**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION NO.927 OF 2019**

**KNIGHT SUPPORT (T) LTD.....APPLICANT**

**VERSUS**

**BWIKO NYAMASYEKI.....RESPONDENT**

**JUDGMENT**

*Date of last Order: 11/06/2021*

*Date of Ruling: 19/08/2021*

**Z.G.Muruke, J.**

On 21st April,2008 the respondent herein was employed by the applicant whereby, on January,2012 he was appointed to be a Branch Manager at Arusha. He worked with the applicant until 10th July,2013 when he was terminated on grounds of gross misconducts to wit, failure to account an amount of 15,971,340.00/=, gross negligence by failure to follow accounting systems, abuse of company's property and submitting Tax invoices which are not genuine. Being aggrieved with termination, the respondent appealed to the Commission of Mediation and Arbitration (herein CMA) claiming for unfair termination. CMA's decision was partly on his favour as they confirmed that termination was substantively fair and procedurally unfair, consequently the arbitrator awarded the respondent with one month salary in lieu of notice, five (5) years severance pay, leave allowance and one month salary as

compensation for procedural unfairness. The applicant felt resentful with the award, he thus filed the present application challenging the award on the following grounds;

i. The arbitrator failed to assess the applicant's evidence and erroneously concluded that the respondent was procedurally unfairly terminated.

ii. The arbitrator erred in law and fact by ordering the applicant to pay the respondent severance pay of five years equal to 9,200,960/= while the respondent was terminated on ground of misconduct.

iii. The arbitrator erred in law and fact in ordering the applicant to pay the respondent a tune of 6,835,000/= as annual leave while there is no proof to the same

iv. The arbitrator erred in fact in calculating the correct amount to be paid to the respondent hence arrived to a wrong figure.

The application was supported by the affidavit of Ombeni Samwel Msuya, the applicant's Principal officer. The application was opposed by the Counter affidavit sworn by the respondent. The application was disposed by way of written submission. The applicant herein was represented by Advocate Innocent Mushi whereas the respondent was served by Advocate Edward Peter Chuwa.

The applicant's counsel prayed to adopt the affidavit in support of the application to form part of his submission. Starting with the 1st ground applicant's counsel submitted that, at page 6 of the award the stated that DW1 was the Chairman of the Disciplinary Committee while there is no any proof as regard to the same save for the applicant's

allegations. That even if the at was true, the respondent have no shown how he was prejudiced with the same.

On the 2nd ground it was submitted that despite of the arbitrators finding that, the applicant had valid reason for termination, he went on awarding the respondent 5 years severance pay. The applicant was terminated on misconduct and he did not challenge his termination. That, awarding him severance pay was contrary to Section 42 (3) (a) of the Employment and Labour Relations Act, CAP 366 RE 2019.

On the 3rd ground it was contended that the arbitrator erred in law and fact by awarding the respondent with one year leave amounting to 6,835,000/=, while there was no any proof that the respondent had applied for such leave and the same was cancelled by the applicant. He referred Section 31(9) of CAP 366 RE 2019 which provides that; An employee is not entitled to any prorate amount for accrued annual leave if the employee has not taken the leave within the period and circumstances prescribed in subsection (3).

As to the 4th ground it was submitted that the arbitrator having wrongly awarded the respondent with severance pay and compensation, he arrived to a wrong calculation of Tshs. 29,705,960. It was further stated that, the applicant is not contesting the award of one month's salary in lieu of notice and the same was stated in his termination letter that the amount is ready to be collected after the respondent's compliance with the exit procedure. He thus prayed for the application be granted.

As regard to the 1st ground, respondent's counsel averred that, Section 39 of CAP 366 RE 2019 casts the burden of proof of unfair termination to the employer. The respondent alleged to have been unfairly terminated. The constitution and proceedings of a disciplinary committee is crucial in determination of fairness of termination. According to the respondent's contention, the proof in this matter included the disciplinary hearing minutes which would have enlightened the arbitrator on the correctness or otherwise of the respondent's contention. It is therefore unfounded for the applicant to shift the burden to the respondent. The arbitrator having found that termination was procedural unfair, ordered compensation of one month salary. The awarded amount was contrary to the law Section 41 (1) of CAP 366 RE 2019. He thus prayed for this court to invoke Rule 28 (1) of the Labour Court Rules, 2007.

On the 2nd ground it was submitted that, the applicant's argument as regard to order of severance pay for five years is misplaced. Section 42(3) of CAP 366 RE 2019 provides for exceptions on the entitlement of the Severance pay to wit, to a fair termination on ground of misconduct. Since termination is considered to be fair if there is both procedural and substantive fairness, then the respondent cannot be subjected to Section 42(3) of CAP 366 RE 2019.

On the 3rd ground it was submitted that, it was the applicant's duty to prove or disapprove the respondent's annual leave claims as per Section 39 RE 2019. On default then respondent cannot be denied the amount claimed. Therefore, the arbitrator was correct in ordering the payment of unpaid annual leave to the respondent.

Lastly, it was submitted that the amount award by the arbitrator was correct, as the same is based on the calculations made on the amounts that were awarded to the respondent. Therefore, the ground is baseless. He thus prayed for dismissal of the application.

After careful consideration of the parties' submissions, court records laws applicable, this court has the following issues for determination;

i. Whether the arbitrator properly analyzed the evidence tendered by both parties to arrive to a decision that termination was procedurally unfair.

ii. Reliefs entitled to the parties.

On the first issue, the applicant's counsel alleged that the arbitrator failed to analyze the applicant's evidence as a result he decided that, termination was procedurally unfair. It is a principle of law that termination must be on fair procedure as provided under Section 37 (2) (c) of CAP 366 RE 2019. It was the CMA's finding that the applicant failed to adhere to the procedure for termination, as the Chairman of the disciplinary hearing was the one who conducted investigation which gave rise to the respondent's misconduct.

It is the requirement of the law under guideline 4 (2) of the Disciplinary, incapacity and Incompatibility policy and procedures GN 42/2007. That;

*4.-(1) Senior manager should be appointed as chairperson to convene a disciplinary hearing in the event of –*

*(a) further misconduct following a written warning or warnings; or*
*(b) repeated written warnings for different offences; of*
*(c) allegations of serious misconduct such as those referred to the Rules relating to termination of employment, and which could on their own justify a final written warning or dismissal.*

*(2)* ***The chairperson of the hearing should be impartial and should not, if possible, have been involved in the issues giving rise to the hearing. In appropriate circumstances, a senior manager from a different office may serve as chairperson.***

I have examined the records unfortunately I did not come across with the disciplinary hearing minutes, which I believe could have divulged who was the Chairperson of the Disciplinary Committee. As stated by the respondent's counsel that, the duty to prove fairness of termination is vested on the employer (the applicant). The fact that the applicant has failed to prove who chaired the disciplinary meeting, this court draws inference to the respondent's contention that, DW1 was the one who chaired the disciplinary meeting so is the one who conducted investigation which gave rise to the misconducts against the respondent. It is my standpoint that, under the circumstance where the Chairperson is the one who conducted investigation, it is likely for the Chairperson to act without impartiality for his investigation findings to prevail.

As found by the arbitrator, I am also of the considered view that, the procedure for termination was unfair as it was conducted contrary to the rule against bias. It is a principle of law that, you cannot be a judge on your own cause (nemo *judex in causa sua*). Since it is undisputed

that DW1 is the one who chaired the meeting, the committee was just a rubber stamp on that matter. Therefore, the respondent's termination was procedural unfair.

Concerning relief of the parties. The applicant is contesting the award of one (1) month salary as compensation for procedural unfairness, and the order of payment of severance pay for five years and payment of leave to the tune of 6835,000/=

The law under Section 40 (1) (c) of Cap 300 RE 2019 provides that;

> *'40 (1) If an arbitrator or labour Court finds a termination is unfair, the arbitrator or court may order the employer -*
>
> *(a) N/A*
>
> *(b) N/A*
>
> *(c) to pay compensation to the employee of not less than twelve month's remunerations.'*

The provision above provides for circumstance to order compensation of not less than twelve months' salary, that is after finding that there was unfair termination. When termination is substantively fair and procedurally unfair, the remedy cannot be similar to the one provided under Section 40 (1) (c) of CAP 366 RE 2019 (supra). In the Consolidated Revision No. 370 and 430 of 2013 between **Saganga Mussa Vs. Institute of Social Work,** High Court of Tanzania, Labour Division, at Dar es salaam(unreported) as cited in the case of **Puma Energy Tanzania Ltd v. Azayobob Lusingu & 2 others**, Rev. No. 697 OF 2019 the Court held that; -

> *"Where there is a valid reason for termination but the procedures have not been complied with, then the remedy cannot be similar as*

*in cases where both the termination was unfairly done substantively and procedurally."*

Basing on the above position and on the circumstances of this matter, I hereby quash the arbitrator's order of one (1) month salary as a compensation. I order that the applicant be paid Six (6) months' salary as compensation for procedural unfairness.

On severance pay, CMA awarded the respondent five (5) years severance pay to a tune of 9,200,960/= It is undoubted that, termination is considered to be fair once there is valid and fair reason and was conducted in accordance with the procedure prescribed by laws. The law under Section 42 (3)(a) of CAP 366 RE 2019 read together with Rule 26 (2) (b) provides for exceptions to the payment of severance pay.

***42**.-(1) For the purposes of this section, "severance pay" means an amount at least equal to 7 days' basic wage for each completed year of*
*continuous service with that employer up to a maximum of ten years.*
*(2) An employer shall pay severance pay on termination of employment if –*
*(a) the employee has completed 12 months continuous service with an employer; and*
*(b) subject to the provisions of subsection (3), the employer terminates the employment.*
*(3) The provisions of subsection (2) shall not apply -*
*(a)* ***to a fair termination on grounds of misconduct;***

Also Rule 26 (2) (b) of Employment and Labour Relation (Code of Good Conduct) Rules, GN. 42/2007. It provides;

*26.-(1) When an employment contract terminates, the employer shall pay the employee severance pay at least equal to 7 days basic wage for each completed year of continuous service with that employer, up to a maximum of 10 years.*

*(2) The employer is not required to pay severance pay if the employment is terminated-*

*(a) before the completion of the first year of employment;*

***(b) fairly on grounds of misconduct;***

In this application it is undisputed that the respondent's termination was fair on ground of misconduct. Termination in this matter would have been fair both substantively and procedurally, save for the fact that the Chairperson of the meeting was the one who conducted investigation. However, it is my believe that the said procedural error would not vitiate the respondent's misconduct. I thus find the arbitrator misdirected himself by ordering payment of severance pay to the respondent who was fairly terminated on ground of misconduct. I hereby quash the order five years severance pay.

As regard to the order of payment of 6,835,000/= to the respondent in lieu of unpaid leave, the applicant alleged that arbitrator ordered him to pay that amount to the respondent while, the respondent have not proved that he was entitled to the same. I have gone through records and I did not come across with any evidence from the applicant to prove, either the said leave days were already taken by the respondent or the same were paid to the respondent. On applicant's failure to prove otherwise, I find no reason to interfere with the Arbitrator's finding as regard to the same.

I thus find the the application with merit. CMA award is revised to that extent. It is so ordered.

Z.G. Muruke

**Judge**

19/08/2021