IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 697 OF 2019

BETWEEN

PUMA ENERGY TANZANIA LTD.....APPLICANT

VERSUS

AZAYOBOB LUSINGU AND 2 OTHERS..... RESPONDENT

JUDGEMENT

Date of Last Order: 16/02/2021
Date of Judgment: 19/03/2021

A.E MWIPOPO. J

This is revision application against the ruling of the Commission for Mediation and Arbitration (CMA) which was delivered on 31/07/2019 by Hon. Batenga, M. Arbitrator. PUMA ENERGY TANZANIA LTD, the applicant herein, filed Revision applications before this court against the decision of the CMA in Labour dispute no. CMA/DSM/TEM/279/2018/98/18.

The Revision application was made under Rule 24 (1), (2) (a) (b) (c) (d) (e) (f), (3) (a) (b) (c) (d) and Rule 28 (1) (c) (d) (e) of the Labour Court Rules, GN No. 106 of 2007 and section 91(1) (a) (b),

(2) (a) (b) (c) and section 94 (1) (b) (i) of the Employment and Labour Relations Act, No. 6 of 2004.

The application contains four grounds of revision. The grounds are as follows;

i. Whether it was proper for the arbitrator not to analyze evidence of all the parties in the award.

ii. Whether it was proper for the arbitrator to prepare and complete the award without determining issues framed.

iii. Whether it was proper for the arbitrator to hold that it was wrong for the applicant to take disciplinary steps against the respondents and finally terminate them while their issues was under police investigation and instead the applicant had to wait until the police file a criminal case and the judgement delivered, and in case of an appeal the determination of the appeal.

iv. Whether it was proper for the arbitrator to hold that whilst there is employment misconduct, which also has criminality, the employer should not take any disciplinary steps instead should leave it to the police and the Court in the exercise of criminal jurisdiction.

The briefly background leading to the present application was that, respondents were employed by the applicant namely Puma Energy Tanzania Ltd as a Fuel Operator for unspecified period. They were terminated from the employment for Gross misconduct on 15/05/2017. Aggrieved with the applicant's decision, the respondents filed the matter at CMA. CMA decided the matter in favor of respondents. The Applicant was not satisfied hence he filed the present application.

At the hearing of the application, the applicant was represented by Mr. Frank Mwalongo learned Counsel while respondents were represented by Mr. Jamael Ngowo from TUICO. Hearing of the application proceeded by way of written submission following the Court order.

Mr. Frank Mwalongo submitted 1st and 2nd ground jointly as well as ground 3 and 4. On 1st and 2nd ground, he submitted that the arbitrator did not determine the issue no.1 at CMA. He stated that the issue of procedure was not addressed as it was faulted by PW1 and PW2 regarding the position of Chairperson of the Disciplinary Committee and the status of Disciplinary authority. Thus, the

arbitrator did not determine the procedural aspect of termination in view of evidence tendered and allegation raised.

The applicant Counsel stated that PW-1 and PW-2 testified that they did not cause loss hence the reason for termination was unfair. He stated that the arbitrator did not address the framed issue which resulted to the determination of reliefs on wrong premises. In supporting his argument, he cited the case of **Wamilika Gama v. Action Aid,** Revision No. 659 of 2019, High Court of Tanzania, Labour Division, at Dar es Salaam (unreported).

It was further submitted that the arbitrator did not determine the procedural fairness and substantive fairness of the respondents' termination. PW1 and PW2 testified on two aspect of termination which is reason and procedure, but the same was not addressed by arbitrator. To cement his position, the Counsel cited the case of **People's Bank of Zanzibar v. Suleiman Haji Suleiman** (2000) TLR 347.

Lastly, he submitted that Rule 27(3) (e) of the Labour Institutions (Mediation and Arbitration Guidelines) G.N No. 67 of 2007 provides that, reason is one of the components of the award. On such basis the reason for decision should base on the evidence

tendered in answering issue and not outside. The issue to be determined must be known to the parties and parties should get time to respond to the same.

On ground 3 and 4 the Counsel submitted that Section 7 of the Criminal Procedure Act, Cap 20 R.E 2019 gives legal duty to any person who becomes aware of the commission or intention to commit an offence to report to the police or person in authority in the locality. To cement his argument, he cited the case of **Chela James Ghanai and Another v. Deogratious Ndanu,** Civil Appeal No.1 of 2019, High Court of Tanzania, at Tabora (unreported).

He averred that Section 135 of the Criminal Procedure Act, Cap 20 R.E 2019 provides content of a charge sheet. He is of the view that the charging takes place before the Court of law to which investigators appear as witness.

Mr. Frank Mwalongo submitted that Section 37(5) of the Employment and Labour Relation Act,2004 restricts taking disciplinary action on an employment misconduct which is substantially the same with criminal offence which the employee has been charged. The provision is very clear that the restriction applies when an employee has been charged with a criminal offence before the Court of law.

Thus, being charged with criminal offence does not means investigation.

Further it was submitted that there some erroneous decision which goes contrary to Section 37(5) of the Employment and Labour Relation Act, R.E 2019. He stated that the provision cited by the arbitrator impose restriction when an employee is charged with criminal offence, but the decision impose restriction when the matter is reported to the police for investigation which is not provided in law. To strengthened his argument, he cited the case of **Chai Bora Limited v. Allan Telly Mtukula,** Revision No. 38 of 2017, High Court of Tanzania, Labour Division, at Arusha(unreported) as one of erroneous decision. Therefore, such confusion led to come up with a misconceived interpretation of Section 37(5) of the Employment and Labour Relation Act,2004

Lastly, Mr. Frank Mwalongo submitted that Section 37(5) of the Employment and Labour Relation Act,2004 does not bar employer to take disciplinary action first, followed by criminal action. Supporting the same he cited the case of **Super Meal Ltd v. Peter Magari,** Revision No. 316 of 2009, High Court Labour Division, at Dar

es Salaam (unreported). Thus, the Respondent prayed for the CMA award to be set aside.

In reply, Mr Jamael Ngowo submitted that it is a crystal clear that the arbitrator has complied with a requirement of the law as provided under part II of the G.N. No. 67 of 2004, also he complied with the rule 27 of Labour Institution [mediation and arbitration guideline rules] G.N. No. 67 of 2004 as indicated at page 8 of CMA award. He stated that the commission direct itself to section 37(1) of Employment and Labour Relation Act, 2004 after analysing the evidence and testimony of both parties' witness, and this is well stated at page 8 of the CMA award.

It was submitted that the findings of the arbitrator from page 8, 9 and 10 of the typed awards are from what was testified by the applicant witness from the said investigation report. The evidence tendered by the applicant during the hearing at CMA does not prove directly how the respondents commit the offence. In such circumstance, relying on the investigation report only without any document to support the same was not enough to finalize the case before the court of law. In that position he was of the view that the case needed to be considered on the basis of the legal requirement

of the section 37(5) of the Employment and Labour Relation Act, Act No. 6 of 2004. In strengthening his argument, he referred this court in different cases including cases of **C.R.J.E. Vs. Abdalah Said** and **15 others**. Revision No. 166 of 2015, High Court labour division, at Dar es Salaam, (unreported).

Mr. Jamael Ngowo submitted further that the arbitrator has evaluated very well the evidence of applicant which is investigation report. He is opinion that the evidence of the applicant did not prove the charges. The employer is bound to prove that the termination was fair and he had the strong reason to terminate the respondents as per section 39 of the Employment and Labour Relation Act.

He averred further submitted that one of the evidences which was supposed to be proved at CMA by the applicant (employer) includes which provision or rule was violated to warrant termination. To support his stand, he cited the case of **James Leonidas Ngonge V. DAWASCO,** Revision No. 382 of 2013, High Court Labour Division, at Dar es salaam (unreported).

In answering ground 3 and 4 the Respondent's Counsel submitted that the Employment and Labour Relation Act prohibit an employer from taking any disciplinary action against an employee

who has committed misconduct of criminal nature and whereby the employee is charged with and the matter is before the court of law. Therefore, the employer will need to retain the employee who has committed misconduct of a criminal nature (e.g., theft, financial fraud) on the payroll until the final determination of the employee's case.

He argued that the only remedy available to the employer when an employee is charged with a criminal case is to suspend the employee on full payment. Despite of the criminal proceedings and outcomes against employee there is an emphasis on the proper internal disciplinary action to be carried out in relation to employee's misconduct. In supporting his argument, he cited the case of **Stella Manyali and another v. Shirika La Posta,** revision no 2 of 2010, High Court of Tanzania, Labour division, at Dar es salaam (unreported).

It was submitted by Respondents' Counsel that it is a principle of law that an accused person is presumed to be innocent until proved guilty. This right is well provided under article 13 (6) (b) of the Constitution of United Republic of Tanzania. Since the matter was reported to the police then the court of law has duty to prove the

charges against the respondent. On such basis, the investigation process was not given weight according to the law by employee and that is contrary to rule 13(3) and (4) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007.

The Respondent submitted further that Rule 13 of the Employment and Labour Relation (Code of Good Practice) Rules, G.N. No. 42 of 2007, provides very clearly that one of the procedures in establishing whether there was a ground of conducting disciplinary hearing is to conduct investigation first. He stated that this position is well supported by Article 7 of the Employment Convention (ILO) No. 158 of 1984. The applicant violated the provision of Section 37(1), (2) and (5) of the Employment and Labour Relation Act, and Rule 13(1), (3), (4), (5), (10) of the Employment and Labour Relation (Code of Good Practice) G.N. No. 42 of 2007 which govern the principal of fair hearing. The investigation process was not given weight according to the law by the applicant. This means in absence of such proof it is clear that the applicant violated the law which renders the whole process of terminating the respondent illegal. To support his argument, he cited the case of **Tanzania Revenue Authority v. Andrew Mapunda,** Revision No. 104 of 2014, High

Court of Tanzania, Labour Division, at Dar es Salaam (unreported). Thus, he prayed for the application to be dismissed.

In rejoinder the applicant Counsel reiterated his submission in chief.

Having heard parties' submissions in this matter, and having considered the chamber summons and the affidavit for and against the application, there are two issues for determination. The issues are as follows; -

i) Whether the award was properly procured by the arbitrator.

ii) What are the reliefs entitled to parties?

To commence with the first issue, the CMA proceedings and the CMA Award shows that the CMA framed two (2) issues. The issues raised at CMA were; -

a) Whether applicants' employment termination was unfair

b) What reliefs are entitled to the parties.

In the matter at hand the applicant claimed that the arbitrator did not address the framed issue regarding reason and procedure for termination. It was testified by PW1 and PW2 that they did not steal fuel, thus the reason for termination was not fair. Also, he claimed

that the respondents questioned the position of Chairperson of Disciplinary Committee by signing the letter of termination and the status of Disciplinary committee, as the procedure aspect of termination but the same was not addressed by the arbitrator.

It is an established principle of law that the award should have a content as provided under Rule 27(3) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, G.N 67 of 2004. The Rule provides that; -

"27(3) An award shall contain the following;

a) Details of parties.

b) The issue or issues in dispute.

c) Background information

d) Summary of the parties' evidence and arguments.

e) Reason for decision."

The above legal stand was stressed in the case of **Safi Medics v. Rose Peter and 2 others**, Revision. No. 82 of 2010, High Court of Tanzania, Labour. Division, at Tanga, (Unreported), the Court held that; -

"A successful arbitration requires that both the arbitrator and the parties in the dispute have common understanding of the issue in controversy"

Having enough time to read the CMA award I noted that the arbitrator failed to address the first issue (reason for termination), by

addressing the issue of finality of respondents' criminal case before taking disciplinary action by applying Section 37(5) of the Employment and Labour Relation Act. In cause of preparing the Award the arbitrator didn't address the issue of fairness of the reason and fairness of procedure for termination. In deciding the fairness of the termination there are two aspect which must be determined. These aspects are validity and fair reason and procedural fairness should be considered. In the present case the Arbitrator decided the dispute before considering the issues for determination. In such circumstance I am of the view that the award did not address the first issue framed about the fairness of the termination thus the Award was improperly procured.

Having finding that the arbitrator did not determine the first issue framed regarding the fairness of the termination, the next question is whether the same can be determined by this Court. This Court is of the view that since the issue of fairness of termination was pleaded by the parties at CMA and the evidence was adduced, this Court has mandate to address and determine the same. The law is settled to the effect that parties are bound by their own pleadings and documents. {See **Makori Wassanga v. Joshua Mwaikambo**

and Another [1987] TLR 92; **Peter Ng'homango v. Attorney General,** Civil Appeal No. 114 of 2011, (CAT), DSM (unreported); and that of **Astepro Investment Co. Ltd v. Jawinga Investment Limited**, Civil Appeal No. 8 of 2015, (CAT), DSM (unreported)}. For that reason, I proceed to determine the issue of fairness of the termination which was not determined by the Commission.

The validity and fairness of termination is well stipulated under Section 37(2) of the Employment and Labour Relation Act, No.6 of 2004 which states that; -

"Section 37 (2) A termination of employment by an employer is unfair if the employer fails to prove-

(a) That the reasons for 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."

Onus of proof for fairness of termination is on the employer as per Section 39 of ELRA and is on a balance of probability.

It is on record that the respondents were charged for falsifying sales transaction record, deliberate breach of set rules including theft and tempering the delivery certificate. The employer relied on the Police Investigation Report and the respondents were found guilty for gross misconduct as evidenced by Exhibit P11 (a letter of termination). Having gone through CMA record I noted that the respondents were charged for various offence as mentioned above which fall under misconduct. Also the investigation was conducted by the Police Force as evidenced by Exhibit P5 (a letter of investigation) and Exhibit P15 (Delivery Certificates) which show that there was a theft of fuel resulting from respondents' misconduct. From the evidence available in the record, I'm of the view that the evidence available was sufficient to prove the disciplinary offences of forgery and stealing against the respondents. The respondent's allegation that investigation was not conducted by the employer lacks legal stance. In the present application the employer decided to use police investigation. On that basis I am of the view that there was a valid reason for termination.

The second aspect of fairness of termination as provided by the law is procedural fairness. For termination to be procedurally fair, the employer is supposed to follow the procedures laid down under rule 13 of the Employment and Labour Relations (Code of Good Conduct) Rules, G.N. No. 42 of 2007. The rule provides that, I quote:-

> *"13(1) The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held."*

Investigation was carried out as per Exhibit P5 (a letter of investigation) and they were charged as per Exhibit P15. CMA found that the procedures were unfair on the respondents as the provisions of Section 37(5) of the Employment and Labour Relation Act, No.6 of 2004 was not complied with. I' m of the same position with the Arbitrator that the applicant was not supposed to proceed with both criminal and disciplinary action against the respondents. The evidence in record shows that the applicant decided to take criminal action against respondents by reporting the matter to the police.

This Court in the case of **Chai Bora Ltd v. Allan Terry Mtukula**(Supra), provides clearly that the criminal charges start by the party to report the matter to the police and thereafter if the

police found in their investigation there is sufficient evidence the criminal charges are instituted in Court. This is the proper interpretation of the law and I'm of the same opinion. The employer has to choose the action to take against the employee who has committed disciplinary offence which is also a criminal offence. If the employer chooses to proceed with criminal procedure, the disciplinary proceedings have to wait until the criminal procedure are concluded. The aim of this provision is to protect the employer from being multiple activities take against him/his at the same time. This was the position of this court in the case of **Stella Manyaki and Another v. Shirika la Posta** (Supra).

In the present case there is nothing which shows that at the time of initiating disciplinary proceedings the criminal case has already been concluded or withdrawn. Thus, the applicant wrongly proceeded with both criminal and disciplinary proceeding at the same time against the respondents.

Further, it is in record that the respondents were not availed with investigation report before hearing of the disciplinary of the report which was the basis of the disciplinary charges against them. The respective investigation report is police report. This is contrary to

Rule 13(1) of the G.N No. 42 of 2007. Failure to accord the employee with the report which is the basis of allegation amount to deny the employee right to be heard. The Court of Appeal in the case of **Severo Mutegeki and Another vs. Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA),** Civil Appeal No. 343 of 2019, Court of Appeal of Tanzania at Dodoma, (unreported), held that; -

> *"It is our considered view that, though the Internal Auditor's ultimate reporting responsibility lies to the Director General it is not in dispute that, those actually audited where the appellants and it is the audit report which triggered the charges against them. In that regard, the non-involvement of the appellants and subsequent conviction based on that report was irregular because they could not adequately prepare for the hearing before the disciplinary committee of the respondent. Instead, it is the respondent who being in possession of the report had all the ammunition to make a stronger case which was to the disadvantage of the appellants which rendered what followed to be unprocedural...."*

In this application the respondents claimed that there was no impartiality regarding the position of Chairperson of Disciplinary Committee as he signed respondents' letter of termination. Having gone through CMA record it is clear that Lameck Hiliyai who was the Chairperson in Disciplinary Hearing signed the letter of termination - Exhibit P5. This is contrary to Guideline 4(9) (Guidelines for Disciplinary Hearing) which is the Schedule to the G.N No. 42 of 2007. The guideline requires the Chairman to sign Disciplinary Form only and his recommendation to be forward to the Management. Thus, by signing the termination letter it affects the impartiality of the whole process. Since the Chairman of the Disciplinary Hearing was also the authority who terminate the respondents, I find that the reason for termination of respondents' employment was fair as a result I find that the termination was not fair procedurally.

Regarding the reliefs entitled to the parties, unlike the CMA, I have found that the termination of respondents' employment was unfair procedurally. In such situation the remedy is supposed to be less than the remedy provided by the law for substantively unfair termination.

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), 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.'

Again, in the case of in the case of **Felician Rutwaza v. World Vision Tanzania,** Civil Appeal No. 213 of 2019, CAT at Bukoba(unreported), it was held that:-

".....Under the circumstances, since the learned Judge found the reasons for the appellant's termination were valid and fair, she was right in exercising her discretion ordering lesser compensation than that awarded by the CMA....."

In the circumstances the respondents remedy for procedural unfair termination has to be less than 12 months salary compensation provided under Section 40(1) of the Employment and Labour Relation Act, 2004. Thus, the applicant has to pay six months salary compensation to the respondents for unfair termination. Christopher

Gallus has to be paid Tshs. 6,856,435.38/=, Azayobob Mduma Ths. 8559,776.64/= and Mohamed Haji Tshs. 6787258.62/=

Therefore, the application is partly granted and the CMA award is set aside. Each party to take care of his own cost of the suit.

A.E MWIPOPO

JUDGE

12/03/2021.