IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

CONSOLIDATE REVISION NO. 354 OF 2020 & 292 OF 2021

WALTER MUZE..... APPLICANT/RESPONDENT

VERSUS

TANESCO PWANI..... RESPONDENT/APPLICANTION

(From the decision of the Commission for Mediation & Arbitration of Pwani at Bagamoyo)

(Makundi: Arbitrator)

dated 12th March 2019

in

No. CMA/PWAN/BAG/R.80/017

JUDGEMENT

22nd October & 13th December 2021

Rwizile, J

For over 20 years, the applicant worked as the electrical technician employed by the respondent, the sole Tanzania Electric Supply Company Limited. He was employed as such on 29th October 1992. By the time of

termination for offences of gross dishonesty, on 1st April 2017, he was a senior Electrical Technician who also was an acting District Manager at Bagamoyo in the Coast Region of Tanzania. Upon termination he was paid some terminal benefits and was not satisfied. He filed a dispute with the Commission for Mediation and Arbitration. It was found that although his termination was unfair in substance and procedure, he was not entitled to reinstatement, but payment of terminal benefits of the amount of 30,196,200.00. He was not satisfied with award. He filed this application challenging the reliefs awarded. The respondent, also successfully filed application No. 292 of 2021, challenging the legality of the award. This court, on agreement of the parties, the two applications were consolidated. Parties also agreed to argue only two issues namely;

i. *Whether termination was both substantively and procedurally fair*
ii. *Whether the arbitrator was justified to order compensation for 12 months instead of reinstatement as pleaded in CMAF1*

Mr. Ngowo learned counsel represented the applicant. His argument was simple and straight to the point that, the commission held that there was failure of the relationship between the applicant and the respondent leading to award of compensation instead of reinstatement. The learned advocate

argued that the applicant pleaded and prayed for reinstatement or reengagement under section 40(1)(a). But it was held by the commission and awarded as under section 40(1)(c) of the Employment and Labour Relations Act. In his view the commission is bound to awarded what was pleaded in Form1. It was his argument further, that the respondent failed to prove fairness of termination under section 37 of the Act.

Lastly, the learned counsel submitted that section 44(1) of the Act, provides that payment should be for work done, such as annual leave, notice and severance were to be paid but the commission did not. He ultimately asked this court to order for reinstatement.

Mr. Laurian a legal Officer of the respondent, was of the reply that in terms of section 40(1) of the Act, remedies for unfair termination are provided. It is the discretion of the court to order the available remedies in the circumstances of the case, provided reasons are given as the arbitrator did. Reinstatement, in his view cannot be served in the same plate with terminal benefits. He argued, what was not pleaded in the CMAF1 should not be granted.

On the other side, he argued that there was enough evidence before the commission to prove that the applicant committed misconducts charged at the disciplinary hearing. He said, witnesses from Dw1 to Dw9 witnessed and gave evidence on that behalf. Mr. Laurian was of the firm view that the respondent proved that there were valid reasons for termination.

On procedure, it was his argument that Dw10 who chaired the disciplinary hearing committee came from Dodoma, he also testified before the commission. In his view, the proceedings were conducted in an orderly manner and so were free from bias. He said, this point was not pleaded in CMAF1. Further, he argued that the Commission did not decide the issue of procedure based on the evidence. He went saying, the arbitrator made his own analysis to justify the finding that it was not fair. He said, the courts, in the case of **Ahamada Mussa Ntambi v R** [1998] TLR 268 at page 277, were warned to fill in gaps in the cases, doing so he argued nullifies the proceeding. As well, Mr. Laurian lamented that the court should not indulge itself in the secret search of the gaps in the case, here, he was fortified by the case of **Merita Nackiminjali and Loishirali vs Sairevolo Barigut** [1998] TLR 120 at page 129. He therefore asked this court to set aside the award.

By way of rejoinder, Mr. Ngowo said, the respondent did not prove how she discharged her duty under section 39 of the Act as well, as Rule 9 and 12 of the Code of Good Practice. He said, charges before the committee were not proved. He finally asked this court to confirm the decision of the commission on unfairness of termination and lastly order reinstatement.

I have to start with the first issue whether termination was fair. As it has always been the case, fairness of termination is in two aspects; based on valid and fairness of reason and second on the procedural fairness. These two are like the two sides of the same coin, since none leaves the other. In this application, the commission held that there was no proof of both. This, in my view is not a fair finding. I will show how. First, I have to say, labour disputes are not like criminal cases, where proof of which, is beyond reasonable doubt. It needs evidence with enough weight compared to the counterpart to prove an issue.

The applicant was charged before the disciplinary hearing, which I think was duly constituted and was charged on 5 counts. The Commission held that the charged offences were not proved.

I have gone through the evidence of the respondent before the commission. It is clear to me that there was enough evidence to show; **First**, that the applicant gave to the customer two cost estimations/ quotations with two different prices in a considered span of one month. The first was issued on 16th July 2015 with costs of 60,000,000/=, while on 28th August 2015 the cost dropped to 32,862,362.13. The reason advanced by the applicant is fluctuation of prices. This means, in a such short period of time the prices dropped by half. This is doubtful

Second, the applicant was in the bar, when he received the amount of 49,000,000/= from the customer. Although the same was indeed paid into the officer but still, it was out of procedure to conduct business of the public officer in the bar.

Third, when cogitating the above event closely, it is found that the applicant had personal interest. He was a senior officer not even an accountant by profession but received cash and went to pay it to the account, which is out of procedure. Without personal interest, it is not likely to receive such an amount of money transfer it by himself. I think, it is an act that endangered his life.

Fourth, the money was indeed paid in the account of Land Link properties Ltd and the receipt was issues. It should be noted here that there is an allegation that he was having interest in the same company.

Fifth, there is evidence that, although it is normal for private companies to build electric lines, still, it was his proposal to the customer that the office was having tight programs and so the same should be done by the company. He received cash from the customer out of procedure and by designed made sure it was himself cashing it in the account of the company. This proves with not doubt that he had personal interest.

From the evidence of Dw5,6,9, 10 and 11, also exhibits Dw9 and B8, it is shown and proved at the required standard that the respondent proved that the applicant was involved in acts of dishonesty and such offences were proved not only at the commission but even at the disciplinary hearing. In brief and to say the least, it was proved that there was valid reason for termination.

On the other hand, for termination to be considered fair, there must be valid reasons for termination followed by fair procedure. In this party, I agree with the commission in one aspect that there were two anomalies in the

procedure; thus **First**, the applicant was suspended pending investigation for one year. This time is considered shockingly inordinate. Taking such long ought to be accompanied by plausible explanation. There was no such a thing throughout the hearing at the commission.

Second, despite taking that long, the commission was not issued with investigation report. The investigation report being a tool that commenced the prosecution proceedings has to be proved in the record. The commission and the court are interested in examining the same to see if it complied with standards. I think failure to produce it was done at the risk of the respondent's case.

Lastly, I do not agree with the commission that the disciplinary hearing was bias.

The Chair of the team was from Dodoma and there is no allegation that he was a junior officer of the company. What is illegal under rule 13 (4) of the Code of Good Practice is that the chair and members should not be persons who have dealt with the matter in other ways before the disciplinary hearing. There was no evidence that the same had done so. This point therefore is

baseless as submitted by the respondent. I hold that termination although for valid reason but it was not procedurally fair.

Lastly, having so ruled, the issue of reliefs is simple to handle, the applicant was not happy with 12 months awarded. He asked for reinstatement. In my considered view, the commission was not bound as submitted to order reinstatement. Provision of compensation is a creature of the law whenever it is found that an employee was unfairly terminated. Now that I have held that termination was for valid reason, I think there is no reason to consider reinstatement. But still, even the amount of 12 months compensation in normal circumstances is in the high side, it ought to be reduced as found by the Court of Appeal in the case of **Felician Rutwaza v World Vision Tanzania,** Civil Appeal No. 213 of 2019, CAT at Bukoba (unreported), where it was held that; -

> *"...Under the circumstances, since the learned Judge found the reasons for the appellant's termination were valid and fair, she was right in exercising her discretion ordering lesser compensation than that awarded by the CMA..."*

But in this application, I have hesitated to reduce the same. This is simply because of one reason that the applicant had worked for the respondent for almost 25 years.

In my considered view, it is enough not to interfere with the award in terms of reliefs. This being the case therefore, the two applications have no merit. They are dismissed with no order as to costs.

A.K. Rwizile

JUDGE

13.12. 2021