

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 64 OF 2020

KARIAKOO MARKETS CORPORATION.....APPLICANT

AND

LILIAN ORONGAI & 4 OTHERRESPONDENTS

Date of last Order: 24/06/2021

Date of Judgment: 08/07/2021

Z.A. Maruma, J.

JUDGMENT

The applicant in this revision calls upon the court to examine, revise and quash the decision of Commission for Mediation and Arbitration in CMA/DSM/ILA/R.130/17/299 delivered on 21st May 2019. The application is brought under section 91(1), (2), (3) and (4) of the Employment and Labour Relations Act, 2004 and Rule 24 (1) (2) (3) and Rule 28(1) of the Labour Court Rules, GN. No.106 of 2007.

The background of the dispute in brief is that the respondents Lilian Orongai, Primitiva Kamugisha, Pastedy Rutter, Kelvin H.T. Daud and Godwin

Mbuya were employed by the applicant Kariakoo Market Corporation at different times and posts as well as with salaries. The applicant terminated the respondent's employments on 23rd January 2017 due to the alleged misconduct of producing wrong information to the employer by presenting and using fake certificates which resulted into getting employment contracts. Aggrieved with the employer's decision the respondents instituted a dispute before the Commission for Mediation and Arbitration (CMA). The CMA indeed determined the dispute and found that the respondents' termination were substantively unfair and awarded them with a total of TZS 77,570,121/= comprising compensation, One month in lieu of notice and the unpaid salary for the working days before termination.

Being dissatisfied with the CMA's decision, the applicant has now moved this court through revision application seeking for revising, set aside of the award and quash proceedings of the Commission for Mediation and Arbitration dated 21st May 2019.

The application was supported by an affidavit sworn by Mr. Charles J Sombe, Human Resources Manager for the applicant and a counter affidavit sworn by Mr. Prosper Mrema, advocate for the respondents, lodged to oppose the application. When the matter was called for hearing, the

applicant was represented by Mr. Oresto Njalika, advocate while the respondents had represented by Mr. Khaliid Mfaume, Legal Officer Tuico.

Arguing the application, Mr. Oresto Njalika presented four issues that; The Arbitrator erred to award terminal benefit while admitted grounds of termination were not proper referred this Court at Pg 12 and he argued this was contrary to Rule 12(3) (a) GN No. 42 of 2007. He added that any Arbitrator has to consider the act to justify termination that, the fact that the respondents provided wrong information to the employer may result contract to void abo initio. That was a reason for termination. He further argued that, the Arbitrator was wrongly awarded unfair termination without considering that, the respondents were called on for the disciplinary meeting and if they were not satisfied by the decision of the meeting, there was a chance for respondents to seek other remedies as they could write to the Permanent Secretary for the Ministry of Local Government. Also, he submitted that, the respondents can request clarification from the National Examination Council of Tanzania (NECTA) since there was an issue concerning the education information. Likewise, the award did not consider conditions provided under para 6.1 of the contract (KMC5) which required the respondents to be given one month notice or paid the one-month salary of which they were given a

notice of one month. He also argued that even though the contract in item 11 is silence if the employee conducted a gross misconduct, but the law already established that if a public servant conducted misconduct is not entitled for terminal benefits. He also submitted that the CMA did not considered that all salary payments (Hali Bora Agreement) should be subject to capital gain through TRA.

Therefore, the learned counsel prayed for this court to quash the CMA decision as it was based on irregularities and the matter to start afresh or each party to have the entitled rights.

Contested the issues raised, Mr, Khalid for the respondents started with the first issue that, the law provides for the employer to have the reasons for termination and procedures to be followed as at page 12 of the decision the reason stated there clearly that allegation was proved. He argued in law that was not enough the employer before to terminate the employment, he/she should follow procedures provided under Rule 37 (2) (a) and (b) and 37 (2) (c).The respondents' insisted that the procedures were not followed. The Applicant is protecting employers' interest without considering procedures provided by the laws. He further argued that on the CMA Award at page 13 Arbitrator made reference to rule 37 (2) and rule 13

stipulate the procedure to be followed and cited the decision of **Bugando Medical Center Vs Dr. Salvatory Ntubika**, Lab Div. MZA, Revision Application No. 10/2015 (LCCD)1 on pg 14 of the CMA's decision that;

"The requirement for procedural fairness in the termination is part of the law by virtue of section 37(2), itself found on principles articulated by Article 7 of ILO Termination of Employment Convention, 158 of 1982 which provide that, "..... the employment of a worker shall not be terminated for reasons related to the workers conduct of performance before he provided an opportunity to defend himself against the allegation made".

Mr, Khalid went further by submitting that, the aspect of procedural requirement is mandatory to be observed by the employer and if he failed to do so the whole process is void and that was what happened in this dispute. The required procedures were not followed as held by the Arbitrator that respondents were not given reasonable time and rights to defend themselves. The Chairperson of the employment and disciplinary committees was the General Manager himself contrary to sect 13 (3) and (4) and the principles of natural Justice. On the issue of severance payment the argument was that, the respondents were entitled as due to the fact that, the alleged misconduct were not proved and since there was unfair

termination the payment of severance is one among the payment. He submitted the payments are also provided under item 11 ,7.1 and 7.0 of the respondent's contract. On the issue the amount awarded did not consider the capital gain to be excluded, respondents has no dispute on that as the capital gain is legal requirement and they have no dispute. Therefore, the CMA's decision was properly determined.

I have gone through and considered the record of the CMA and submissions of both parties. The issue of determination in this court is whether the procedures for terminating the respondent's employment were followed as required by the law.

It is the established principle that for the termination of employment to be considered fair, it has to be based on the valid reason and fair procedures.

Based on available evidence on the record, I agreed with the Arbitrator's findings that the applicant (Employer) failed to prove that the procedures were fairly conducted based on the following irregularities. There is no clear evidence that the respondents were sufficiently given right to be heard on the allegations made against them. I say so because DW1 at pg 11 of the proceedings testified to request the respondents to submit their

educational academic certificates. However, he failed to submit the said letter before the Commission instead he tendered two letters, one dated 18/07/2016 and another dated on 30/08/2016 marked **D1** collectively. The letter dated 18/07/2016 was from NECTA informing the employer about the status of employee's certificates among them included the five respondents. The said letter revealed that the academic certificates of the respondents had some doubts which need further verification which need the presentation of original certificates. The evidence on record shows after receiving the said letter applicant wrote letters to the 1st respondents to explain why they have refused to submit the alleged forged certificates Marked **D2**.

The record also shows that the allegation of forged certificates was not clearly established to link the respondents with misconduct committed which will be a valid reason for the termination. The record shows how the applicant failed to establish that the respondents were informed about the directive given for them to submit their education certificates. Also, the record shows that, the respondents never submitted the original certificates. However, the record shows that the applicant used copies of the certificates which were also not tendered before the Commission. The copies used by

the applicant resulted to the proof of allegation by the NECTA through the confidential letter dated 30/08/2016 which also looking on it still leave some doubts on whether the certificates used for second verification were those of the respondents. All these steps conducted respondents were not aware of and never been involved with the investigation conducted. The respondents came to be involved from September 2016 by requested to explain about their refusal of directives given to the letters issued to them but never tendered before the Commission. This create a doubt whether the allegations against the respondents were really valid.

Again, the evidence shows that, later on respondents were summoned to appear before the employment and disciplinary committee to explain why they have used forged academic certificates. Further to that the General Manager who is an employer sit as a chairperson of the employment and disciplinary committee. This is according to the evidence of DW1 at pg 20 of the proceeding when he was cross examined from question No. 23 – 26. DW1 also, failed to produce the minutes of the said meeting. All these scenarios proved that there was no fairness of procedures used by the employer to terminate respondents' employment. Moreover, the principle of natural justice were not observed on the two causes, one the General

Manager who is the employer who employed the respondents sit as a chairperson of the disciplinary committee. The respondents were condemned un heard before the disciplinary committee as per evidence of AW1, the 1st respondent at pg 31 of the proceedings that all of the respondents were requested not to explain anything against their allegations. Based on these above findings. the reason for termination was very valid to amount termination of the respondents' employment. However, it is apparent clear that there was unfair termination due to the failure of the applicant to follow proper procedures.

As to the last issue whether award was properly procured, the law under section 40(1) emphasize of the Act provides clearly the remedy once the termination of employment adjudged unfair among others be order for reinstatement, re-engagement or compensation and other entitlements which includes allowances, overtime, leave, notice, severance pay and others depending on parties agreement. However, it is at the discretion of a Judge or Arbitrator to give award that is considered just and fair depending on the circumstance of each case, though is restricted to comply by what is or are indicated in CMA F1 as was decided in the case of **Power Road (T) LTD Vs Haji Omari Ngomero**, Revision No. 36 of 2007.

In the circumstances of the case, I fully agree with the Arbitrator's position that the termination of employment of the respondent was procedural unfair and the award given was based on section 40 (2) (c) of the Employment and Labour Relations Act of GN No. 7 of together with the terms and conditions of the respondents contract **(A5)**. I therefore, hesitate to revise the said decision. In the result the application is dismissed accordingly.



Z.A. Maruma

JUDGE

08/07/2021