IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT DAR ES SALAAM

REVISION NO. 860 OF 2019

MIC TANZANIA LIMITED ..... APPLICANT

VERSUS

EDWIN KASANGA ..... RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J.

The applicant filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (herein CMA) in labour dispute No. CMA/DSM/ILA/551/11/09 ("The Dispute") dated 30/11/2015 by Hon. Mkombozi. Z.B, Arbitrator. The application is supported by an affidavit of Kay Nalomba, applicant's Legal Officer sworn on 13/11/2019. The respondent vehemently challenged the application by filing his counter affidavit praying for the dismissal of the application.

Brief background of the current dispute is that the respondent was employed by the applicant on 01/03/2007 to 30/05/2007 as a Management Trainee – Technical. Subsequently on 01/12/2007 the parties entered into another employment contract for an unspecified period where the respondent was appointed as a Network Operations Manager. On the 06/10/2009 the respondent was terminated form the

employment after he was accused of and found guilty of a misconduct namely battery theft and taking bribes. Aggrieved by the termination the respondent referred the matter to the CMA where it was decided in his favour. The applicant was dissatisfied by the CMA's award hence he filed the present application on the following grounds:

That the Honourable Commission erred in law and fact in holding that:-

1. That the there was no valid reason for termination because:
    - There was no proof that the complaint committed the alleged disciplinary offences
    - The termination was based on extraneous matters
    - The investigation report did not contain the name of the private investigator who prepared it
    - The private investigator was not called in the disciplinary hearing
    - No whistle blowers were brought in the disciplinary hearing and no emails were presented
2. That the termination was not procedureally fair
3. 60 months salary equivalent to Tshs. 364,000,000.00 is a fair quantification of general damages
4. The respondent is entitled to:-
    (a) Unpaid leave allowance for the month of October 2009, Tshs. 1,142,857.00
    (b) Unpaid Salary for the last day of 6/10/2009 of Tshs. 206,451,00;

(c) Severance pay of Tshs. 2,987,000.00; while the Respondent was terminated for misconduct

(d) 13the Salary of Tshs. 4,906,60.00 as per the contract while the respondent ws no longer working for the employer at the end of the year

(e) Compensation of USD 34,800.00 fro the 580 shares of Millicom International; in the absence of evidence that the respondent owned the 580 shares and without considering that shares being personal property the Applicant had no control over them.

(f) Performance bonus for the year 2009 of Tshs. 7,700,000.00; without considering that the said bonus is only paid after successful completion of a year of services and it is subject to performance.

5. That the Honourable Commission did not put to test the evidence of the Respondent before it and the same before the Disciplinary Hearing

6. That the Honourable Commission did not apply the test of requisite burden of proof required in labour cases

7. That the Honourable Commission did not direct itself to the fact that it is a Commission of equity not bound by technicalities of procedure or rules of evidence.

The application was disposed by way of written submissions. The applicant's submissions were drawn and filed by Ms. Blandina Kihampa,

learned advocate while the respondent's submissions were drawn and filed by Mr. Seni Malimi, learned advocate.

Arguing in support of the first ground of revision, the applicant's Counsel submitted that there was sufficient proof that the respondent committed the alleged disciplinary offences as evidenced by the testimony of the applicant's witness and the investigation report. That the investigation report clearly explained how the respondent was involved in fraud and battery theft. It was argued that, the fact that the name K.S Robert did not appear in the investigation report does not nullify the accuracy of the report in question.

It was further submitted that, the signature affixed in the report shows ownership by the investigator which is enough to authenticate the report. That the absence of the name of the investigator did not contravene any law or procedure. He argued that not summoning the investigator in the disciplinary hearing did not diminish the findings of the investigation so long as the respondent was afforded an opportunity to examine the investigation report contested.

The Learned Counsel went on to submit that the information which would have been testified by the whistle blowers and allegations on the emails were already featured in the investigation report. He hence concluded that there was a valid reason for termination.

Regarding the termination procedures, it was submitted that the allegation that there was no disciplinary record is not true because the meeting was well recorded as evidenced by the hearing form. As to

mitigation of the respondent, it was argued that G.N No. 42 of 2007 permit an employer to depart from the outlined disciplinary procedure depending on the circumstances of each particular case. That the gravity of the offences charged justified some procedures such as that of mitigation.

As to the reliefs that were granted by the cMA, the learned Counsel for the applicant submitted that the quantification of the general damages was flawed as it was not based on principles. To support his submission, he referred this court to the decision of the Court of Appeal in the case of **Saruji Corporation v. African Marble Company Limited [2004] TLR 155** and the case of **A.S. Sajan v. CRDB [1991] TLR 44.** He then submitted that the award of 60 months' salaries to the tune of Tshs. 384,000,000/= as general damages was based on wrong consideration by the Arbitrator and was not supported by any evidence. It was argued that the alleged loss of future bonus is not a direct consequence of the termination. As to the claim of loss of carrier development, it was submitted that it resulted from the respondent's personal choices and decision.

The Learned Counsel also disputed that award of leave allowance on the ground that the same was not provided in the contract. That since the respondent was terminated on the ground of misconduct, he is not entitled to severance pay.

It was further submitted that, the CMA erred in awarding 13th salary of Tshs 4,906,607/= provided in the employment contract because the respondent did not work for 12 months of the year. As to the award of

USD 34,800 for the 580 shares, it was submitted that there is no proof of the same. Regarding the award of bonus for the year 2009 of Tshs. 7,700,000/= it was submitted that, the bonus is only paid after successful completion of the year of service and it is subject to performance. That, the respondent was terminated before the year 2009 ended thus, he is not entitled the same.

In conclusion, the Learned Counsel submitted that the respondent was fairly terminated both substantively and procedurally therefore he is not entitled to the reliefs awarded. He hence prayed for the application to be allowed and the CMA's award be revised and set aside.

Responding to the submissions, the respondent's Counsel submitted that this application is grossly misconceived, devoid of merit and should be dismissed. That it is on record the allegations against the respondent were known to him on the first day when he was given notice of disciplinary hearing and served with the investigation report (exhibit D1). The Learned Counsel alleged that, the investigation report has the following major defects:-

- It was done before suspension of the respondent contrary to the law
- It was done in secrecy without the knowledge of the respondent contrary to the rules of natura justice
- It was presented to the respondent on the date of suspension
- The report has no name of the author/investigator

- The investigator was never called as a witness at the disciplinary hearing.
- The presenter of the report was never questioned or cross examined.
- The whistle blowers mentioned in the investigation report as source of the allegations grounding the termination, were not called in the disciplinary hearing.
- The emails mentioned in the report as conforming the allegations in the report were not presented at the disciplinary hearing.

He then submitted that the investigation was conducted contrary to Rule 13 (1) and 27 (1) of GN 42 of 2007. That the employee is entitled to know that he is being investigated and be able to offer his explanation in the allegations against him, however, heargued, such procedure was violated in this case. The Learned Counsel contended that, in this matter no investigation at all was conducted thus, the whole termination process becomes illegal. To cement his submission, he referred the Court to the case of **Barclays Bank Tanzania Limited v. Kombo Ally Singano, Labor Revision No. 65 of 2013** (unreported)

As to the name of the author of the investigation report, the respondent submitted that the relevant report has no name of the author and the name K.S Robert was stated during cross examination. He then argued that according to the law of evidence, the documents speak for themselves and cannot be altered by oral evidence. To buttress his submission, he cited the Court of Appeal case of Ashraf

Akber Khan vs Ravji Govind Varsan (Civil Appeal No.5 of 2017) [2019] TZCA 86; (09 April 2019). On the reason for termination, it was generally submitted that the same was invalid and unfair.

Submitting on the fairness of the termination procedures, the respondent's Counsel submitted that no document was tendered at the CMA to prove the record of the disciplinary hearing. It was argued that the hearing form (exhibit P5) was just a summary of the disciplinary hearing and not a record of the hearing. It was also submitted that since the investigation was not properly conducted, then the procedures for termination were not followed. Further that the respondent was not afforded an opportunity to mitigate pursuant to Rule 13 (7) of GN 42 of 2007.

Regarding the reliefs awarded, The Counsel submitted that the authorities cited by the applicant's Counsel are distinguishable to this case. That being a labour matter and since the respondent's termination was unfair both substantively and procedurally the payment of 60 months salaries is just and appropriate in the circumstances of the case. He argued that the contested award though termed as general damages by the Arbitrator, it is compensation within the scope of section 40 (1) (c) of the Act. He added that the respondent was terminated on malicious and unsubstantiated grounds which apart from loss of right to work, borders defamation on his personality and character hence, entitled to the relief awarded.

As to the award of leave allowance and severance pay, it was submitted that the same are statutory thus properly awarded by the

Arbitrator. Regarding the payment of Millicom shares, the learned Counsel submitted that the respondent owned the shares in question as per a letter dated 05/05/2008 (exhibit P7). On the award of bonus for the year 2009, he submitted that prior to the impugned termination, the respondent had an impeccable performance which led him to be awarded the Millicom shares for exemplary performance. That being offered a more senior job at the associate company of the applicant, Millicom Ghana. In the upshot, the Learned Counsel urged the court to upheld the CMA's award and dismiss the application.

Having gone through the CMA and this Court's records as well as submissions by both parties, it is my considered view that the issues for determination before the Court are on the fairness of the termination of the applicant both procedurally and substantially. The employer in this case is duty bound to prove the misconducts levelled against the respondent and whether the misconducts justified his termination and whether she adhered to fair termination procedures in terminating the respondent. The reliefs will thereafter be determined.

Starting with the first issue as to whether the applicant proved the misconducts levelled against the respondent. Pursuant to Section 37 of the Employment and Labour Relations Act, Cap. 360 R.E 2019 (ELRA), employers are supposed to terminate employees only on valid and fair reasons. It is therefore the duty of the employer to prove on balance of probabilities that the employee's termination was fair pursuant to Section 39 of ELRA. Misconduct is recognized as one of the valid and fair reasons for which an employment relationship may be terminated.

In the matter at hand, the respondent was terminated for misconducts namely battery theft and taking bribes. As per the records, the applicant's evidence on termination relied on the investigation (collective exhibit P4). I have keenly read the report in question, in my view such document is not sufficient evidence to prove the misconducts levelled against the respondent. For instance, the employer alleged that he started private investigation after he received information from anonymous people that some of the employees were involved in the alleged theft and they were taking bribes. Surprisingly, the content of the alleged information is unknown to this court.

The investigation report at hand is uncertain as to when did the offence of theft occurred and how did it happen. The report does not point out where the investigator received his information regarding the accused employees, neither does it indicate the employee having been interviewed. Moreover, the report is also not supported with any document to prove that the respondent committed the alleged misconduct. In my view, the misconducts in question were so serious and called for a prosecution even under the Penal Code. Therefore they needed sufficient evidence to be proved. Relying on the investigation report at hand may result to subject an employee on unfair dismissal as the employer did while denying him the right to be heard on such serious allegations.

Under the above circumstances I fully join hands with the Arbitrator that the report was based on suspicious information rather than evidence to prove it. In the absence of sufficient evidence to prove the misconducts in question, the Court considers he was denied right to

be heard hence unfairly terminated which denied him his fundamental right to work. In the case of **John Msigala Vs. Pan African Energy Tanzania Ltd**, **Labor Revison No. 688 of 2018 DSM**, (Unreported), the court, Hon. Muruke, J. stated as follows:-

> *'Employer should not gamble with One's right to work. To this court "A man's right to work is just as important to him as, if no more important than, his rights of property". Thus, termination of employment must be first substantively fair with fair and valid reasons putting in regards that the concept of Right to work as a component of human rights, is so fundamental and therefore guaranteed by different international legal instruments'*

Similarly, the Universal Declaration of Human Rights of 1948 provides for the right to work which is to the effect that:-

> *'Article 23 (1) ... everyone has the right to work to free choice of employment to just and favourable condition of work and to protection against unemployment...'*

Again, in the Book titled **African Bishops on Human Rights by Stanislaus Muyemba**, A source Book, Paulines Publications Africa. It is proclaimed that: -

> *'... The right to work includes the right to security and stability of employment. This implies the employee has a right not to lose one's job unfairly. Industrial courts should be instituted to provide legal protection against unfair dismissals and retrenchments. Such incidents are common within the context*

of privatization as carried out by the government. In case of unjustified and unlawful dismissals, the employee has the right to indemnity or to reinstatement on the job'.

Therefore, on the basis of the foregoing, it is my view that the applicant had no valid reason to terminate the respondent's employment. This is because in cases of serious misconduct like the ones at hand, the evidence available on record must be sufficient such that even when assessed by any prudent man, it will justify termination of the employee in question. Unfortunately, the employer in this case did not tender sufficient evidence to warrant termination of the respondent on the ground of theft and taking bribes. The termination was hence substantively unfair.

On the second issue, whether the applicant followed procedures in terminating the respondent, my findings are as follows; termination of employment on the ground of misconduct must adhere to procedures stipulated under Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, GN 42 of 2007 ("The Code"). Before termination can be issued as a penalty following serious misconduct, the employer has an obligation to undertake a disciplinary hearing where the employee will be given an opportunity to be heard. The first procedure an employer needs to comply with is to conduct an investigation to ascertain whether there are grounds for a disciplinary hearing to be held. The law is silent on what scope the said investigation and the process to be undertaken during the investigation should be.

In the case at hand it is undisputed that investigation was done. On his part, the respondent alleged that it was wrong to conduct an

investigation behind his back, that he was not involved in the whole process of investigation. As stated above, the law is silent on a manner in which the investigation has to be conducted, however in my view, the whole process should adhere to the principles of natural justice, this further entails even that even the investigator should be an impartial person. In some circumstances, it is even prudent to for the investigator to question the employee involved in the incident investigated so as to afford him/her the right to be heard at such stage.

Looking at the investigation report at hand, it does not indicate the name of the investigator which makes it impossible to ascertain whether it was done by an impartial person or not. The report is not exhaustive as to who were investigated and the evidence relied by the investigator, we cannot therefore rule out the possibility that the same investigator might have adjudicated the matter, well the report is silent, one might not stop making all assumptions. The case would have been different if the name of the investigator was identified in the report. Therefore, as rightly held by the Arbitrator, the report raises suspicious on the information contained therein.

In this matter, since the employer's allegation originated from the anonymous emails, it is therefore expected that the emails would have been attached in the relevant report or tendered in the disciplinary hearing. However, as the record shows the alleged emails were not tendered as evidence and its contents is unknown. Furthermore, the anonymous email should have been handled with a lot of care because any person with malicious against the respondent might have initiated

this scandal against him. On these findings, I have no hesitation to say that the investigation was not properly conducted in this case. I therefore join hands with the Arbitrator's findings that the procedures for termination were also unfair. I am aware that it has been decided in a number of cases that the procedures should not be adhered as a checklist fashion, the same should adhere to the principle of natural justice. As for the case at hand, from the way the allegations started as unanimous rumors, the investigation report should have been more thorough and given the nature of the misconduct alleged, the standards of proof should have been higher than what was relied by the applicant.

On the last issue as to what reliefs are the parties entitled; since I have made findings that the termination of the respondent was unfair both substantively and procedurally, then the respondent to the remedies for unfair termination as provided under section 40 of the ELRA. In this case the Arbitrator did not award any of the remedies provided in the relevant provision despite the finding that the respondent was unfairly terminated both substantively and procedurally. In my view the Arbitrator was wrong not to award any of the remedies provided under section 40 of the Act because the award of compensation is not a substitute of any other remedies awarded to the affected employee. This is the position of the law as it is provided under section 40 (2) of the Act which is to the following effect:-

> *"An order for compensation made under this section shall be in additional to, and not a substitute for, any other amount to which the employee may be entitled in terms of any law or agreement."*

On the basis of the above position, and having found that the termination was unfair both procedurally and substantively, I revise the award of the CMA and order the following reliefs; the respondent is entitled to 12 months remuneration as compensation for unfair termination pursuant to section 40 (1) (c) of the Act. The respondent's monthly salary was Tshs. 4,900,000/= x 12= 76,800,000/=.

The respondent is also entitled to the award of severance pay in accordance with section 42 of the Act because he was unfairly terminated from employment. Severance to paid is Tshs. 2,987,000/= and leave allowance of Tshs. 1,142,857/= as awarded by the Arbitrator. I also agree with the Arbitrator that the respondent is entitled to 13th salary as per the contract because it is the remuneration he would have received if he was not unfairly terminated from employment. The 13th salary is therefore awarded at Tshs. 4,906,607/=.

Regarding the award of 60 months salaries as general damages, the Arbitrator decided to term the same as compensation. As stated above the award of compensation is not a substitute for any other remuneration which the employee is entitled. In my view it is true that employers should be held accountable for unfair labor practises like terminating employees on their own whims. It is my view that the compensation imposed to employers should be in line with the objectives of our labour laws as they are provided under section 3 of the Act. Therefore the above compensation is in accordance with the law, general damages under the circumstances will be an excessive sanction to the employer.

Regarding the award of performance bonus for 2009 and compensation of 580 shares I find no proof of the same. The bonus is awarded on an assessment of the employees' performance the preceding year and in this case that year was not completed. It will therefore be unfair to award the same to the employer. As for the compensation on the expected 580 shares, this is an issue which does not fall under jurisdiction of the labor laws. The issue of shares is dealt with under the Companies Act, Cap 212 R.E 2019. Under Section 14(10 of the Labour Institutions Act, Cap. 360 R.E 2019, the functions of the CMA is to mediate any dispute referred to it in terms of any labour law; determine any dispute referred to it by arbitration ifa labour law requires the dispute to be determined by arbitration or if the parties to the dispute agree to it being determined by arbitration. The CMA also determine a matter if the Labour Court refers the dispute to it to be determined by arbitration in terms of section 94(3)(a)(ii) of the ELRA. There is no law which confers the CMA with jurisdiction to determine an issue of shares that the party allegedly holds in a company. The CMA hence dealt an issue which was ultra vires of its jurisdiction, that part of decision awarding compensation for shares is revised and set aside.

On those findings, this revision application is partly allowed to the extent explained above. The Arbitrator's finding that the respondent was unfairly terminated both substantively and procedurally is confirmed. The respondent is entitled to 12 months salaries as compensation for unfair termination. The respondent's monthly salary was Tshs. 4,900,000/= x 12= 76,800,000/=. He is also entitled severance pay to Tshs. 2,987,000/=, leave allowance of Tshs. 1,142,857/= as awarded by

the Arbitrator and 13th salary as per the contract Tshs. 4,906,607/=. Therefore, the respondent is entitled to the total of Tshs. 85,836,464/= subject to statutory deduction.

Dated at Dar-es-salaam this 03rd September, 2021

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S.M. MAGHIMBI

JUDGE