IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MOROGORO

REVISION NO. 08 OF 2021

BETWEEN

MWANANCHI COMMUNICATIONS LIMITED.....APPLICANT

VERSUS

AMINA JUMA SANGAWE.....RESPONDENT

JUDGMENT

30th August & 6th September 2021

Rwizile J.

This application is for revision, where the applicant challenges the decision of the CMA. It is filed under section 91(1)(a), (2)(b)(c) and Section 94(1)(b)(i) of the Employment and Labour Relations Act, Rule 24(1), (2)(a), (b), (c), (d), (e) and (f) and (3)(a), (b), (c) and (d) and Rule 28(1)(c)(d) and (e) of the Labour Court Rules, GN No. 106 of 2007. It is supported by an affidavit sworn by one Josephat Kesagero, asking this court to mainly revise the decision of the CMA in Labour Dispute No. CMA/MOR/84/2018. The points for determination of this application are stated in the terms as stated hereunder;

(i) Whether the arbitrator made an error on points of law and facts in holding that the respondent was unfairly terminated.

(ii) Whether the applicant herein had no genuine reasons to terminate the respondent's employment and whether the burden of proof in employment cause is like that of criminal case.

(iii) Whether the Honourable tribunal erred in law for drawing his award on extraneous matters and facts which were not stated by the applicant's witnesses.

(iv) Whether the award was improperly procured for being delivered at the expiry of the prescribed statutory time without any justifiable cause.

(v) Whether the arbitrator erred in law and facts in ordering the applicant to pay the respondent Tshs. 33,250,000/= while there were genuine reasons for termination of the employment contract and the procedure were followed.

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It is on record that the applicant, a registered company, is among the media giants, running its business in Tanzania. It however, come into contact with the respondent when it appointed her to a post of a Bureau Chief on contractual basis commencing 5th February 2016. Their relationship did not last longer, because her employment was terminated for underperformance of her duties to the required standard on 16th April 2018.

The respondent was not happy with not only termination of her employment, but also for terminal dues accruing from it. She therefore referred the dispute to the Commission. Upon hearing, the Commission was satisfied that she was unfairly terminated and awarded her the sum of 33,250,000/= as terminal benefits. This, however, did not please the applicant who preferred this application.

Before this court the applicant was represented by Mr. Emmanuel Nkoma learned advocate, while the respondent was in the service of Baraka Lweeka learned counsel. At the hearing of this application. Mr. Nkoma coaxed this court to see that termination procedure due to poor performance were complied with since the respondent was given time to answer the charges, and as well, was given time to improve her performance. She was as charged and failed to give plausible reasons for her poor performance. It was his argument that

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Rule 17(1) (a)-(e) of the Employment and Labour Relations (Code of Good Practice) Rules GN. No 42 of 2007 (the Code) was complied with and the procedure laid down in the same code under rule 18(1) was adhered to. According to him, this was in line with the decision of this court in **Nelson Mwemezi vs Tanzania Women's Bank PLC**, Labour Revision No. 47 of 2019.

Submitting on the second point, the learned counsel argued that the award was based on extraneous matter contrary to evidence. The learned advocate highlighted them to include the finding at Page 19 of the award, that Lugano as witness did not say the respondent improved her performance and that it is not true that members who sat in the meetings were same in the two occasions they sat in respect of the respondent's dispute.

In his view, this was contrary to the decision in the case of **Clement Pancras vs R,** Criminal Appeal No 321 of 2013.

The learned advocate advancing the course on the other point was of the view that since the award was given after 30 days from when the pleadings were completed, it was contrary to section 88(9) of the Employment and Relations Act, (the Act) as well as rule 27(1) of labour Institution (Mediation and Arbitration Guidelines) Rules GN No. 67 of 2007. Although strange, but the counsel held the view, that

the award was therefore improperly procured and so should be set aside as under section 90 of the Act.

It was his last point that the reliefs awarded ought to match with what is provided for in the fixed term contract between the parties and not what the award gave. This court was asked to allow this application.

Mr. Baraka learned counsel, on the other hand, his main argument hinged on the fact that poor performance alleged, was on the first half of 2017 which is the period that immediately preceded Maternity leave. He argued, poor performance was to be proved as under section 39 of the Act. He said, rule 17(1) of code was not complied with as held by the Commission. According to him, the award was under section 2 of the interpretation of Laws Act.

Further, it was stated that in between 26th December 2016 to 22nd March 2017, the respondent was on maternity leave and this constitutes the 3 months falling in the first half of the period alleged under performed. Maternity leave, he added, is legal and is governed by section 33(6) of the Act.

According to his submission, this period is succeeded by another 6 months of two hours of breastfeeding every day as per rule 15 of the

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Code. He went on arguing, that it was not possible for the respondent to have her performance improved during the period of 9 months after delivery as shown above. He held the view, that the respondent was therefore punished for maternity leave which is discrimination against women stated under section 7 of the Act.

Mr. Baraka further submitted that, the respondent was never given targets from January to June 2017 as per the employment contract – exhibit DD1. She was either, not given any job description, company rules and regulations. The applicant did not prove so. Since she was never given those tools, rule 17 of the code was not complied with. It was clear, he went saying, that the applicant did not prove and did not cross-examine the respondent on the issues, which means they were admitted as held in the case of **Chacha Marwa v R**, Criminal Appeal No. 34 of 2020.

Submitting on the question of procedural compliance, Mr. Baraka was of the view that the procedure for hearing and ultimate termination was faulty. The respondent did not fallow rules of natural justice. He submitted, a member Dw2, sat on the two committees and suggested what was done, that is, he complained and prosecuted the respondent. It was his argument further that the respondent was in a senior position and so was not covered by rule 18(5) (a) of the code,

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if so, then there is no proof. He submitted further that the cases cited are distinguishable and there were no extraneous matters discussed by the Commission. It arrived, in his opinion, at the decision that was correct.

Then, he said, section 88(11) of Act, provides for time to have the award given but it does not provide for the remedy when the same is given out of the prescribed time. Therefore, he was of the view that the decision was properly procured. Lastly, it was his submission that termination of the employment was followed by full time payment due to the remaining terms of the contract. He then asked this court to dismiss this application.

In his brief rejoinder, Mr. Nkoma was of the view that rule 18 of Code was complied with and that the case of **Chacha Marwa** (supra) was cited out of context based in the circumstances of the case.

Before delving into the merits of the application, I think I have to first determine if upon delivering an award out of the 30 days prescribed by section 88(11) of the Act, as shown in the award, it was then improperly procured. I have read section 90 of the Act, as cited by Mr. Nkoma. Unless, I did not get his point well, but this section deals

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with correction of arbitral awards. It is in line with section 88(10) of the Act. But what he called an improperly procured award is not defined by the law. I have gone through the law itself, I have yet to come across any provision, neither did he cite any, that provides for the remedy, in situations as when the award was delivered out of its 30 days prescribed time. It goes without saying therefore, that in the absence of the legal remedy, the applicability of the provision remains a matter of discipline among the arbitrators.

But, in the absence of clear provisions of the law, specifying that the award made after 30 days prescribed time, is improperly procured, it cannot be taken to invalidate the same. I therefore see no merit in this point.

Second, I have gone through the point whether, the award based on extraneous matters as submitted by the applicant. Still, I have found it different. What I think, was the point, is that the arbitrator was interpreting the law and then discussed a range of issues that cannot be taken as to have been out of context. The award may have arrived at a wrong conclusion on certain aspects but that cannot be termed as going outside the limits of the commission to venture. I see no merit in the second point also.

Having dealt with the points stated above, I think the remaining issues for determination included ***whether termination was fair and whether the reliefs matched terms of termination***.

I have to perhaps starting stating that termination was based on poor performance. This was explicit on her termination letter dated 16th April 2018. But all this was commenced by a charge sheet dated 24th August 2017, which accused her of poor performance on the first half of 2017. She was informed in the same, that she had scored rating of 4 in her mid-year performance review which signified she met some targets but not all. Her answer to the charge dated 28th August 2017, was explicit that from January to March 2017 was on maternity leave, and her subordinates did not meet the Regional editorial targets. She went on saying, on April to June when she was back in office, she met 85% of the requirements.

She then identified barriers which led her office not meet the stated targets, which if acted upon by the management, editorial agreed targets, would be met.

It seems, on 15th September, she was called in hearing done on 19th September. The allegations of poor performance level to her in the 24th August charge sheet were tabled to her before a committee.

The respondent pleaded that she was on maternity leave on the first half of the year and asked them perhaps to deal with her in the next quarter. She also informed them that she has never been informed of her targets that she was supposed to deliver whether weekly or monthly. What she was doing was based on daily routine, she told them. She said therefore that she considering herself the best performer since she never failed to file stories.

It was concluded from the said meeting that she did not know to properly to fill in the appraisal forms and the impact of not doing so. She was therefore given two months to improve on areas stated. She promised to improve her performance. Despite the meeting being done on 19th September, the outcomes of the hearing were served on her, on 27th October. She was placed on Performance Improvement Plan for the months of October and November.

On 13th March 2018, she attended a performance review hearing. No doubt it was for reviewing of what were the PIP terms of 19th September 2017. The hearing was conducted by different persons except Josephat Kesagero a legal and administrative Manager just as member as in the previous one.

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This time, the respondent was informed why she failed to meet the assigned PIP objectives. The respondent was of the answer that she had several duties as a bureau chief that made it difficult to achieve her PIP objectives. But it is on the same process when it was noted that she had signed the forms with objectives signifying ability to attain the same goals. She did not also complain to her supervisor or human resource officer that, she could not meet the same. She also indicated to have not faced challenges on delivering what they called IJ or day 2 stories. Based on this hearing, the respondent pleaded for more time to make improvements.

I have gone through these documents with purpose. I did so because, I consider the same to be key to the determination of this application and they are the same that the award based to come to the decision impugned. As I said before, since termination based on poor performance the law on the issue must be complied with. It has been submitted here that rule 17 of the court applies to the prevailing situation. I agree that it provides the answer. For ease of refence it states as hereunder;

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17(1) Any employer, arbitrator or judge who determine whether the reason a termination for poor performance is fair shall consider.

(a) Whether or not the employee failed to meet a performance standard;

(b) Whether the employee was aware, or could reasonably expected to have been aware, of the required performance standard.

(c) Whether the performance standards are reasonable;

(d) The reasons why the employee failed to meet the standard, and

(e) Whether the employee was afforded a fair opportunity to meet the performance standard.

(2) Although the employer has the managerial prerogative to set performance standards, the standards shall not be unreasonable.

(3) Proof of poof work performance is a question of fact to be determined on a balance of probabilities.

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From the above therefore, this court is to investigate if all what has been stated was complied with. In order to meet the performance standards, first the same must be well known to the employee, that should be proved in all cases. In this case, I am inclined to hold that the respondent being a Bureau chief for Morogoro, she was not expected not to know the targets. She also admitted to have failed to meet the targets as station when she was on leave.

But when she came back from maternity leave, she met at least 85% of the same. If she did not know the targets set, what then did she achieve at that stated percentage. As well, she was informed and did not dispute in the first hearing on 15th September that the same were received and she acknowledge reception of the same. She could not therefore be heard to say, she did not have the same to her knowledge.

On the second point, even if she was not given the same, as the head of the Bureau Chief of Morogoro, she was in the leadership position and was therefore expect to know the performance standards. That is why in the answer to the charge sheet she pleaded for some challenges that were a barrier to achieving performance standards.

Third, on whether performance standards are reasonable, this is difficult to measure.

The respondent herself had to raise an alarm that the set standards cannot be performed. I am saying because the question whether they are reasonable or not is more of fact than the law. I am therefore compelled to believe that in the absence of any evidence showing they were not achievable, the same cannot be held to be reasonable. She did not complain above it in both cases when she was called for the hearing. She asked for more time to achieve them.

Fourth, the respondent did not say with certainty why she failed. In the answer to the charge sheet, she said it was due to the programs that were removed from the Morogoro section. At the first meeting, she said, she was not aware of them and could not be assessed during the time she was just coming from maternity leave. In the second hearing, she said, she had many duties that led to failure to meet the same.

Lastly, she did not plead during the second meeting that she had little time to make amends. It cannot be inferred from the look of things. The employer had to at least plead so. If it is held as the Commission held that she had no sufficient time, how could she improve the same

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when she had pleaded that she has other duties to render her failure apparent. But I also think that her basic duty as a chief was to make sure that all duties personally assigned to her and those, she is to supervise are done with perfection within the set standards.

Having stated what is the position of the law and what this was enjoyed to look at, I have no venture into whether the termination procedure due to poor work performance was complied with.

By all means, the duty of the employer is to make sure that an employ who is not performing according to the institutional set goals is either assisted to improve or rather terminated. Regardless of the position of the employee, it is an ultimate expectation of the employer to see all employees are performing.

The Code provides for mandatory procedure to follow before taking any steps to the none performing employee. The essence of having these procedures is, to make sure that employee is given enough time know his or her performance and the view of the employer towards the situation. In this case, I have shown before that the respondent's poor performance was first communicated to her on 24th August 2017, through a charge sheet.

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In my view this was wrong, Item 6(1) of the Guidelines for Disciplinary, Incapacity, and Incompatibility Policy and Procedures, - Schedule to GN No. 42 of 2007, provides;

6(1) *In cases of alleged poor work performance by an employee, a manager should consult the employee to identify and analyze the problem. The employee should be given an opportunity to account for the poor work performance.*

(2) Whether the manager believes that it is a matter constituting misconducts, it should be deal with in terms of the procedures outlined the Rules.

(3) Whether the manager believes it is a matter constituting incapacity on the party of the employee concerned, a process of consultation and counseling between management and the employee should take place in an attempt to rectify the problem. The process include appropriate evaluation, training, instruction, guidance or counseling and should provide for a reasonable period of time for improvement.

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(4) Where the employee continues to perform unsatisfactorily, the employee should warm the employee that employment may be terminated if there is no improvement. An opportunity to improve may be dispensed with if.

(a) The employee is a manager of senior employee whose knowledge and experience qualify him or her to judge whether he or she meets the standards set by the employer; or

(b) The degree of professional skill that is required is so high that the potential consequences of the smallest departure from that high standard are so serious that even an isolated instance of failure to meet the standard may justify termination.

There is no gainsaying here that the consultation by the manager was done before proceeding to charge her. Charging her, in my view was done after her manager had ruled out that her problems was not based on misconduct, but rather, it was a matter of incapacity. That is why the rest of the procedures were followed. Now, when did her manager come at that conclusion without first consulting her to identify and analyze the problems.

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This procedure, if I may be pardoned for saying so, is key and cannot be jumped. It is key because the manager in other words is the supervisor of the employee and is not only charged with duty of supervising her but also mentoring the employer. This was not done. The applicant therefore cannot be excused for doing what she did. This brings back to life the fact that the respondent's plea that she was in maternity leave. Perhaps, if the supervisor had undertaken to have a friendly consultation for identifying and analyzing her problems, she could not only have served her employment but also her blessed time of breastfeeding.

From the forgoing, I hold that the procure for termination was not complied with. Therefore, this application is partly allowed to the extent explained.

On reliefs, since the respondent ought to be terminated as it was done but operated with a faulty procedure, I can only award compensation for unfair termination for only a salary worth half of the period remaining to complete her contract.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) (Labour Division) DIVISHENI YA MAHAKAMA YA KAZI

AK. Rwizile

Judge

06.09. 2021

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