IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 265 OF 2020

TANZANIA LOCAL GOVERNMENT

WORKERS UNION (TALGWU) ..... APPLICANT

VERSUS

SOSPETER GALLUS OMOLLO ..... RESPONDENT

(From the decision Commission for Mediation & Arbitration of DSM at Temeke)

(**Nyagaya**: Arbitrator)

Dated 29th May 2020

in

Labour Dispute No. CMA/DSM/ILA/R.1310/17/158

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JUDGEMENT

29th September & 26th November 2021

Rwizile, J

This application is for revision, where the applicant is challenging the decision of the Commission for Mediation and Arbitration to be referred herein as the Commission. It has been preferred under section 91(l)(b), (2)(b) and Section 94(l)(b)(i) of the Employment and Labour Relations Act, Rules 24(1), (2)(a), (b), (c), (d), (e) and (f) and (3)(a), (b), (c) and (d) and Rule 28(1), 43(1) (a) and (b) of the Labour Court Rules, GN No. 106 of 2007.

It is, as well, supported by an affidavit sworn by one Twaha Mtengera applicant's counsel, asking this court to mainly revise the decision of the commission. In her affidavit the applicant coached the following issues for determination;

i. Whether it was proper for arbitrator to ignore the evidence of the applicant which was strong and arrived at a wrong decision
ii. Whether it was proper and failure for arbitrator not to consider the confession by the respondent during a disciplinary hearing
iii. Whether it was proper for the arbitrator to rule in favour of the respondent while no concrete evidence was adduced to prove his case

Opposing the application, the respondent's filed a counter affidavit. The first issue is whether there is a good reason for termination of the respondent's employment. The applicant's counsel, Mr.Burton Mayage submitted that; the applicant had valid reasons for termination of the respondent. He stated that the evidence by Dw1, Dw2 and Dw3 showed clearly that there was a strong reason for termination of employment of the respondent. It was argued, the respondent was ordered by the General

Secretary to close account Number 10201719003 at BOA Bank. The order, according to him, was based on the resolution of the meeting but it was disobeyed by the respondent. This therefore, it was submitted, is a serious misconduct in the eyes of the law.

The counsel submitted that failure to obey the directive of the National Executive Committee which is the final authority, amounts to gross insubordination.

It was his submission that the respondent knew the resolution of National Executive Committee to close the said account as per exhibit D10. The learned counsel went on arguing that at page 20 of the award, the arbitrator so noted, but did not accord due weight to that piece of evidence.

Mr. Barton Mayage, for the applicant, further, submitted that the issue to be resolved is whether insubordination done by the applicant merits termination in accordance with Rule 12 (3) of Employment and Labour Relations (Code of Good Practice) GN number 42 of 2007. It was his considered view that gross dishonest, willful damage to property, willful endangering the safety of others, gross negligence, assault on a co-

employee, or supplier, or customer, or member of the family of any person associated with the employer amounts to gross insubordination. Under the law, he argued, it constitutes a good ground for termination. He asked, this court to refer to the case of **Onael Moses Mpeku versus National Bank of Commerce Limited,** Revision No. 461 of 2019, High Court of Tanzania Labour Division at Dar es Salaam.

According to him, failure to obey the order and proceed operating an account led to a loss of 420 million. The respondent, in Mayage's view, was not acting in good faith towards his employer. The employer, it was further argued, lost faith and trust in the respondent's gross insubordination. In his view, this constitutes a valid and fair reason to terminate the respondent for gross insubordination.

He argued that the respondent was to prove by tendering a written directive which he received from the General Secretary allowing him to continue operating it. The respondent simply testified on defence without procuring any such proof. In supporting his argument, he cited the case of **Lamshore Limited and Another v Bizanje K. U. D. K,** (1999) TLR 33. He said, the respondent did not present any evidence to the effect that he advised the Secretary General on costs of repairing the Motor Vehicle with

Reg. No. T234BLZ. That the cost be paid by the Insurer and not the applicant, but during the hearing, it was argued further, there was no such evidence from the respondent to the effect that he advised the secretary General. Failure to prove so, he insisted, the court should draw an inference on the respondent.

Regarding the procedure, the counsel submitted that, the applicant complied with the procedures of termination outlined under Rule 13 of the Employment and Labour Relations (Code of Good Practice) G.N No. 42 of 2007. Therefore, he argued, that the respondent's defence that he was terminated by the General Secretary lacks merit as shown by exhibit D17. It is clearly shown, he argued, that the respondent was terminated by the National Executive Committee, in observance to Regulation 27 (3) of the Tanzania Local Government Workers Union Regulation, 2018. According to the regulations, the National Executive Committee is the disciplinary authority to Heads of Department as the respondent.

Opposing the application, MS Stella Simkoko learned counsel for the respondent submitted that, the respondent did not disobey the order to close the bank account No. 10201719003.

The order was by the General Secretary as in exh. D10. It was further argued that, the respondent did not admit doing so as submitted by the applicant.

It was submitted that, Dw1 did not tender an investigation report to the disciplinary hearing committee to prove the alleged offences. The counsel submitted, that the applicant failed to prove that investigation was conducted since no report was tendered. It was not proved as well that the respondent was withdrawing money from the account fraudulently. Dw1, she argued, simply said he had conducted investigation. He admitted that the report was not tabled anywhere. Neither before the Enquiry Committee, the Disciplinary Hearing Committee nor before the Commission so as to prove the alleged misconduct.

The counsel went on submitting that the respondent did not commit an offence of gross insubordination. It was not proved so by the applicant. Concluding this point, the learned counsel was of the view that termination was unfair. It was further submitted that the respondent did not fail to advise the General Secretary to close the said account as was testified for the applicant. She further stated that since the procedure of withdrawing money was not contested, then withdrawals had the approval of the

General Secretary. The respondent, in Stella's view, could not have advised otherwise. Further, she went on commenting that, the respondent testified that the account was operating under the directive of the General Secretary. The General Secretary signed the debit notes and that he did not instruct the applicant's branches to stop depositing money in the account.

Ms. Simkoko submitted that none of the signatories was brought to negate withdrawal procedures. The applicant did not as well prove if signatories were not properly signing or that they had not signed cheques during said period. In her view, instead, the applicant shifted the burden of proof to the respondent by demanding that he should have advised the General Secretary to close the account. It was submitted that the applicant is cast with the duty to prove as per section 110 of the Evidence Act.

She was of the view further, that the employee may be terminated if the employer has valid reasons for termination. The duty is cast on an employer to prove so as per section 39 of the Employment and Labour Relations Act. In the absence of such evidence, the respondent was unfairly terminated.

Further, it was submitted that forgery was not proved. The alleged forged signature of one Kibwana Ramadhani Njaa was not supported by evidence at CMA or at the disciplinary hearing. The said Kibwana Ramadhani Njaa, the counsel commented, was not brought to testify. Also, it was submitted, no evidence was tendered to prove that the respondent had forged the cheques or debit notes so as to withdrawal the respective amount of Tsh. 420,000,000/=

On failure to advise in maintaining a vehicle with registration No. T234BLZ, it was submitted, that there was no evidence to prove, that the applicant was so advised as indicated in exhibit D9. Further, it was submitted no contravened rule was stated. The learned counsel submitted that the respondent never admitted to have committed any of the offences.

The respondent maintained that the applicant ought to have conducted an investigation. This was in order to ascertain the extent of unauthorized withdrawals by the respondent bearing in mind that there were official cheques signed by his superiors. Lastly, it was submitted that cases cited by the applicant are distinguishable with this application.

In rejoinder, the applicant reiterated his submission in chief and asked this court to grant the application.

Having considered the record and arguments of the parties, I have to determine *whether the applicant's termination was substantively and procedurally fair*? And *to what reliefs*

Section 37(2) of the Employment and Labour Relation Act, [Cap 366 R.E 2019], provides that; -

> *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.*

It is a well-established principle that once there is an issue of unfair termination, the duty to prove reasons for termination were valid and fair is cast on the employer as per section 37(2) read with section 39 of ELRA. It

was also held so in the case of **Amina Ramadhani v Staywell Apartment Limited,** Revision No. 461 of 2016, High Court Labour Division, at Dar Es Salaam as was cited by this Court in the case of **Boni Mabusi v The General Manager (T) Cigarette Co. Ltd,** Consolidated Revision No. 418 and 619 of 2019 at page 14.

Having gone through the record, the applicant was charged for various offences of misconduct including conspiring in running the alleged closed account no. 10201719003 and participating in authorizing Tsh 420,114,091.47 to be withdrawn from the same account as per the charge sheet, exhibit D12. But the disciplinary committee decision shows that he was charged with six offences and found guilty with four offences as per exhibit D17.

Apart from that variation of offences, the applicant tendered a chart showing the money was withdrawn. No documentary proof or a witness that were tendered to show who authorized the transactions and when the money was exactly withdrawn. In absence of the evidence, I am of the view that the alleged offences were not proved. Forgery and failure to advise the General Secretary, is a question of fact. It must be proved by

evidence. No evidence was tendered before the commission. It was not therefore proved as it has been submitted.

Furthermore, it has not been proved that the applicant had rules, that required as a matter of law, practice or procedure, the respondent to be the adviser to the General Secretary on repairing the alleged sold cars. As well, the allegation regarding insubordination as per exhibit D10 shows that the General Secretary of TALGWU directed the Branch Manager to close the alleged account. This means, he was mandated to close the same. It is therefore clear that there is no evidence showing the respondent failed to act as it has been submitted.

Section 37 of ELRA as indicated before, is clear and states that the employer has to prove not only that termination was for valid reason but also that the reasons were fair. Termination for misconduct as in this case is governed by Rule 12 of the Code of Good Practice GN No. 42 of 2007. Having gone through the reasoning of the arbitrator and the records available, I am in doubt if rule 12 was complied with.

The offences charged were grounded on misconduct as stated and proved to exist in the employer's manual exhibit D1. But since, it is the duty of the

employer to prove that there were fair reasons for termination, the same was not done. It cannot be said, the respondent was terminated for valid reasons. I therefore hold the view that termination was not of valid reasons.

Fairness of procedure for termination is stated under rule 12. It must be observed fully as under ruled 13. Rule 13(1) provides, there must be investigation first, to establish if there is a need for conducting a disciplinary hearing. In my view, this stage is important since it puts the whole disciplinary machinery process into motion.

However, in the present dispute, the evidence available does not reveal whether investigation was conducted or not. It is not clear, if the respondent was afforded with an opportunity to interrogate the said report.

Failure to conduct investigation and avail the employee with the investigation report, in my considered view, is tantamount to denying the respective employee with his right to defend himself from the allegations facing him.

Based on such reasons, it is safe to conclude that, the procedure for termination was not fair. Further, the chairman of disciplinary hearing

committee initiated the proceedings as per the charge sheet. He, as well, signed the termination letter as per termination letter, exhibit D17. In essence therefore, it affects the impartiality of fair hearing process. The likelihood of acting with bias cannot be plainly ruled out. This is important to be noted by an employer contemplating termination process, since it conflicts with rule13(4) of the Code of good practice.

In the circumstances, not complying with the procedure, renders termination unfair. Rule 13 of the Code of Good Practices, was therefore to be complied with. Such a finding, was as well reached by this court in the case of **Tanzania Revenue Authority v Andrew Mapunda,** Labour Rev. No. 104 of 2014. Having based on the findings previously made, termination was both substantively and procedurally unfair.

On the last issue, regarding reliefs as the applicant prayed for reinstatement and damages in his CMA form No.1. I am of the view that the same position could not be vacant until this time. The respondent was awarded a chunk as damages. I hesitate to hold that the respondent proved damages.

Damages in the nature stated have to be proved, let alone its extent, which was not proved at commission. Therefore, the respondent was not entitled to damages. The amount awarded as damages is therefore quashed.

By considering section 3 of the Employment and Labour Relations Act, the relationship between applicant and respondent turned sour since March 2017, which is four years in the roll. Considering the age of the respondent at termination and that he was about to retire. Therefore, it is difficult for him to find another job. To meet the justices of this case, compensation of 12 months wages awarded by the commission is quashed and set aside and substituted for it, 24 months' salary. The severance pay for eight years from the date of employment to the date of termination and a notice, if they were not paid yet. Therefore, the CMA award is revised to such extent, each party to bear its own costs

A.K. Rwizile

JUDGE

26. 11. 2021