IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM.

REVISION NO. 905 OF 2019

BETWEEN

DONALD KATAKWEBA... APPLICANT

VERSUS

DAWASCO..RESPONDENT

JUDGMENT

Date of Last Order: 25/06/2021
Date of Judgment: 30/06/2021

A. Msafiri, J.

This application was filed by DONALD KATAKWEBA, seeking for a court order to quash and set aside the award issued by the Commission for Mediation and Arbitration (herein referred as CMA) dated 22nd October, 2019 in Labour dispute No. CMA/DSM/ILALA/R.253/17, on the ground stated in paragraph 2 of the applicant's affidavit in support of the application. The respondent challenged the application through the counter affidavit sworn by Florence Saivoiye Yamat.

Here are the brief facts, on 1st April, 2011 the applicant was employed by the respondent as an Internal Auditor. They maintained their relationship until 9th February, 2017 when he was terminated on

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ground of gross negligence for misplacing the customer's cheque. Aggrieved with the termination, the applicant referred the dispute before CMA, where the dispute was dismissed for want of merit. The applicant felt resentful and filed this application hence this judgement.

At the hearing the applicant was represented by Sammy Katerega-Personal representative. Mr. Katerega prayed to adopt the applicant affidavit in support of the application to form part of his submission. The respondent was represented by Omari Iddi Kipingu and Zuhura Kerenge, their Principal Legal Officers. Mr. Katerega stated that, the arbitrator erred in law and fact as he did not allow the applicant to cross examine the respondent's witnesses. The loss claimed by the respondent was not real hence through cross examination the same could have been revealed. The applicant was partly afforded with a right be heard, that was contrary to Rule 13(5) of Employment and Labour Relations (Code of Good Practice) Rules, GN.42/2007.

Further it was submitted that, the client Jumuiya ya Wauzaji Maji Sala Sala was also the debtor of the claimed amount. His assets were taken by the respondent, this means that the respondent was both the debtor and creditor after taking over the assets and liabilities of their client. That client was one who owed the respondent Tshs.

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8,075,593/=at the same time. It was revealed that the cheque of the said amount was never used as it did not clear in any of the books of accounts of both DAWASCO and Jumuiya ya Wazazi. That, the applicant's admission to have lost a cheque was forced by the respondent that is why the applicant's statement states;

> *'Kufidia hela ya shirika ambayo bado haijaingia kwenye akaunti ya shirika'.*

So, the investigation was incomplete, this would have been be revealed through cross examination.

Mr. Katerega submitted that, the arbitrator overlooked the aspect of composition of Disciplinary Hearing Committee. The same was composed of junior staffs and trainees who were the applicant's subordinate. The chairman of the committee was on the same rank with that of the applicant that was contrary to Rule 13 (4) of GN. 42/2007.

As regard to the life span of a cheque it was submitted that, the cheque is effective within six months from the date it was issued. Since there is evidence that the check did not clear in any of the books of accounts of both client and respondent, the penalty would have been lesser than termination as there was neither theft nor any record of repeated charges in the records.

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Additionally, it was stated that the proceedings of a Disciplinary Committee took a long time contrary to Rule 14 (4) of GN 42/2007 which requires the hearing to be held and finalized in a reasonable time. In this matter it took almost 11 months from 13th March, 2016 to 9th February, 2017 hence the punishment was of retrospective effect.

He submitted that, the applicant was also accused for failure to issue a stop order to the bank. The arbitrator overlooked that the duty of stopping payment of the cheque was not of the applicant, because the same is always done by the owner of the bank account.

In finality Mr. Kateregа stated that, the applicant was not terminated by a proper authority, the termination letter which was disclosed during arbitration stage, was signed by the Human Resource Director and not the Chief Executive Officer.

Responding to the applicant's averments the respondent's representative averred that, the applicant alleged that he was not given a chance to cross examine the respondent's witness. He has not produced any evidence to support his allegations. It is a cardinal principal of law that he who allege must prove his allegations. The arbitrator observed the parties' rights in the proceedings. Moreover, the

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said allegation was not featured in the applicant's affidavit, hence it is a mere statement from the bar which needs to be ignored by this court, referring the case of **MIC Ltd v. CXC Africa Ltd,** Civil Appl. No. 172/2019,

It is undisputed that the applicant committed negligence which caused loss to the respondent to the Tshs. 8,075,593/=. He admitted to that effect through a letter dated 2nd February, 2017. It is undoubted that the respondent did not receive the said amount from the customer because, the cheque that the applicant received from the customer was never submitted to the bank. He made reference to the admission letter (annexure DWSC-2) where the applicant stated;

> *'Ninaomba msamaha ofisi yako ya DAWASCO na pia naomba unikate kidogo kwenye mshahara wangu jumla ya kiasi hicho cha shillingi 8,075,593,00/= kwaajili ya kufidia hela ya shirika ambayo bado haijaingia kwenye akaunti ya shirika hadi sasa.'*

Further, the stated that the law is very clear on the dispensation of procedure upon admission of the employee, referring the case of **Nickson Alex v. Plan International**, Rev. No.22/2014.

As regard to the aspect of Disciplinary Hearing Committee, respondent submitted that, the Labour Court has repeatedly held that

the procedure under Rule 13 of GN. 42/2007 should not be followed in a checklist fashion. The same may be dispensed depending on the circumstances of each case, he cited the case of **Mantra Tanzania Ltd v. Daniel Kisoka**, Rev. No.267/2019. It was further stated, the applicant was afforded with a fair hearing as required under the law except for Rule 13 (1). This is reflected at page 2 of the typed proceedings. He thus prayed for dismissal of the application.

In rejoinder, the applicant's representative reiterated their submission in chief. It was further stated that, the cited cases are distinguished as the issue in this dispute is just a misplacement of cheque and it was not cleared in any bank account, so there was no misappropriation of money.

Having gone through the CMA and Court's records, applicable laws, and submissions by both parties, it is my considered view that the issues for determination are;

i. *Whether the dispute before CMA was properly determined by the arbitrator.*

ii. *Reliefs entitled to the parties.*

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It is a tenet of law that, for termination to be considered fair, it should be based on valid reasons and fair procedures. There must be substantive and procedural fairness on termination of employment as provided for in Section 37(2) of Employment and Labour Relations Act, Cap 366.

On substantive aspect, there is no doubt that the respondent had valid reason of termination as found by the arbitrator. The applicant herein admitted to have misplaced the customer's cheque and he issued the respondent's receipt while the respondent has not received the said amount. Even the applicant himself had not disputed the fact that due to his negligence he misplaced the client's cheque.

On procedural aspect, it was the CMA's finding that termination was procedural fair. The applicant's representative contested on the procedure for the applicant's termination on the grounds that , he was not afforded with a right to cross examine the respondent's witness, duration of the disciplinary meetings was unreasonable, composition of the disciplinary committee and who signed the termination letter had no authority.

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The applicant alleged that the arbitrator failed to observe that, the applicant was not afforded with a chance to cross examine the applicant's witness. It is a requirement of the law under Rule 13 (5) of G.N. 42/2007 for the employee to be afforded a chance to cross examine the employer's witness. It reads;

> *'Evidence in support of the application against the employee shall be presented at the hearing. The employee shall be given a proper opportunity at the hearing to respond to the allegations,* ***question any witness called by the employer and to call witnesses if any.'***
>
> [Emphasis added]

I have cautiously gone through the records, disciplinary hearing minutes and CMA proceedings. I have noted that from the minutes, the respondent had no any witness who testified therein in both disciplinary hearing minutes. After he was informed of the allegations against him, the applicant was given a chance to defend himself. The minutes did not show any other witness other than his defense and the committee's recommendations. In his submission the applicant had not stated which witnesses he is referring to. Even before CMA, records divulge that the applicant was afforded with a right to cross examine the respondent's

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witness. (Page 17), (20) on that regard I find the allegations to be baseless.

Concerning the time for disciplinary hearing, the applicant claimed that disciplinary hearing took a long time contrary to Rule 14 (4) of GN 42/2007 which requires the hearing to be held and finalized in within a reasonable time. In this matter it took almost 11 months from 13th March,2016 to 9th February,2017 hence the punishment was of retrospective effect.

As stated by the applicant's representative, it is apparent that the disciplinary hearing for determination of the applicant's fate, was conducted within 11 months divided into four sessions. The respondent conducted four disciplinary meetings which were held on 30th March,2016,4th April,2016, 20th January,2017 and 2nd February,2017. I have cautiously examined the records particularly the minutes of the disciplinary meetings (exhibits D4, D5, D7 and D8). I am of the considered view that, the time spent by the employer to conduct disciplinary hearing to be so unreasonable.

The respondent has not justified as to what transpired from 4th Arpil,2016 to February, 2017, as the disciplinary Committee gave the

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applicant one month to ensure the said amount is paid to the respondent's account as evidenced by exhibit D5 (disciplinary hearing minutes of 4th April,2016). It was the respondent's representative submission that procedure need not to be in a checklist fashion since the applicant was afforded with a fair hearing. On this aspect I insist that fair hearing includes the timely determination of a dispute. I thus fault the arbitrator's finding that termination was procedural fair.

Again, the applicant alleged that the composition of the disciplinary committee was not proper. It was contrary to Rule 13(4) of GN.42/2007. I find this allegation to be a new issue before this court, because, the applicant has not contested the same before CMA. In his testimony, the applicant has not disputed neither on the qualification of the Chairperson nor the members of the committee. This Court being the court of records, can not determine new issues which were not determined by the trial commission. However, even if the claim was proper before this court, the applicant tendered no evidence to prove his allegation, as a result I find the claim to be unjustified.

Moreover, the applicant is contesting on the termination penalty. That, the penalty is severe as the respondent have not incurred any loss. I have examined the records and found that, it is crystal clear that

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the said cheque was not yet affected as the alleged amount was still in the client's account. This was undisputed by the respondent as reflected on page 4 para10 of exhibit D5 (disciplinary hearing minutes) where the committee confirmed the same from the client's Accountant.

Rule 12 of GN 42/2007 provides for factors to be considered in deciding whether termination for misconduct was fair. The same includes whether or not the employee contravened a rule of standard regulating conduct relating to employment, and if termination is an appropriate sanction for contravening it, see Rule 12(a) (b) (v) of GN.42/2007.

I have perused the records, the respondent has neither tendered any evidence to substantiate the rule of standard breached by the applicant, nor the proof that termination was a proper sanction. On basis of the circumstance of this matter where the respondent has yet suffered any loss then I thus find termination was not a proper sanction to the applicant.

As regard to the relief of parties, having found that termination was procedural unfair, and though the reason was valid but, termination was not a proper sanction. I hereby order the applicant be reinstated

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with half salary payment, from the date of his termination to this decision, as provided by Section 40(1) of ELRA CAP 366 R.E 2019 as I found the employer had valid reason.

On that basis, I allow the application to that extent.

A. Msafiri

JUDGE

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