IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 200 OF 2020

BETWEEN

QATAR AIRWAYS.....APPLICANT

AND

MAFULI HAMADI MFINANGA.....RESPONDENT

JUDGMENT

Date of Last Order: 11/05/2021
Date of Judgment: 09/07/2021

A. E MWIPOPO, J

Qatar Airways, the Applicant herein, has filed the present application for revision against the award of the Commission for Mediation and Arbitration (CMA) in the Labour Dispute No. CMA/DSM/KIN/1014/18/311 which was delivered on 8th May, 2020. The Applicant is praying for the Orders of the Court in the following terms:-

1. That this Honourable Court be pleased to call for and examine the records of the proceedings and award of the Commission for Mediation and Arbitration (Hon. Belinda S.) dated 8th May, 2020, for the purpose of satisfying itself as to the correctness, legality

or propriety of the said proceedings and as to their regularity and revise them accordingly.

2. Any other order that this Honourable Court may deem fit and just to grant.

The background of the dispute in brief is that: the Applicant employed the Respondent namely Mafuli Hamadi Mfinanga on 11th March, 2015 in the post of Finance Assistant. The Respondent was terminated from employment on 26th September, 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 and procedurally. 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 Daniel Engelbert, Principal Officer of the Applicant. The Respondent filed counter affidavit to oppose the Application.

In this Application, both parties were represented. The Applicant was represented by Mr. Rahim Mbwambo, Advocate, whereas the Respondent was represented by Mr. Edward Peter Chuwa, Advocate. By consent of the parties, hearing of the application was disposed of by way of written submissions.

In summary, The Applicant's Counsel submitted in supporting of the application that the Arbitrator erred to award damages contrary to Respondent pleadings before the CMA. The Respondent did not categorize a type of damages she needs the Commission to grant and the Arbitrator erred to assume the Respondent's duty to categorize the damages into general and special damages. The wrong complained against the Applicant is the termination of Respondent's employment and the remedies for unfair termination is provided under section 40 of the Employment and Labour Relations Act, Cap. 366 R.E. 2019. The Arbitrator having awarded the Respondent remedies for unfair termination misdirected herself to treat termination as tort. There is no evidence to prove the injuries suffered to the Respondent in connection to the termination which formed the basis of awarding general damages of shillings 200 million to the Respondent. To support the position he cited several cases including the case of **Rumishael Shoo & 64 Others v. The Guardian Ltd** (2011-2012) LCCD No. 20; and Abubakar Haji Yakubu V. Air Tanzania Co. Ltd (2011 – 2012) LCCD No. 104.

The Counsel proceeded to submit that even the special damage of shillings 30 million awarded by the Commission was not specifically pleaded and proved as it was held in the case of **Stanbic Bank (T) Ltd V. Abercrombie & Kent (T) Ltd,** Civil Appeal No. 21 of 2001, Court of Appeal

of Tanzania, at Dar Es Salaam, (Unreported). The Arbitrator was not supposed to rely on the circumstances of the case but rather by looking on pleadings and the evidence tendered.

The Counsel argued that the Applicant established their case that termination of Respondent's employment was both substantively and procedurally fair. The testimony of DW1 proved that the Respondent committed gross misconduct which are dishonest behavior, breach of trust and breach of organizational policy. The investigation conducted by the Applicant recommended for the Respondent to be charged for disciplinary offences and the Respondent was properly charged for disciplinary hearing and the offence was proved on balance of probabilities. The Respondent appeared before the disciplinary hearing Committee and witness were called as proved by minutes of the disciplinary hearing – Exhibit D3 and AP7. The Respondent admitted to alter bank detail and sent incorrect information to the ticketing agent. This was contrary to Applicant's policy – Exhibit D5. The testimony of DW2 shows that the Respondent did sent an e- mail on 25th May, 2018 and 8th June, 2018 confirming that the customers has deposited some money while the said amount was not in the bank. The offence of dishonest behavior and breach of trust are serious offences that may justify termination under rule 12(3) (a) of the Employment and Labour Relations

(Code of Good Practice) Rules, G.N. No. 42 of 2007. The Counsel is of the view that these evidence from DW1, DW2, Investigation Report and Minutes of disciplinary hearing proved on balance of probabilities disciplinary offences against the Respondent.

On the procedures for termination, the counsel averred that the procedures were adhered as the investigation was conducted, the Respondent was given notice to attend disciplinary hearing, charges were sent to him, disciplinary hearing was conducted and after she was found guilty by the Committee a termination letter was issued to her. The Respondent testimony that she never appeared before the disciplinary Committee and she was handled with suspension letter, charges, minute and termination letter on 26th September, 2018 by DW1 is not true. The testimony of DW1 on the appearance of the Respondent before the disciplinary hearing was not challenged. The Respondent admitted in opening statement that she appeared before the disciplinary hearing committee. Thus, the Respondent was not prejudiced in anyway.

On the Award, the Applicant submitted that the Arbitrator erred to award 24 months' salary without justification. There is no special circumstances which was stated for awarding the compensation. To support the position the Counsel cited the case of **Alliance One Tobacco Ltd V.**

George Msingi (2011-2012) LCCD No. 77. He went on to submit that the calculation of the compensation was based on the Gross salary of the Respondent instead of basic salary. The Respondent basic salary was shillings 678,400/= and not shillings 932,134/=. Also, there is no explanation of the awarded shillings 2,565,000/= for unpaid leave. There is no explanation from the Respondent and from the Arbitrator as the amount was paid for which annual leave. The Court was supposed to consider only one annual leave pay as the rest would be time barred.

Replying to the Applicant submission, the Respondent's Counsel in summary submitted that the Applicant failed to prove that the termination was fair. DW1 who was Applicant witness testified before the Commission that the Respondent had misappropriated the Applicant's fund after the money deposited in the Applicant's account was not found in the Applicant's account. DW1 admitted in cross examination that when purchasing a ticket the customer deposited directly into the Applicant's account at Citibank and the Respondent could not was not a signatory hence he could not withdraw or temper with the account. The witness testified that the Respondent misused Usd 561 for the reason that the amount was not traced in the general ledger. However the alleged ledger was not produced as evidence. DW1 also testified that the allegation against the Respondent were based on

investigation conducted by Tariq Said who was Finance Manager. The said Finance Manager is based in Doha, Qatar and was not called to testify on the investigation report – Exhibit D6. Failure of the Applicant to call Tariq Seif who is a material witness the Arbitrator was right to draw adverse reference since the Exhibit D6 was not dated and DW1 was not in position to testify on the document. For that reason, this Court could not rely on Exhibit D6 whose authenticity is highly doubted.

The Counsel argued that DW2 a co - worker of the Respondent testified that their duties were to book ticket for customer who later paid directly to the Applicant's account. DW2 and the Respondent could not see the money deposited by the customer but the same could be seen by the finance department. DW2 testified that she has never seen Exhibit D6 and she was never called to disciplinary hearing to testify against the Respondent. She has never seen the said Tariq Said and when she was at DW1 Office she heard DW1 was talking on phone to the said Tariq Said. She was surprised as to why the Respondent was terminated as Respondent was not among signatories of the Applicant. This evidence by DW1 and DW2 proved that the Respondent termination was not fair.

On the Applicant's submission that the types of damages was supposed to be categorized, the Respondent counsel submitted that it is in record that

CMA Form No. 1 shows at paragraph 4 that the outcome of the mediation the Respondent pleaded for re-instatement, damages for unfair termination to the tune of shillings 300 million, unpaid meal allowance shillings 12,367,000/= and other damages shillings 100 million. The Arbitrator or Court are not confined to grant only the claims found in CMA Form No. 1 as it was held in **Said Mohamed Nzegere V. AARS Leff Bam International**, Revision No. 17 of 2014, High Court Labour Division, at Sumbawanga. The general damages need not to be pleaded and they are awarded at the discretion of the Court. The Commission awarded shillings 200 million as general damages after it was satisfied that the Respondent had miscarriage as a result of the Applicant's act. The damages were awarded solely as the consequences of unfair termination and the miscarriage was direct consequence. The Medical report – Exhibit A4 proved that the Respondent had a miscarriage and the Exhibit A4 was admitted without objection.

The Counsel went on to argue that the Appellate Court only interfere with general damages after it was satisfied that in assessing damages the lower Court applied wrong principle or the amount awarded is inordinate low or inordinate high that it must be a wholly erroneous estimate of the damage as it was held by the Court of Appeal of Tanzania in the case of **Cooper**

Motors Ltd V. Moshi/Arusha Occipational Health Services [1990] T.L.R 96. General damages is granted on top of legal remedies provided under the law.

On the award of 24 months' salary as compensation for unfair termination, the Respondent counsel submitted that 12 months' salary is just a minimum as it was held in the case of **Alliance One Tobacco Ltd V. George Msingi** (2011-2012) LCCD 17. The Applicant has not provided any legal basis for alleging that the calculation has to be on the basis of the monthly basic salary.

On the award of shillings 2,565,000/= for accrued leave, the Respondent Counsel submitted that DW1 admitted that the Respondent is entitled to the amount as unpaid leave allowance. Thus, this evidence on admission was sufficient to prove that the Respondent was entitled to be paid the amount for unpaid leave allowance.

From the submissions, the Court is called to determine the following issues:-

1. Whether the reason for termination of Respondent employment was valid and fair.
2. Whether the procedure for termination was fair.
3. What remedies are entitled to the parties.

Commencing with the first issue whether the reason for termination was valid and fair, the Employment and Labour Relations Act, Cap. 366 of the laws, R.E. 2019 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 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 application at hand, the Applicant submitted that the Arbitrator erred to hold that the Respondent was unfairly terminated while the disciplinary offences against her were proved. The Respondent on her 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 charges and notice to appear before the disciplinary hearing committee dated 18th September, 2018 – Exhibit D2 the Respondent was charged for 4 disciplinary offences of gross dishonest behavior, breach of trust, serious breach of organization rules or policies and fraud or misappropriation of organization fund. The Disciplinary hearing form – Exhibit D3 shows that the Complainant – DW1 who stated his case and one witness namely Tarek Said El – Sherbiny testified where he elaborated all the offences alleged to have been committed. In his testimony the witness stated that the Respondent manipulated deposit amount on 25th May, 2018 and 8th June, 2018 by confirming to receive a direct deposit in respondent account Usd 561 and 875 respectively. The witness alleged that the amount confirmed by the Respondent does not match the amount in the Applicant account. Also he

stated that accused wrongly allocated Usd 140 to offset the Applicant's office sales on 8th June, 2018. However, the bank statement which was alleged to have been manually altered by the Respondent and the general ledger were not tendered.

The Respondent challenged the Exhibit D3 that there was no disciplinary hearing which was conducted against her. In such circumstances, I have to look for other evidence and in the record. The remaining evidence on the fairness of the reason for termination is the investigation report – which was tendered before the Commission as Exhibit D6 and testimony of DW1. Unfortunately, DW1 did not provide explanation on the how the report was made and its findings as he was not the maker of the report. DW1 testified that Exhibit D6 was prepared by Finance Manager namely Tariq Seif. Thus, I'm of the same opinion with the Arbitrator that in absence of explanation of Tariq Seif who made the investigation report which was relied by disciplinary hearing committee to terminate the Respondent and in absence of the bank statement alleged to be altered by the Respondent and general ledger, there is no sufficient evidence to prove that the Respondent committed disciplinary offences she was charged with. Thus, I find that there is no sufficient evidence to prove that the reason for termination was fair.

The second issue is whether the procedure for termination was fair. The Applicant submitted that the Arbitrator erred to hold that the procedure for termination was not fair as the investigation was conducted, the Respondent was given notice to attend disciplinary hearing, charges were sent to him, disciplinary hearing was conducted and after she was found guilty termination letter was issued to her. The Respondent contested the Applicant submission and argued that the Respondent never appeared before the disciplinary Committee and she was handled with suspension letter, charges, minutes of disciplinary hearing and termination letter on 26th September, 2018 by DW1.

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, Cap. 366 R.E. 2019. 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 Arbitrator in the award held that the procedure for termination was unfair as the Respondent was not given right to question the witness and was not availed with any document for the purpose of preparing his defence such as investigation report and the Respondent was never interviewed by the investigation committee.

The Respondent in her testimony stated that she was not called for disciplinary hearing. I have read charges and notice to appear before the disciplinary hearing committee – Exhibit D2 which does not show at all if the Respondent was served with the charges and notice to appear. Also, I read the minutes of the disciplinary hearing – Exhibit D3. The Exhibit D3 shows that the Respondent informed the disciplinary committee that she would not sign the minutes but she will only sign the attendance register. Unfortunately, the alleged register was not tendered to prove that the Respondent attended the disciplinary hearing. In such circumstances where the Respondent testified that there was no disciplinary hearing which was conducted, the evidence on record put more weight on Respondent testimony.

Also, the Exhibit D3 shows that the Respondent was not afforded right to cross examine the Applicant's witness during the disciplinary hearing and was not afforded with investigation report which was the basis of all the disciplinary charges and was relied much by the disciplinary hearing committee in reaching its decision. This means that the Respondent was denied right to defend himself as he was denied the report which is the basis of his disciplinary charges. This was the position held by the Court of Appeal in the case of the case of **Severo Mutegeki and Another** V. **Mamlaka ya**

Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA), Civil Appeal No. 343 of 2019, Court of Appeal of Tanzania at Dodoma. All of these are contrary to rule 13 and has prejudice the right of the Respondent to fair hearing. Thus, I agree with the Arbitrator that the procedure for termination was unfair.

Lastly, what are remedies entitled to parties? The Commission awarded the Respondent with 24 months' salary for unfair termination as the circumstances of the case are intolerable, shillings 2,565,000/= for accrued leave, shillings 30 million for specific damages and shillings 200 million for general damages. The Applicant submitted that there is no justification for awarding 24 months' salary compensation which is above the minimum compensation provided by the law and the Arbitrator erred to award general damages and specific damages which were not categorized by the Respondent in her CMA form No. 1. He is of the view that the Court may interfere with the Commission decision as the Commission applied wrong principle in awarding the damage and the damages awarded are inordinate. Also, there is no justification on the award of shillings 2,565,000/= for accrued leave and calculating the compensation on the gross salary instead of basic salary.

The Respondent submitted that the Commission award was justified as 24 months' salary compensation is minimum and the Commission may order compensation depending on the circumstances of the case. On the award for damages the Respondent was of the view that the specific damage awarded was pleaded specifically and was proved by the Respondent that she lost her pregnant as a result of the Applicant's act. And the general damage is the discretion of the Commission and it need not to be pleaded. Regarding the payment for accrued leave allowances, the Respondent was of the view that the Applicant witness admitted the claims as a result there was no need for justification. And on the basis for calculation, he submitted that the Applicant has no legal basis for his argument.

Regarding to the award of 24 months' salary compensation, I'm of the opinion that there is no sufficient reason presented for the Court to revise the Commission holding. The Arbitrator stated in page 27 of the award that the reason for awarding the compensation is that the termination was substantively and procedurally unfair and at the time the Respondent was pregnant. I find the reason to be justifiable.

On the payment of damages, as it was submitted by both parties that the Appellate Court will only interfere after it was satisfied that in assessing damages where the lower Court applied wrong principle or the amount

awarded in inordinate low or inordinate high that it must be a wholly erroneous estimate of the damage. This was held by the Court of Appeal of Tanzania in the case of **Cooper Motors Ltd V. Moshi/Arusha Occipational Health Services, (Supra)**. In the application at hand the Commission awarded 30 million for specific damages on ground that the Respondent lost her pregnancy as direct consequence of the act of the Applicant. The Commission relied on testimony of the Respondent and medical information – Exhibit AP4 which shows that she lost the pregnancy. This evidence was challenged by the Applicant during cross examination but the evidence clearly proved that she was admitted to the hospital on 27th September 2018 just a day after she was terminated and was discharged on 29th September, 2018. I'm of the opinion that the same was pleaded and proved by the Respondent. Thus, I find that there is no reason for the Court to revise the Commission on the specific damages.

On the general damages, the Commission awarded shillings 200 million to the Respondent as general damages on ground that the Respondent was mistreated, her reputation was damaged to the extent that she may not find another employment and she has lost her pregnancy. The amount which was awarded is inordinate and I'm of the view that there is need to look at the principles applied. On the first ground for awarding the general damages

I agree with the Arbitrator that in her testimony the Respondent proved that she was mistreated by the Applicant where her Id and healthy insurance was taken from her, the guard did take her from the office and she was told not to come back to the office. This proves infringements of the Respondent rights, she was humiliated and her reputation was affected while in the office. Unfortunately there is no proof that the humiliation and her reputation affected her out of Respondent's office. The evidence available provide that she was mistreated, humiliated and her reputation affected but it was in Respondent's office.

The other grounds for awarding the general damages are that she was unfairly terminated and she lost her pregnant as the direct act of the Respondent. However, the evidence available shows that the Arbitrator has already awarded 24 months' salary compensation to the Respondent for unfair termination and 30 million shillings for specific damages for the loss of pregnancy. The remedy for the unfair termination is provided by section 40 (1) of the Cap. 366 R.E. 2019 and the Arbitrator or Court may order the employer to reinstate the employee without loss of remuneration, to re-engage or to pay compensation to the employee of not less than twelve months' remuneration. From the provision of the law, the Arbitrator or Court has to order one of the remedies available where there is unfair termination.

I'm of the opinion that after the Arbitrator has awarded 24 months' salary compensation for unfair termination was not supposed to award general damages for the same ground of unfair termination. Thus, unfair termination was not supposed to be the ground for awarding the general damages. The same applies to the ground for awarding general damages for loss of pregnancy which has already been awarded in specific damages. Thus, I hold that the only available ground for awarding the general damage was mistreatment when the Respondent was terminated. And the ground does not justify award of 200 million shillings as general damages. For that reason, I'm of the opinion that the award of 20 million shillings would be sufficient as the Respondent was mistreated in her place of work. Therefore, I revise the award of 200 million shillings which was awarded by the Commission.

On the accrued annual leave, the evidence in record shows that DW1 stated during cross examination at page 14 of the typed proceedings that the Respondent was not paid shillings 2,565,000/= which is annual leave allowance. There is no evidence to show that the same was paid. For that reason, I find no reason to revise the Arbitrator's award of accrued annual leave.

Regarding the basis of calculation, the Arbitrator calculated the payment on shillings 932,134/= as Respondent monthly salary. However, the Respondent's salary slip – Exhibit AP8 which is the only available evidence in record shows the Respondent basic salary was shillings 678,000/=. Thus, all the calculation made on the bases of monthly salary has to be calculated on the basic salary.

Therefore, the Applicant is ordered to pay a sum of shillings 68,837,000/= being 24 months' salary compensation for unfair termination, accrued annual leave, specific damages and general damages. The application is partly allowed and the Commission award is hereby set aside. Each party to take care of his own cost of the suit.

A. E. MWIPOPO

JUDGE

09/07/2021