent was found with five bottles of wine containing the label of the applicant. It was further submitted that at page sixteen (16) to eighteen (18) of the impugned award the Arbitrator noted that the respondent contravened the applicant's code (Staff hand book) which was admitted as Exhibit KH4 for being in possession of the applicant's properties including five wines bottles, 11 cookies and an apple.

It was the applicant's Counsel submission that by contravening the employer hand book, it amounts to misconduct and, the same warranted termination under Rule 12 (1) and (3) (a) to (f) of the Employment and Labour Relations Act (Code of Good Practice), GN. 42 of 2007 (herein GN. 42 of 2007). It was added that Rule 12 (3) (a) of GN. 42 of 2007 provides that gross dishonest is an act which may justify termination. To strengthen his submission the Learned Counsel cited the case of **Vedastus S. Ntulanyeruka & Others Vs. Mohamed Trans Ltd.**, Rev. No. 4 of 2014, where at page 14 to 20

the court discussed that gross dishonest entails breach of the rule or standard regulating conduct relating to employment.

It was strongly submitted that in this case the trial Arbitrator erred to hold that, though the respondent's misconduct amounted to breach of organizational rule, he failed to find that it amounts to fair termination.

In ground number 3 it was submitted that, the Arbitrator wrongly held that the standard of proof in labour matter is beyond reasonable doubt. That the Arbitrator was wrong to hold that theft or unauthorized possession of properties was not proved merely because the applicant did not report the loss to the relevant authorities. It was further submitted that the law governing standard of proof in employment disputes is section 39 of the Act, read together with rule 9 (3) of the GN. 42 of 2007, which states that the burden in labour disputes lays to the employer and it is sufficient to prove that on balance of probability. It was strongly submitted that in this case the applicant case was proved on the balance of probability.

On the fourth ground it was submitted that the Arbitrator erred in law and fact by awarding twelve (12) month salaries as

compensation and severance pay even after finding that the respondent was in breach of the organizational rules. It was argued that, the Arbitrator failed to hold that the applicant had substantive reasons to terminate the respondent. The Learned Counsel further argued that where the termination is found to be substantively fair but procedurally unfair, then the amount of compensation in procedural unfairness is lesser to that of substantive fairness. He added that, the award of 12 month was very high and he pleaded the Court to reduce the same. To cement his submission, he cited the case of **Vedastus (supra)** where the High Court agreed to the Arbitrators' award of six months. He therefore prayed for the award to be revised to lesser amount as was held in the case of **Sodetra (SPRI) Ltd. Vs. Njelu Moeza & Another,** Rev. No. 207 of 2008, HC DSM (Unreported).

In the upshot the Learned Counsel urged the Court to uphold the grounds for revision and allow the application.

Responding to the application Mr. Kurubene Pasensa in respect of the first ground submitted that, the allegation against the respondent found in this ground was never proved during the Arbitration. He stated that, there was no evidence which was

tendered at the CMA to prove the alleged misconduct of distrust and unauthorized possession of the applicant's properties. He added that at page 6 of the impugned award there is no any evidence which was tendered but only summary of the witnesses' statements.

The Learned Counsel went on to submit that the evidence tendered by the applicant that is Staff hand book (Exhibit KH4) clearly shows that the alleged offence committed by the respondent would have been penalized by a warning and not termination. He added that at page 19 of the award the Arbitrator discussed that the respondent was terminated by being found with unauthorized possession of the applicants' properties and there was no proof of the misconduct in question. He also added that there was no any piece of evidence or report from the store keeper which proved that there was any loss of the alleged properties.

It was submitted that what is observed in page 18 of the award is that, there is no any doubt that when the respondent entered the applicant's gate had some properties which ought to be registered. It was argued that the fact that he failed to do so, can be termed as breach of the organizational rules but did not to prove that he was found in possession of unauthorized properties.

It was further submitted that in the award, there is nowhere to show that the respondent was summoned to appear before the disciplinary committee for hearing on such alleged misconduct. It was stated that the respondent was only given the charge sheet and he was not accorded any opportunity to be heard and defend himself for the offence charged. He said, there was no disciplinary hearing by any relevant authority as provided in law, so the Arbitrator was correct to award the respondent because he found that there was no any valid reason to terminate him from employment, and he was not given opportunity to be heard as required in law. It was also submitted that the case of **Vedasto (supra)** referred by the applicant's Counsel is distinguishable to this one.

On the second ground it was submitted that the stand of proof was considered because the complaint was determined on the balance of probability as reflected at page 18 of the award. That Rule 13 of the GN. 42 of 2007 provides for procedures to be followed before termination of employment. Also, section 37 (2) (a) (b) (c) of the Act provides that termination of employment will be fair if the employer proves that there was fair reasons and fair procedures were followed.

It was also strongly submitted that, according to the applicant's evidence at the CMA, the Arbitrator found there was no any evidence to prove that the respondent committed the offence charged on balance of probabilities.

Regarding the issue of compensation, it was submitted that the amount awarded by the Arbitrator as compensation was correct because the termination was found to be both substantive and procedural unfair. It was also added that the award of severance pay was proper. In the conclusion the Learned Counsel prayed for the revision application be dismissed for want of merit.

In rejoinder Mr. Jonathan Wangubo added that, the respondent's counsel allegation that no disciplinary hearing was conducted is not correct because the respondent was given a charge sheet and he respondent to the same which amount to the right to be heard.

After considering the submissions from both counsels, the record in court and relevant laws I find that there are four issues to be determined by the Court. The first issue is whether the applicant proved the misconduct levelled against the respondent, secondly is

whether the applicant followed laid down procedures in terminating the respondent, thirdly is whether the award of 12 months salaries was correct and lastly is to what reliefs are the parties entitled.

On the first issue as to whether the applicant proved the misconduct levelled against the respondent it is on record the respondent was terminated for the following misconducts as listed in the termination letter (exhibit KH13):-

(i) Breach of the code of conduct and conditions of employment.

(ii) Theft or unauthorized possession of the employer's property.

(iii) Dishonesty or any other major breach of trust under the company Rules & Regulations and the terms and conditions of employment contract.

(iv) Jeopardize hotel safety and security.

(v) Supplying false information about oneself.

(vi) Other serious breach of organizational rules or policy which have effect of causing an irreparable break down on the employment relationship.

The applicant summoned three witnesses and tendered exhibits to prove the allegations levelled against the respondent. The security officer, Nicholas Glody Kalunde, DW2 who was on duty on the

incident date testified at the CMA that at the beginning the respondent refused to be searched until he sought support from his superior. He testified that after inspection the respondent was found in possession of five bottles of wine, 11 pieces of biscuits and one apple, the evidence which was not disputed by the respondent. DW2's evidence was collaborated with DW3 who testified the same as well as DW1's evidence who also tendered witnesses' statement regarding the incident, which is exhibit KH5, KH6, KH7, KH8 and KH9. According to the applicant the goods found were stolen from his properties while the respondent strongly disputed such fact. The respondent summoned his witness PW2 who testified to be the owner of the bottles of wines in dispute.

In his testimony at the CMA the respondent testified to be aware of the employee handbook (Exhibit KH4) which analyze the procedures to be followed by employees during entering and leaving the employer's premises with their own properties. It is crystal clear that, the applicant set his standards of behavior in his place of work. The law requires when there are standard set by the employer the employee should be aware of the same, this is in accordance with

Rule 12 (1) of GN 42 of 2007 of which I find no need to reproduce the same.

In this case despite being aware of those procedures and standard of behaviours the respondent did not follow the same. Under such circumstances it is my view that, the applicant was right to charge the respondent with theft or unauthorized possession of the employer's properties. The record reveals that, the respondent was found with five bottles of wine which are similar to those of his employer. In my observation if the respondent did not steal the wines in question, he would have followed procedures of leaving with goods from the employer's premises as prescribed in Exhibit KH4. Under normal circumstances if the respondent had good intention and just forget to follow the procedures when entering to the employer's premises he would have not refused to be searched when leaving the employer's premises until when the security officer on duty sough support from his fellows. The respondent also tried to bribe the security office in duty the act which shows he had an intention to steal. The fact that he did not inform his employer that he was in possession of his wines obtained from outside and refused to be

searched draws an inference that he stole the same from the employer.

On the basis of the above discussion I do not agree with the Arbitrator's findings that the applicant was obliged to report the matter to the police to prove that theft took place. In my view the applicant as an employer is not exempted from charging his employee with that nature of an offence despite of him/her not being an authorized machinery for that purpose. It is also worth to note that in employment matters the standard of proof is on the balance of probabilities as correctly submitted by the applicant's counsel. In this case I am satisfied that the applicant has proved his case on the balance of probabilities that the respondent committed the misconduct in question. Therefore, I have no hesitation to say that the applicant had valid reason to terminate the respondent.

On the second issue as to termination procedures as stated above the respondent was terminated on the basis of misconduct. The procedures for terminating an employee under the ground of misconduct are provided under Rule 13 of GN. 42 of 2007. In the application at hand as the record reveals, there is no doubt that the procedures provided by the law was not followed. For easy of

reference, I quote DW1's testimony on his own verbatim when he was cross examined:-

> *'S: Baada ya kugundua amekosa uaminifu mlimuandikia nini?*
> *J: Tulimuandikia makosa yake ajieleze tuhuma.*
> *S: Baada ya kujieleza ukasema mlifanya uchunguzi je baada ya uchunguzi mlimuita tena*
> *J: Kulingana na cheo chake tuliona kuwa amedhamiria hivyo tukamwachisha kazi'.*

So according to the testimony of DW1 it is clear that, after the investigation was conducted the respondent was terminated from his employment without being summoned at the disciplinary hearing.

It is trite law that a person shall be entitled to fair hearing which including the right to be heard before any decision is made against him/her. The right to be heard in any matter before the CMA and Court, including labour disputes is so fundamental and a Constitutional one as has been decided in a chain of cases. In the case of **Mbeya - Rukwa Auto parts and Transport Ltd. Vs.**

Jestina Mwakyoma [2003] TLR no. 251, it was held that:-

> *'In this country natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of the equality before the law, and declares in part:-*
>
> *(a) wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu.'*

Also, in case of **Abbas Sherally & another vs. Abdul S.H.M. Fazalboy,** Civil Application No. 33 of 2002, the Court held that:-

> *'The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice.'*

'It has long been settled that a decision affecting the individuals rights which is arrived at by a procedure which offended against principles of natural justice, is outside jurisdiction of decision-making authority.'

In the matter at hand the respondent was condemned without being heard. As the record reveals he was not summoned to any disciplinary hearing so as to be able to question the employer's evidence presented against him. As much as the employer had a good case against the respondent but he violated the right to be heard which is of paramount importance before any adverse action is taken against any person. Thus, as rightly found by the Arbitrator the procedures for termination under the ground of misconduct as they are provided under Rule 13 of GN. 42 of 2007 were not followed in the matter at hand.

On the third issue as to whether the award of 12 months' salaries compensation was fair, compensation is one the remedies awarded on a finding of unfair termination as they are provided under section 40 (1) of the Act. I have noted the cases cited by the applicant's Counsel on the award of compensation. However, the award of compensation on a finding of unfair termination has been

recently elaborated in a case of **Higher Education Student's Loans Board V. Yusufu M. Kisare,** Consolidated Lab. Rev. No. 755 of 2018 and 858 of 2018, HC, DSM (unreported):-

> *'Regarding the order of reinstatement, it is my view that as it is found that the employer had valid reasons to terminate the employee's employment such an order will not be appropriate. I believe the order of reinstatement is granted where the employee is unfairly terminated both substantively and procedurally and the circumstances of his case allows him to be reinstated to his position in the employer's organization without disturbing the working environment at the particular working place. It is on record that upon findings that the employee was unfairly terminated procedurally the CMA awarded him six months salaries compensation. The employee wants this Court to fault such an award on the reason that the Arbitrator has no power to award less that 12 months Compensation on a finding of unfair termination.*
>
> *'In my view the Arbitrator was wrong to award such an award because the provision of section 40 (1) given discretion to the Court to*

award the employee any order among those in section 40 (1) (a) (b) or (c). Section 40 (1) (c) is very clear that in awarding compensation if the Court decides to do so by using its discretion it should order payment of compensation to the employee of not less than twelve months remuneration. The Court notes the compensation is of remuneration and not only salary which is part of remuneration as defined under section 4 of the Act. Reading between the lines section 40 (1) (c) sets the minimum standard and the Court is allowed to award more than 12 months remuneration and not less depending on the circumstance of the case. I fully agree with those who expresses their view regarding section 40 (1) that provides for the remedies when the termination is found to be unfair. Unfair termination is defined under section 37 (2) of the Act. Reading between the lines I am reluctant to say that the legislature made a demarcation as to what extent of unfairness the provisions of section 40 (1) (c) can apply, that is the minimum stand of not less than twelve month's remuneration can apply. In my view in labour matters, there must be a minimum stand as it is in the relevant

provision and, that is why the Court is left to use its discretion to go above it. It is my considered view that every law enacted by Parliament must be obeyed to the letters. No matter how unreasonable or unjust it may be, nevertheless if it is clear on the point, the Judge have no option. They must apply the law as it stands. The Judges have a duty to administer and apply the law of the land and, if we depart from it and do so knowingly we would be guilty of misuse of our inherent powers which any Court of justice must possess to prevent any abuse of the Court's process which would bring the administration of justice into disrepute among right thinking people.'

In line of the above quoted case, it is my view that a Judge or Arbitrator is not empowered to award less than 12 months compensation on a finding of unfair termination be it substantive or procedurally. Therefore, in this case it is my view that the Arbitrator was correct to award the respondent 12 month's salaries remuneration as compensation for unfair termination.

On the last issue as to relief of the parties, the applicant alleged that the respondent was not entitled with severance pay. The award of severance pay is governed by section 42 of the Act. Under section 42 (3) (a) it is provided that the award of severance pay shall not apply to a fair termination on the ground of misconduct. In this case the applicant has proved that the respondent committed the misconducts in question. In the event I am of the view that the respondent is not entitled to the award of severance pay as awarded by the Arbitrator. Thus, such an award is hereby quashed and set aside.

In the result as it is found that the applicant had valid reasons to terminate the respondent's employment but did not follow the legal procedures in doing so, hence the application at hand is partially succeeded. The applicant is ordered to pay the respondent 12 month's remunerations as compensation for unfair termination and a certificate of service as ordered by the Arbitrator. The award of severance pay to the respondent is hereby quashed and set aside.

It is so ordered.

I.D. Aboud
JUDGE
07/05/2021