IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 83 OF 2022

SHAIBU ABDALLAH MNDEME ..... APPLICANT

VERSUS

GALCO LIMITED ..... RESPONDENT

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

(Chuwa: Arbitrator)

Dated 17th September, 2021

in

REF: CMA/DSM/TEM/2020

JUDGEMENT

19th September & 28th October, 2022

Rwizile, J

This is an application for revision. In this application, this Court has been asked to Call for records, revise the proceedings, and set aside the award of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/TEM/2020 dated 17th September 2021.

The brief facts behind this case are that, the applicant was employed by the respondent since 01st June, 2015 as a driver. He was paid a salary of TZS 330,000.00 per month.

He was terminated on 21st September, 2020 following accusations of committing an assault at the work place.

On 14th September, 2020 he was asked via a letter, to show cause why he should not be subjected to disciplinary hearing on the allegation stated as *"UTOVU WA NIDHAMU NA UVUNJIFU WA AMANI KAZINI".* On 15th September, 2020, he was notified to appear before the disciplinary committee to be held on 18th September, 2020, with a more or less different allegation stated as *"UTOVU WA NIDHAMU ULIOKOTHIRI NA DHARAU KWA UONGOZI.*

a) Kupigana katika eneo la kazi kwa maana ya kufanya shambulio la kudhuru mwili kwa kiongozi wako wa kazi

b) *Kudharau ofisi ya Rasilimali watu"*

The applicant was later terminated on 23rd September, 2020. He was not satisfied with termination and filed a labour dispute at CMA claiming for compensation of 12 months salaries, annual leave arrears for 5 years. Upon full hearing, the dispute was dismissed, hence this application. The application is supported by the applicant's affidavit that raised two grounds for determination;

i. That, the honourable arbitrator erred in law and in fact after issuing the award in favour of the respondent while the allegation in the disciplinary committee were different with show cause letter.

ii. *That, the honourable arbitrator erred in law and in fact in dismissing the dispute while the applicant was terminated without being heard properly.*

The application was heard by way of written submissions. The applicant was represented by Mr. Jackson Mhando, Personal Representative, while the respondent was represented by Mr. Davis Kato learned Advocate.

The applicant only argued one ground to wit, *the honourable arbitrator erred in law and in fact after issuing the award in favour of the respondent while the allegation in the disciplinary committee were different with show cause letter.*

Advancing his argument on the issue, Mr. Mhando submitted that, the applicant received the letter from the respondent alleging "UTOVU WA NIDHAMU NA UVUNJIFU WA AMANI". The letter according to him, did not specify the name of the person alleged assaulted. He stated further that the applicant denied the allegation as per exhibit G1.

It was his further submission that on 15th September, 2020, the applicant received a letter from the respondent requiring him to appear before the disciplinary hearing committee on 18th September, 2020 but it contained three allegations -

1. UTOVU WA NIDHAMU ULIOKOTHIRI NA DHARAU KWA UONGOZI

a) *Kupigana katika eneo la kazi kwa maana ya kufanya shambulio la kudhuru mwili kwa kiongozi wako wa kazi*

b) *Kudharau ofisi ya Rasilimali watu*

He went on to submitted that the allegations were new. Strongly, he insisted that even the report of the disciplinary hearing committee did not show the previous allegation.

In his view the respondent did not want the applicant to be heard on the former allegation which he explained on 14th September, 2020.

He submitted that the arbitrator disregarded the fact that the respondent did not convene the disciplinary committee upon the previous allegation in the show cause letter dated 14th September, 2020. He supported his point by citing rule 13(1) of the Employment and Labour Relation (Code of good Practice) G.N. No. 42 of 2007 which provides for the right to be heard, and the case of **Tanzania Telecommunications Company Ltd v Augustine Kibandu**, Revision No. 122 of 2009. He then prayed for this Court to set aside the award.

In reply, the respondent through Mr. Kato submitted that the applicant was given opportunity to be heard on 14th September, 2020 when he was requested by the respondent to give a written explanation on what transpired that led him to gross misconduct (exhibit G1). It was his

argument that the applicant gave his explanation which did not please the respondent. It is for that reason, he was called to a disciplinary hearing with a charge sheet on 15th September, 2020.

In his view, the charge sheet had detailed information regarding the allegations levelled against him. He further said, the applicant's right to be heard was observed during the disciplinary hearing. He said, he was given sufficient time for the incident. He pleaded that exhibit G2, shows the procedure was duly followed. Based on the gravity of the offence, the committee upon conviction found it proper to terminate his employment. According to him, the applicant was given time to appeal but he forfeited it

This court was therefore asked to find this application with no merit. It should be dismissed.

In a rejoinder, the applicant's personal representative submitted that the respondent did not deny that there was a different allegation from the "show cause letter" and that the respondent abandoned the previous allegation that led to unfair termination.

After going through the pleadings, submissions, CMA proceedings and exhibits, the court had been called to determine: -

i. *Whether CMA was right to hold that the applicant had valid reason to terminate the applicant and*

ii. *Whether CMA was right to hold that there was procedural fairness in terminating the applicant*

In this application there is no dispute that the applicant was the employee of the respondent who was terminated due to misconduct. On terminating the employment contract, there are rules to be followed for termination to be fair. Section 37(2) of the Employment and Labour Relations Act [CAP 366 R.E. 2019] provides that there must be valid and fair reasons for termination, but as well there must be procedural fairness. It also should be noted that the duty to prove whether the termination was fair lies to the employer. This is provided under section 39 of the Act.

Further the court notes that rule 9(1) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007 is categorical that;

> *"An employer shall follow a fair procedure before terminating an employee's employment which may depend to some extent on the kind of reasons given for such termination."*

As it has been stated, it is the respondent who was supposed to prove at CMA whether there was reason for termination and if the procedure for the termination was followed.

In dealing with the first issue, the applicant stated that there was no reason for his termination. He stated that he was given the letter with allegation stated as "UTOVU WA NIDHAMU NA UVUNJIFU WA AMANI" but was not provided with the name of the person alleged to be assaulted. The respondent stated that there was reason for termination as the applicant through his letter admitted to attack his fellow employee who was his boss.

Witnesses for the respondent stated that the applicant assault his leader by punching him and in exhibit G1 the allegation is (UTOVU WA NIDHAMU NA UVUNJIFU WA AMANI KAZINI). Making his defence in respect of that letter, the applicant stated. For easy reference: -

> *"... kwahiyo nikashangaa sababu nimeshaingia kwenye ofisi ya Rasilimali watu nabado yeye alikuwa ananikandamiza kwa meseji ambazo hazina ushahidi na pia alishaniambia nikabidhi gari jambo ambalo nililitekeleza kwahiyo alishaanua kunipa adhabu bila ya kujitetea, Hilo ndiyo lililosababisha tupishane Kiswahili, sababu ofisi ni ya Rasilimali watu ilitakiwa nihojiwe bila ya Fathi kuwepo."*

Base on the above, it is apparently clear that the applicant did not deny the allegation but rather stated reasons for assaulting his leader. This indeed shows, the applicant made assault on his leader. This in my view

is a valid reason for termination as rule 12(3)(e) and (f) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007. In law therefore assault on a co-employee, supplier, customer or a member of the family of, and any person associated with, the employer is a form of gross misconduct and merits termination.

It follows therefore that apart from the above, still there is the offence of gross insubordination.

As it has been discussed above the act of the applicant to assault his leader as it has been proved by witnesses for the respondent was a fair and valid reason for termination as held by the CMA.

On the second issue, the applicant on issue of procedure stated that the allegation provided in the letter was not the same as the one heard at the disciplinary hearing and that he was not given time to be heard. Rule 13 of G.N. No. 42 of 2007 provides for investigation to be conducted as per Rule 13(1), notice of the allegations is provided under rule 13(2), while reasonable time to prepare for the disciplinary hearing among other things is a creature of rule 13(3). It is proved by the exhibits tendered at CMA.

Exhibits do not show whether there was investigation done, since no report. All what was tendered was the letters of other workers talking about the coincidences (exhibit G5). As shown before when dealing with

first issue that the applicant admitted to have committed the incidence. In my considered view, there were no need for the respondent to conduct investigation. This is stipulated under rule 13(11) of G.N. No. 42 of 2007 that: -

> *"In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with them. An employer would not have to convene a hearing if action is taken with the consent of the employee concerned."*

But exhibit G2 shows the applicant was provided with the notice of disciplinary hearing. It was given to him on 15th September, 2020 and was supposed to sit on 18th September, 2020 (23/04/2019). As the law provides the applicant was provided with the notice to show cause which stated the misconducts charged with and particulars of the offence.

For the allegation of the applicant that he was given a letter and time to show cause, it was accompanied with charge different to the charges listed in the notice of disciplinary hearing, I find them to have no merit. This is so because the latter dated 14th September, 2020 (exhibit G1) needed him only to explain how the incident occurred. After answering, it followed the notice to the disciplinary hearing which the law requires to

list charges levelled and the employee's rights. And as per rule 13(2) of G.N. No. 42 of 2007 it gave the applicant reasonable time to prepare himself for the disciplinary hearing as the law requires.

By the respondent to follow all these procedures, it has been proved that the respondent has complied with rule 13 of G.N. No. 42 of 2007 that she adhered to the procedures for termination of the applicant.

Thus, this application is dismissed for want of merit. No order as to costs to either party.

A.K. Rwizile

JUDGE

28.10.2022