

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM**

LABOUR REVISION NO. 265 OF 2022

*(Arising from the award of Commission for Mediation & Arbitration of DSM at Temeke
Dated 11th July 2022 in Labour Dispute No. CMA/DSM/TEM/249/2020/103/2020)*

SUPHIAN MOHAMED BAKARIAPPLICANT

VERSUS

M.R & SONS LIMITED.....RESPONDENT

JUDGEMENT

K. T. R. MTEULE, J.

18th October 2022 & 09th November 2022

This application for revision arises from the award of the Commission for Mediation and Arbitration of Dar es Salaam, Temeke (CMA) delivered by **Hon. Mikidadi, A. Arbitrator**, dated **11th July 2022** in **Labour Dispute No. CMA/DSM/TEM/249/2020/103/2020**. The Applicant (former employee of the respondent) is praying for this Court to call for the record of the proceedings and the award of the CMA in the aforesaid Labour Dispute, revise quash and set aside the award therein on the reason that the termination of the applicant's employment was unfair in both procedure and reasons. The Applicant is further praying for an order for payment of **TZS 22,500,000.00** as compensation for unfair termination.

From what is extracted from the CMA record, as well as the affidavit and counter affidavit filed by the parties, the applicant was employed by the respondent as a Driver from **1st January 2017** under permanent terms. His contract was terminated on **11th May 2020** due to an allegation of misconduct (gross insubordination) which faced the applicant, alleged to have refused to perform assigned duties by using a new car as a Driver. The applicant pleaded that he refused to drive the said vehicle because it was a Chinese vehicle make of FAW which once caused him health problems. Disciplinary hearing was initiated by the employer where the applicant was found guilty of the disciplinary offence and terminated from the employment.

Being resentful with the employer's decision to terminate his employment, the applicant filed the **Labour Dispute No. CMA/DSM/TEM/249/2020/103/2020** claiming to have been unfairly terminated and for payment of **TZS 22,500,000/=** as compensation and **TZS 50,000,000/=** as general damages plus severance pay and leave payment. At the CMA, the arbitrator found that, the reasons and procedures for the applicant's termination were fair and decided the matter against the applicant. The arbitrator found that the applicant's termination was both substantively and procedurally

fair hence awarded nothing. This decision aggrieved the applicant and triggered this application for revision.

Along with the Chamber summons, the applicant filed an affidavit sworn by his advocate namely Hekima Mwasipu, in which after expounding the chronological events leading to this application, alleged the applicant to have been unfairly terminated substantively and procedurally. The deponent stated that the arbitrator misdirected herself in her findings that the applicant's termination was fair in all aspects.

Paragraph 4 of applicant's affidavit contains two legal issues as reproduced hereunder: -

- i) The arbitrator misdirected herself on the facts the procedures were followed in terminating the applicant.
- ii) The arbitrator misdirected herself on the facts that the reasons for termination were fair.

The application was challenged through a counter affidavit affirmed by **Mr. Mohammed Remtulla**, respondent's Principal Officer. The deponent of the counter affidavit vehemently and strongly disputed applicant's claims of unfair termination.

The application was disposed of by oral submissions. The Applicant was represented by Mr. Hekima Mwasipu, Advocate, while the respondent

was represented by Ms. Victoria Njau Advocate from a firm styled as unbiased Law Chambers. I appreciate their rival submissions which will be considered in determining this application.

Having gone through the parties' submissions and their sworn statements together with the record of the CMA, I am inclined to address two issues. The first issue is **whether the applicant has adduced sufficient grounds for this Court to revise the CMA award issued in Labour Dispute No. CMA/DSM/TEM/249/2020/103/2020** if the answer is affirmatively then the second issue is, **to what reliefs are parties entitled?**

In addressing the issue as to **whether the applicant has adduced sufficient grounds for this Court to revise the CMA award**, two grounds of revision will be considered basing on the facts that both of them fall within the ambit of two aspects of fairness of termination namely fairness of reason and fairness of procedure.

It is an established principle of law that for a termination to be fair, there are standards an employer must observe internationally and nationally to ensure fairness in ending or terminating employment contract. Termination of employment is said to be fair if it complies with **Section 37 of the Employment and Labour Relation Act, Cap 366 R.E 2019** which provides: -

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

- (a) that the reason for the 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."*

Internationally, Article 4 of Termination of Employment Convention, 1982 (No. 158) provides: -

"Article 4: The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or services."

In the case of **Tanzania Revenue Authority V. Andrew Mapunda**, Labour Rev. No. 104 of 2014 it was held that: -

"(i) It is the established principle that for the termination of employment to be considered fair it should be based on valid reasons and fair procedure. In other words, there must be substantive fairness and procedural fairness of termination of employment, Section 37(2) of the Act.

(ii) I have no doubt that the intention of the legislature is to require employers to terminate employees only basing on valid reasons and not their will or whims."

In this matter the applicant was terminated from employment for allegedly having committed misconduct, that is refusal to perform some assigned duties without any justifiable reason as stated in termination letter.

In his submissions Mr. Hekima Mwasipu, the applicant's counsel, challenged the fairness of the termination basing on the ground that the reasons for termination were not reflected in the disciplinary Committee meeting. He further added that the witnesses who testified in the CMA did not testify in the Disciplinary Committee.

Item 9 of Exhibit D-1 (minutes of Disciplinary Hearing and Decision) shows that in his statement which he signed, the applicant refused to drive a truck with Registration No. T 118 DGH. Ms. Victoria Njau the respondent's counsel countered the applicant's averment that he refused to drive the truck because of health problem. In her view no evidence adduced to substantiates any health problem.

It is undisputed that the applicant was employed as a driver. It is further undisputed that the applicant refused to drive a truck assigned to him.

The reasons for the refusal to drive it was not disclosed in the disciplinary committee meeting, but he emphasized to have refused to drive a vehicle with Registration No. T 118 DGH make of FAW. It was in the CMA where the applicant stated that the said vehicle once caused him health complications.

According to the record, it was not known to the employer as to why the applicant refused to drive the truck as he refused to answer the show cause letters as he clearly emphasized in the disciplinary meeting that he will never write such a letter. In this respect, until the time of termination, there was no reasons provided by the applicant to state why he refused to drive the vehicle. Being a driver, it is a reasonable expectation that the applicant could be able to drive any vehicle or truck being it a Chinese or any other origin and make. Refusal to perform this primary duty in employment without assigning any reason amounts to misconduct capable to be described as to gross insubordination which attract termination as a proper sanction as per **Rule 12 (3) (f) of G.N No. 42 of 2007**. This confirms that there was a fair reason for termination.

Having found that there was fair reason for termination, the next question is whether the applicant's termination was procedurally fair. Regarding procedural fairness, it is the submission of the applicant's

counsel who submitted that the principle of natural justice was not adhered to by the disciplinary committee because the Chairman of the Disciplinary Committee was neither a Senior member from respondent's management nor mentioned the position he held and he was a respondent's friend and there was no impartially.

It was further submitted by the applicant's Counsel that procedures were violated as there was no evidence or testimony given in Disciplinary Hearing but what was done by the Chairman was the reading of the charge and proceeded to suggest penalty against the applicant. He further added that applicant's refusal to give evidence and being not cooperative in the meeting does not prevent conduct of proper hearing. Supporting his allegation, he cited the case of **Kibo Bell Ltd v. John Van Vout**, Civil Appeal No. 248 of 2021, Court of Appeal of Tanzania, at Moshi, (unreported).

On the other side the respondent's Counsel Ms. Victoria Njau maintained that the applicant attended the disciplinary hearing with his representative and that the chairman who conducted the disciplinary hearing was impartial on the reason that he was Senior Manager of a law firm called Unbiased Law Chamber and he was not a friend of the respondent. She added that it is not true that there were no witnesses. She referred to page 1 of annexure 2 in the counter affidavit which

contained the names of the persons who attended the meeting, namely Hasnein Ladder and Walstan Muhonda.

In resolving this debate regarding procedural aspect, I find it appropriate to start with the alleged impartiality of the Chairman. **Rule 13 (4) of G.N No. 42 of 2007** provides that for a person to qualify as a chairperson of a disciplinary committee he must be a Senior Officer of the employer. In this application the record reveals that the disciplinary hearing was conducted on **06th May 2020** as per Exhibit D-1 (Minutes and Decision of Disciplinary Committee). According to that exhibit D1 under item 7 (i) the name of the Chairman is filled but it does not show the position he held during the time when he was chairing the meeting. There is uncontested information that the chairperson is from a Law Firm. As contested by the applicant's Counsel, this is contrary to **Rule 13 (4) of G.N No. 42 of 2007** which needs such position to be held by a Senior Officer of the employer. Although it was not, it was upon the employer to ensure that that disclosure of the position of the chairperson was to be made in the CMA and during the disciplinary hearing. However, it still leaves one reality that the position of the chairman of the committee was not known during the disciplinary hearing and in the CMA.

With regards to the issue of evidence in the disciplinary committee, I read Exhibit D1. It is true, the persons who testified in the committee meeting are not reflected in the minutes. Much is desired as to how the committee was conducted without having the witnesses. This in my view constitute an irregularity.

Since it is established that the chairperson of the disciplinary committee was not a senior staff member of the applicant and that the statements of witnesses were not taken, it is my finding that there was noncompliance with the procedure during the applicant's termination.

The above analysis confirms unfairness in the termination of the applicant's employment in terms of procedure. As such the issue as to whether there are sufficient reasons to revise and set aside the award is answered affirmatively.

As to what are the reliefs entitled to the parties, unlike CMA I have found that the respondent had a fair reason to terminate the applicant but she did not comply with fair procedure. In this application the applicant claimed TZS. 22,500,000.00 as compensation for unfair termination. I stand guided by the case of **Felician Rutwaza v. World Vision Tanzania**, Civil Appeal No. 213 of 2019, CAT at Bukoba (unreported). It was held; -

".....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....."

From the above authority, less amount than the minimum of the twelve months' salary compensation provided under **Section 40 of Employment and Labour Relation Act, Cap 366 R.E 2019** can be awarded where the termination is unfair in only on procedural aspect. Since in this matter, the unfairness is based only on the procedural aspects, I have view that an award of six (6) months' salary is sufficient to compensate the applicant for that unfairness in procedure.

Consequently, I hereby revise and set aside the CMA award in Labour Dispute No. CMA/DSM/TEM/249/2020/103/2020. The applicant is awarded 6 months salaries basing on his net salary as compensation for unfairness in the employment termination procedure. The application is therefore partly allowed to that extent. I give no order as to the costs. It is so ordered.

Dated at Dar es Salaam this 09th day of November 2022.



KATARINA REVOCATI MTEULE

JUDGE

09/11/2022