IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 138 OF 2021

BETWEEN

SUZAN WANGWE .... APPLICANT

VERSUS

MSPH TANZANIA LLC .... RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J.

The present revision application is against the award of the Commission for Mediation and Arbitration for Ilala (CMA) issued on 14th May, 2020 by Hon. Mbena, S. Arbitrator in Labour Dispute No. CMA/DSM/ILA/R.1264/17/26. The applicant moved the court under the provisions of Section 91(1)(a),(b), (2)(b) and (c), Section 91(4)(a),(b) and Section 94(1)(b)(i) of the Employment and Labour Relations Act No. 6 R.E. 2019 and Rule 24(1)(2)(a),(b),(c),(d),(e) and (f), (3)(a),(b),(c) and (d), 28(1)(c),(d) and (e) of the Labour Court Rules, 2007 seeking for the following orders:

1. That this honourable court be pleased to call for records, revise and set aside the Arbitrator's award dated 14the day of May 2020 by Hon. Mbena M.S. (Arbitrator) made in Labour dispute No. CMA/DSM/ILA/R.1264/17/26) on grounds set forth in the

annexed affidavit and on such other ground which may be adduced on hearing date.

2. That this honourable Court be pleased to determine the matter in the manner it consider appropriate and give any other relief it considers just to grant.

The application was argued by way of written submissions. Both parties were represented, Mr. Godfrey Ngassa, learned Counsel appeared for the applicant whereas Mr. George Shayo, learned Counsel was for the respondent. Before going into the merits of this revision, brief background is narrated.

The dispute between the parties arose out of the following context; on the 08th June, 2016 the applicant was employed by the respondent as a Human Resource Officer in a one-year fixed term contract. After expiry of the referred contract, the parties automatically renewed into another fixed term contract. On 26th July, 2018 the applicant was terminated from employment after being charged and found guilty of misconducts which will be apparent here under. Aggrieved by the termination, the applicant referred the dispute to the CMA claiming for unfair termination, the CMA dismissed the applicant's claim for lack of merits. Still eager to pursue her rights, the applicant filed the present application on the following grounds: -

i. That the Arbitrator erred in law and fact by failing to evaluate evidence adduced by applicant who proved the unfairness of applicant's termination.

ii. That the Arbitrator erred in law and fact in holding that there was reason for termination of the employment of the applicant without considering the gravity of the ooffence even if the alleged offence was committed at all.

iii. That the Arbitrator erred in law and fact in holding that the respondent was not bound to comply with the procedures of termination of the employment of the applicant as provided under the law.

iv. That the Arbitrator erred in law and fact in holding that this labour dispute was the dispute which the employer was exempted from complying with procedures of termination as provided by the law.

v. That the Arbitrator grossly erred in law and facts in disregarding completely aapplicant's' final submission in support his case, to the contrary he based on unfounded facts and reasoning instead of reasoning in line with the law and evidence on record.

Arguing in support of the first ground, Mr. Ngassa submitted that the applicant was being obedient to her supervisor by following her

instructions. That later he came to deny to have never given any instructions nor remarks to the applicant. That the evidence of hearing form (exhibit D11) clearly shows that the evidence of the respondent witness, Bentson Mariki admitted that he discussed with one Gloria Mbulu (the applicant's supervisor) on the issue of Gerald. Mr. Ngassa argued that the Arbitrator wrongly reached the conclusion that the applicant admitted the offence of switching names of the interviewed candidates, while she was under instructions of her supervisor/line manager failure of which would have amounted to insubordination. He added that had the Arbitrator properly considered and evaluated such evidence, she wouldn't have reached her decision.

Mr. Ngassa went on submitting that the report sent by the applicant was not final, it was just draft for perusal and correction as testified by DW2 at page 7 paragraph 2 of the impugned award. That the said DW 2 on the same paragraph stated that he informed the applicant and the applicant sent another email to the panellist team of the correct names as they have agreed before. He added that by sending another email, it clearly shows that it was an internal correspondence in which the applicant cleared the error internally. That the respondent did not prove how he was affected by the act of the applicant to the extent of terminating her employment. Mr. Ngassa

insisted that the Respondent did not suffer any harm till this moment as the Interviewed Candidates were not yet contacted regarding their interview results.

On the second ground, Mr. Ngassa submitted that the Arbitrator erred to conclude that there was an offence committed while there was no policy, Staff Rule or Staff Regulations tendered at the CMA to prove the violated rule. He stated that the Arbitrator erroneously reached the conclusion that there was a reason for termination with no evidence to rely on her findings. He added that there is no evidence submitted to the CMA on damages suffered by the respondent by the "alleged" act of the applicant to switch names of the Interviewed Candidates.

Mr. Ngassa went on to submit that in deciding if the termination for misconduct is unfair the employer, Judge or Arbitrator has to consider Rule 12 of Employment and Labour Relations (Code of Good Practice) G.N. No.42 of 2007 ("the Code"), however the same was not complied with in this case. He insisted that in this case there was no policy violated and that termination was not the proper sanction in this case. To support his submission, he cited the book of **"A Guide to South African Labour Law, 2nd edition, at page 196 paragraph 4.6, the authors Rycroft and Jordaan,** which states;

'The employer's reason for dismissing the employee must be both valid and fair. Validity, it has been said goes to proof and to the applicability to the particular employee of the reason for the dismissal. The enquiry is whether the facts on which the employer relied to justify the dismissal actually existed. The employer is not allowed to rely in court on reasons not relied upon or not known at the time of the dismissal. While a mere suspicion of misconduct is not sufficient to warrant dismissal.'

As to the third and fourth ground Mr. Ngassa argued that it is a trite law the termination shall be deemed to be unfair if the employer fails to prove that the termination was in accordance to fair procedure as provided under Section 37(2)(c) of the ELRA read together with Rule 8 (1) (c) (d) of the Code. It was further submitted that the Arbitrator erred in concluding that the respondent was not bound to comply with the law, thus fair procedure is of the utmost importance if the employers consider terminating the Employee. To booster his submission, Mr. Ngassa cited the case of **Tanzania Railways Ltd v. Mwajuma Said Semkiwa, Revision No. 239/2014 [2015] LCCD 1**.

Mr. Ngassa continued to submit that the Disciplinary Hearing conducted in respect of the charges levelled against the Applicant was

tainted with irregularity. That according to Guideline 4 (2) of the Guidelines for Disciplinary, Incapacity and incompatibility policy and procedures, the Code calls for the impartiality of the Chairperson in conduct of Disciplinary Hearing. Mr. Ngassa argued that the cited provision was not honoured by the respondent in the whole procedure towards terminating the Applicant as it is evident that Country Director was the complainant as it reflects in Exhibit D7 (Letter requesting for Explanation) and he played an active role in the Disciplinary hearing and gave his recommendations Exhibit D 11. He further submitted that the same country director determined the Appeal of the Applicant as reflected in Exhibit D12 and terminated the applicant as evidenced by the termination letter (Exhibit D5) which contravenes rule against bias commonly known as ***Nemo Judex In Causa Sua,*** that no man shall be a judge in his own cause. Mr. Ngassa then submitted that the deciding authority must be impartial and without bias.

On the fifth ground for revision, Mr. Ngassa submitted that the Arbitrator erred in law and facts by completely disregarding the applicant's final submission which gave a clear picture and proper summary of the evidence tendered before the CMA. He argued that by disregarding the final submission has led the Arbitrator to reach conclusions which are on unfounded facts and reasoning instead of

reasoning in line with the law and evidence in record as smoothly envisaged by the applicant in her final submission. In the upshot Mr. Ngassa urged the court to award the applicant 36 month's compensation for the alleged unfair termination.

Responding to the first issue Mr. Shayo submitted that in determining the matter, the Arbitrator properly considered the evidence of the parties and the closing submissions. He stated that the applicant's defence of being obedient to her supervisor does not exonerate her from the misconduct that she tempered and violated the respondent's recruitment process by altering the marks of recruits. He added that the allegation that the applicant was obedient to her supervisor is superfluous to these submissions because there is no evidence that the same was raised at the CMA to allow parties to respond to the same.

Mr. Shayo went on to submit that the applicant's allegation that she was under her supervisor's instruction is an afterthought after she was caught up violating the recruitment process. That had there be an instruction from her supervisor; the applicant would have not been subjected to disciplinary hearing. Mr. Shayo argued that based on the evidence on record, the respondent proved the misconducts levelled against the applicant.

As to the second ground Mr. Shayo reiterated his submission in the first ground and insisted that the respondent had valid reason to terminate the applicant's employment. As to whether termination is the proper sanction the Counsel submitted that in the circumstance of this case termination was a proper sanction because it will avoid occurrence of the same incident in the future pursuant to Rule 12 (4) of the Code.

Mr. Shayo went on to submit that the allegation that there were no policies tendered intends to mislead the court because the same was not raised at the CMA to allow parties to argue on the same. He further submitted that even if the policies are not tendered, the misconduct committed falls within Rule 12 (3) of the Code. He then urged the court to condemn the applicant's submission on failure to tender the contravened policies arguing that some misconducts such as this one, even in the absence of any document or policy designating it as a misconduct, cannot be said to be good in the eyes of law. The counsel further argued that what is important in the circumstance of such misconduct is for the employer to prove the commission of such misconduct.

As to the issue of being a first-time offender, Mr. Shayo submitted that the present offence affects the employer employee relationship hence termination was a proper sanction.

As to the third and fourth ground Mr. Shayo submitted that the Arbitrator righty held the position of the law as traversed in the case of **Nickson Alex v. Plan International** (supra) as well as rule 13 (3) of the Code which allows the employer to dispense with adhering to disciplinary procedures. Mr. Shayo submitted that the termination procedures were followed by the respondent as testified by DW1 and the exhibits tendered.

It was further submitted that the cited case of **Tanzania Railway and Mwajuma Said Semkiwa** (supra) is distinguishable to the circumstances at hand. That the law regulating disciplinary hearing process does not allow the chairperson who is a decision maker of the disciplinary committee to be a person who might have been involved in the matter leading to the hearing so as to maintain impartiality. He continued to submit that the law does not bar the complainant in the disciplinary hearing committee recommendation to issue a termination letter if he has such powers.

Mr. Shayo submitted further that in this case, the complainant was the country director, by virtue of his title he was the person entitled to act upon the committee's recommendation thus he is not barred by the law. He went on to submit that the applicant did not show how she was prejudiced for his appeal being heard by the Country Director. He

therefore urged the court to dismiss the application for lack of merit and upheld the CMA's award.

After going through the submissions for and against the application, the main issue for consideration can be narrowed down to whether the termination of the applicant was substantively and procedurally fair. The first and second grounds will be determined jointly, so will the third and fourth grounds. On the other hand, the last ground will be dealt with separately.

As to the first and second ground, they are addressing the fairness of the reason for termination. It is on record that the applicant was terminated for misconducts namely falsification of documents (recruitment report), incompetence or failure to apply sound professional judgment and breach of trust. This is reflected in the termination letter (exhibit D6). After thorough consideration of the evidence of both parties, the Arbitrator held that the respondent proved the misconducts levelled against the applicant because she admitted to commit the same. In his decision, the Arbitrator relied on exhibit D7 though the content explained therein are that of (exhibit D8) response to show cause letter, something which I find to be a typing error of the Arbitrator.

Looking at exhibit D8 referred by the Arbitrator, the applicant clearly admitted that she switched names of the selected interviews candidates where the second candidates were indicated as the first ones and vice versa. The applicant alleges that she switched the names following the direction from her supervisor, Ms. Glorie Mbala. However, going through the record there is no evidence to prove that she was directed to do so by the alleged supervisor. The record shows that the applicant knew that her supervisor was not among the panellists of interviewers, yet she proceeded to switch the names of the selected recruits without proof of the instruction to do so.

The applicant's act of switching the recruit names proves that she failed to act in accordance with her profession thus the respondent rightly questioned her trust. In my view, if the names of the recruits were switched in good intention as claimed, the applicant would have not reported that the first score recruits were not recommended for the job. The applicant further alluded that if she would have refused the directions from her supervisor such an act could have amounted to insubordination. In my view the refusal had nothing to do with insubordination for the following reason. Insubordination as a misconduct have been well defined in the case of **Sylvania Metals (Pty) Ltd v Mello N.O. and Others (JA83/2015) [2016] ZALAC**

52 as cited in the of **Tatu S. Mohamed & Another vs A3 Institute of Professional Studies (Revision 308 of 2019) [2020] TZHCLD 3 (27 March 2020)** where it was held that;

> *"Insubordination in the workplace context, generally refers to the disregard of an* ***employer's authority or lawful and reasonable instructions.*** *It occurs when an employee refuses to accept the authority of a person in a position of authority over him or her and, as such, is misconduct because it assumes a calculated breach by the employee of the obligation to adhere to and comply with the employer's lawful authority. It includes a wilful and serious refusal by an employee to adhere to a lawful and reasonable instructions of the employer, as well as conduct which poses a deliberate and serious challenge to the employer's authority even where an instruction has not been given."*
>
> [Emphasis is mine]

In line with the above quoted definition of insubordination, I find the applicant's refusal would have not amounted to insubordination because the order/direction alleged was not given by the person who had mandate to do so. Even under normal circumstances, it is expected that the panellist members are the ones entitled to recommend on the

result of the interviewees being the ones who directly interviewed them. Therefore, the alleged insubordination cannot stand in this case. In the basis of the foregoing analysis, it is my finding that the Arbitrator properly analysed the evidence on record and reached to justifiable decision that the respondent proved the misconduct levelled against the applicant on balance of probabilities. Under such circumstances, I fully agree with the respondent that the Arbitrator properly found that the respondent had valid reason to terminate the applicant from employment.

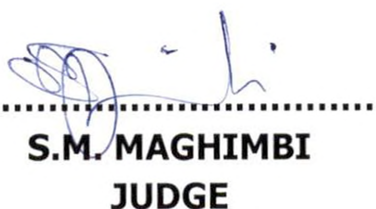
Regarding the issue of termination procedures, as stated above the applicant was terminated on the ground of misconduct. The procedures for termination on that ground are provided under Rule 13 of the Code read together with Guideline 4 of the Guidelines for Disciplinary, Incapability and Incompatibility Policy and Procedures. The contested procedure alleged not to be adhered to is the issue of impartiality. The applicant alleges that the Country Director who also signed the termination letter was the complainant in the Disciplinary Hearing. Looking at the record the complainant who stood as the accuser in the Disciplinary Hearing was the applicant's supervisor and not the country Director as alleged. Thus, the applicant's allegation on that ground lacks merit as it is contrary to the record.

I have also noted the applicant's allegation that the Country Director determined the applicant's appeal at the same time he signed the termination letter. In my view when deciding the applicant's appeal, the Country Director acted as the respondent's appellate body whereas when signing the termination letter, he did on behalf and under instruction of the employer (the respondent herein). Under such circumstances I find the issue of impartiality does not stand so long as the applicant was properly afforded the right to be heard. I cross checked other termination procedures and the same were adhered by the respondent. On such basis, I join hands with the Arbitrator that the respondent followed the termination procedures in terminating the applicant.

In view of the above findings, I find no justifiable reason to fault the Arbitrator's findings. The respondent had valid reason and he followed the required procedures in terminating the applicant. The application is hereby dismissed.

It is so ordered.

Dated at Dar es Salaam this 14th day of April, 2022.



S.M. MAGHIMBI

JUDGE