THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT MOROGORO

LABOUR REVISION NO. 11 OF 2022

(Arising from Labour Dispute No. CMA/MOR/109/2020, CMA of Morogoro)

RAPHAEL PATROBA BWIRE..... APPLICANT

VERSUS

TRIACHEM (T) LTD.....RESPONDENT

RULING

Hearing date on: 07/10/2022
Ruling date on: 30/11/2022

NGWEMBE, J:

This is an application for Revision arising from the award of the Commission for Mediation and Arbitration (CMA) for Morogoro, made on 08/04/2022. The Applicant being aggrieved with the award of CMA, preferred this application by way of a Chamber Summons supported by an affidavit, notice of application and notice of representation as required by Labour laws. On the other side, the respondent filed counter affidavit sworn by Mr. Krishna Vemur and notice of representation appointing Mr. Godfrey Gabriel Mwansoho as her representative. The application is made under sections 91 (1) (a), (2) (c), and 94 (1) (b) (i) of the **Employment**

and Labour Relations Act, Cap 366 R.E 2019 and Rule 24 (1), (2) (3) and 28 (1) (b) (c) and (e) of the **Labour Court Rules of 2007, GN. No. 106 of 2007**, in which he prayed for this court to revise and set aside the CMA award and order costs.

On the hearing date of this application, the applicant had the legal services of Mr. Baraka Lweeka assisted by Suzana Mafwele learned advocates, while the respondent was represented by advocate Gabriel Mwansoho.

On top of the learned advocates arguments, I have taken enough time to review all available records on the genesis of this labour dispute. Certain undisputed facts are evident that, the applicant was employed by the respondent in a renewable Fixed Term Contract as senior sales representative from 1/10/2015 to 30/9/2017. After expiry of that term, he proceeded to discharge his duties. On 01/10/2017 the respondent issued a new contract of two years ending on 31/10/2019 with a new position of Area Manager - Morogoro. In January 2019, while the contract was subsisting, another five years contract ending on 31/12/2023 was issued and the applicant proceeded with his ordinary duties.

In July 2019, the respondent required the applicant to give written explanation on the allegations related to selling employer's goods on credit contrary to the policy and without the employer's permission. He gave a written apology and later promised to repay the loss through salary deductions. It shows that suspicion of misappropriation persisted, during March and April 2020, the respondent conducted audit and stock verification at the applicant's duty station. The outcome of that audit and

verification made the respondent require for explanation on some other misappropriation of the respondent's funds and properties. The letter of the employer was written on 24/04/2020 and same was replied by the applicant on 29/05/2020.

Thereafter, the applicant was charged for misappropriation of employer's funds, gross negligence and gross dishonesty. Disciplinary hearing was conducted on 04/06/2020 at the respondent's headquarters in Arusha.

On 15/06/2020 the applicant's employment contract was officially terminated as an outcome of that disciplinary hearing. Being dissatisfied with such termination, the applicant instituted a labour dispute before CMA, which after determination ended up for dismissal, hence this revision comprised six (6) grounds as quoted hereunder: -

1) The Arbitrator grossly erred in law and in fact by receiving and basing an award on hearsay evidence.
2) The Arbitrator grossly erred in law and in fact by failure to make finding on each issue as framed as well as assigning reasons for the finding thereof.
3) The Arbitrator erred in law and fact by blessing the decision of disciplinary committee which was tainted with gross illegalities and irregularities.
4) The Arbitrator erred in law and in fact by failure to rule out that disciplinary committee had no jurisdiction to terminate applicant herein forthwith.

5) The Arbitrator erred in law and fact by failure to rule out that termination was unfair for including offence, which were purported to be committed since 2016.
6) That, Hon. Arbitrator erred in law and in fact by blessing termination which did not follow the required procedure and has no substantive reason.

In Support of those grounds, advocate Lweeka argued ground 1 & 2 separately, while ground 3, 5 & 6 jointly. On ground one, he submitted that, the arbitrator received and based an award on hearsay evidence. Proceeded that hearsay evidence is not admissible, while referring this court to the case of **Orca Deco Ltd Vs. Ally Mussa Yusuph, Revision No. 733 of 2018.** He pointed out the evidence of DW2 at page 13 of award as hearsay evidence and that exhibit DD2 which were admitted during trial comprised the contents of hearsay evidence.

Arguing on the second ground, on failure of the CMA to determine the framed issues and assigning reasons for the finding, Baraka Lweeka referred this court to Rule 22 (2)(b) & 27 of the **Labour Institutions (Mediation and Arbitration Guidelines) Rules, G.N 67 of 2007)** which requires the CMA to frame issues and answer them according to the available evidences. The CMA failed to determine them, he referred this court to the cases of **Sheikh Ahmed Said Vs. Registered trustee of Manyara [2005] TLR 61** and **Ben Ezekiel Haule Vs. Ben Rumishael Makundi, Civil Appeal No. 73 of 2021** and **Mkurugenzi Ras Nungwi Hotel Vs. Benjamin Mwakyala, Civil Appeal No. 100 of 2008.**

Argued further that, in the CMA award, issues were properly framed at page 6, but were not answered, instead the CMA *suo motu* framed three other issues at page 8 paragraph 2, page 9 last paragraph, and page 14 paragraph 3. He asserts, the whole suit was disposed of based on those issues. Insisted that the proper time to frame issues is before trial, so that parties may produce evidence in support or against. The new three issues were framed after the conclusion of evidence contrary to rule 24 (4) of **GN 67 of 2007** as a result parties' right to be heard was infringed.

On grounds 3, 5 & 6 the learned counsel argued that, the termination of employment of the applicant was unfair procedurally and substantively as per section 37 (1)(2)(a) & (b) of the **Employment and Labour Relations Act.** The termination was unfair for lack of substantive reasons, as termination letter (DD9) did not give reasons for termination, while rule 13 (10) of **GN No. 42 of 2007** requires reasons for termination must be communicated to the employee. To support his ground, he cited the case of **St. Joseph Kolping Secondary School Vs. Alvera Kashushura, Civil Appeal No. 377 of 2021**. Added, exhibit DD9 was endorsed by unknown person.

Insisted that the respondent contravened the law for there being no investigation. The applicant was not informed on the charge, not given time to prepare for the hearing, which was unreasonably prolonged, from 4th to 11th June 2020.

Regarding the propriety of the disciplinary committee the learned counsel submitted that, the proceedings of the committee as per exhibit DD8 was chaired by an officer junior to the applicant. Also, the committee

received e-mails without considering Electronic Evidence procedures. He cited the case of **Severo Mutege & Another Vs. Mamlaka ya Maji Safi na Mazingira, Civil Appel No. 343 of 2019 at page 19-20** and prayed this court be pleased to order 42 months' outstanding salary payment as per **Civil Appeal No. 322, Veneranda Mara & Another Vs. Arusha International Conference Centre** at page 3, 20 and 21. Having argued as above, rested by a prayer that this application be granted.

In turn, Mr. Mwansoho replying against grounds 3, 5 & 6 jointly, commenced with a long living labour law principle that, trust is a cornerstone of every successful business. The core of this dispute is a breach of contractual obligations as per clause 13 of the Employment Contract. The clause had two issues, first is selling of the employer's goods contrary to the company rules and procedure, second is lending the company goods to customers without permit from the employer. Breach of those two basic terms of contract, amounted into gross misconduct leading to losses. The company lost a total of TZS 61,703,700/=, and as a result Morogoro branch was closed, he argued.

He further submitted that, from 2015 the applicant was working professionally until year 2018, where his performance started deteriorating by misbehaviors and mistrust, disobedience and poor performance by lending company's products without permission. For instance, on December, 2019 the applicant lent goods worth Tsh. 37,558,000/= without approval. As a result, the employer wrote him a warning letter (DD8) which he never responded, on 1/7/2019 issued another letter (exhibit DD1), responded on 29/7/2019. On 13/8/2019 the applicant wrote another letter promising to pay a loan advanced to him on instalment.

Added, on 22/8/2019 the employer wrote a comprehensive warning letter, but on 26/9/2019 as per DD10 the applicant again lent goods worth TZS. 17,000,000/= without employer's approval. On 27/09/2019 again did the same by lending goods worth TZS 17,842,500/=. Moreover on 10/10/2019 the applicant paid himself TZS 5,344,500/=, on 11/10/2019 took 527,500/= and on 01/11/2019 TZS 1,294,108/= forming a total of TZS 42,010,608/=. Thus, the employer engaged debt collector as per DD2, but only to realize that, the debts were fictitious. Exhibit DD3 & DD4 the employer engaged an external auditor, the applicant was called before the disciplinary committee, DD5 required him to explain in writing, he responded as per exhibit DD6. As per exhibit DD8 the applicant was called before the disciplinary committee where he appeared with his advocate.

Regarding the issue of investigation, Mr. Mwansoho submitted that, it was conducted properly by including debt collectors and external auditors. On allegations of hearsay evidence as per the first ground, Mwansoho submitted that, DW2 is a debt collector the evidence he gave was not hearsay. The CMA reached its decision properly with reasons and lastly, he prayed this application be dismissed with costs.

In rejoinder, Mr. Lweeka reiterate to his submission in chief and submitted that the fact that Morogoro branch is closed is new evidence and that the debt collector adduced only hearsay evidence.

Having summarized the rival arguments of learned advocates, this court intends to determine merits of this application as submitted. I will deal separately grounds 1 & 2 and proceed with grounds 3, 5 & 6 jointly.

On the first ground, Mr. Lweeka contended that the evidence given by DW2 was hearsay, while Mr. Mwansoho countered it strongly that DW2 being a debt collector his evidence was direct evidence as opposed to hearsay evidence.

It is trite law that, hearsay evidence is not an evidence save for the permissible legal exceptions. The old decision of **Kigecha Njunga Vs. R, [1965] 1 EA 773** was held *inter alia* : -

> *"In this case the informer, whoever he was, may very well have given true information. Very possibly this disguised car was to be used to commit the felony of robbery. The driver of the car, the appellant, very possibly was a party to that felonious enterprise. Very possibly the simi which was under his seat was there to play its part in the robbery. But the knowledge which the court below had of this felonious enterprise was derived from what a Sergeant of Police told the court an uncalled, unnamed and unsworn individual had told him. Without that hearsay evidence the court below very clearly would have found it difficult, if not impossible, to have determined whether the appellant had the intent to commit a felony and if so what felony."*

In the reasoning the Court held in the case of **Ramesh Rajput Vs. Mrs Sunanda Rajput [1988] T.L.R 96 (CAT)**. Although hearsay evidence is generally inadmissible, the objection to its admissibility must be raised right at the tendering or adducing such evidence during trial. The position has been that, if a party did not object to it at the trial, he may have waived that right to question later on especially at the level of appeal

or revision. In labour cases, and specifically Disciplinary Committees where the Law of Evidence does not Strictly apply, the basic rules may still be in action.

The relevant question is whether DW2 adduced hearsay evidence? The record is clear that Joseph Paulo (DW2) was among the Directors of Triple EA Ltd, who was engaged by the respondent to collect debts. Exhibit DD2 tendered by the witness was an audit report. Even the applicant assisted him (DW2) as recorded by CMA quoted hereunder: -

> *"Baada ya kikao alinipatia namba za simu za wadaiwa tukaeleza taratibu tunazofanya ikiwemo kuwaandikia barua na kuwatembelea, alitupeleka kwa wadaiwa mfano tulienda Malali, Ruvumo Pembejeo na Godfrey Fradolini. Katika kufuatilia tuligundua wapo ambao bado wanadaiwa na wengine hawadaiwi. Wapo waliokuwa wamelipa ila hesabu ikaonyesha wanadaiwa"*

In the language of the court, the above was a narration that the applicant gave the witness phone contacts of the defaulters and they visited the said defaulters. In the course he discovered that some of the listed borrowers were actually not in debt. It seems to this court that parties in this revision do part ways in their conceptual framework of the legal phrase *"hearsay evidence"*. To adjudge their reasoning, I found it helpful to expound albeit briefly what constitutes hearsay evidence. In **The Black's Law Dictionary**, (8th edition at page 739) discussed hearsay evidence as follows: -

> *"Traditionally, testimony that is given by a witness who relates not what he or she knows personally, but what others have said*

and that is therefore dependent on the credibility of someone other than the witness. Such testimony is generally inadmissible under rules of evidence"

Similarly, the same meaning was adopted in the case of **Abdallah Ismail Athumani Vs. R, [2008] T.L.R. 1** in line with section 62 of **The Evidence Act,** which requires oral evidence be direct.

Yet another writer, Sir James Fitzjames Stephen, an English Judge, in his work **A digest of the Law of Evidence (1918), Courtright Publishing Company, Colorado** at page 9, he discussed the concept of hearsay evidence as follows: -

"Hearsay evidence is that which attempts to prove the event in question, not by the assertion of one who has personal knowledge of it, but by transmission of his extra judicial assertion through the medium of witness who knows not of the event, but of the former's narration in respect to it"

I have tested the evidence adduced by DW2 against the above concept of hearsay evidence, obvious I have formed a strong position that the evidence given by DW2 did not qualify to be branded as hearsay evidence. The CMA never erred in acting on the said evidence, hence this court finds no point to fault the award on this ground which lacks merit.

Ground two raised a complaint that, the CMA failed to determine the framed issues instead, *suo motu* it framed three new issues upon which it based the whole decision. I have considered the rival arguments on this point. At the onset, I accept what Mr. Lweeka referred to in the decisions

he cited as a correct unfettered position of the law. In **Sheikh Ahmad Said's** case for instance, the Court of Appeal underscored that: -

> *"It is an elementary principle of pleading that each issue framed should be definitely resolved one way or the other. This aspect was touched on by the court in James B. Kumonywa v. Mara Cooperative Union (1984) Ltd and the Attorney General (1). The fact that the two issues covered the same aspect, does not, with respect, detract from the legal requirement under the rules of procedure."*

It is also clear that when the court raises an issue *suo motu* it must avail the parties right to be heard on that issue, see **Mussa Chande Jape Vs. Moza Mohammed Salim, Civil Appeal No. 141 of 2018** among other decisions of the Court of Appeal.

Notably, on 07/09/2020 issues were raised as: ***one*** – Whether the claimant's employment was terminated while fixed term contract subsists; ***two*** - whether termination of employment was on reasonable ground; ***three*** - whether fair procedure was followed in termination; ***Four*** - Legality of the reliefs sought. Same issues were reflected at page 6 of the CMA award and were answered consecutively from pages 7 – 23. I comprehend, the said questions which the applicant's advocate term as new issues, were minor questions confined to the first issue. Same aimed at answering the first issue and thus no alien import was carried in those questions. The complaint by the applicant's counsel on the alleged new issues, is as well not valid.

My observation is that the arbitrator devised derivative questions that assisted him to rule on the first issue. I think the approach was proper and after determining the validity of the renewed agreement the arbitrator did not lose focus on the main issue, I will reproduce a relevant part of the award herein: -

> *"Kutokana na kilichobainika hapo juu, tume inaona kuwa mkataba unaotajwa kuvunjwa ulizalishwa katika namna yenye nia batili hivyo ni sawa kana kwamba haukuwepo. Ingawa izingatiwe kuwa kutokuwepo kwake hakuondoshi uhalisia wa mahusiano ya kiajira yaliyokuwa yakiendelea baina ya pande hizi. Na ndiyo maana imepelekea usitishwaji wa ajira uliofanyika tarehe 16/06/2020 na kupelekea uwepo wa mgogoro huu"*

The above means that the CMA in dealing with the first issue found that the employment contract said to have been breached was entered while there was a subsisting agreement and therefore, that agreement was not valid. But concluded that the previous agreement remained valid, any termination against such agreement was to be procedurally fair, then went to the second issue. Same way, the CMA proceeded to all the four issues as it is reflected on the cited pages of the award. Having found that the issues were properly addressed, therefore, this court fails to accept the suggestion by advocate Lweeka. From the above this ground likewise must fail for lack of merit.

The allegations in grounds 3, 5 & 6 together centre on unfair termination based on fairness of reasons and procedural fairness for termination. While advocate Lweeka persisted that the termination was

unfair, the counterpart Mr. Mwansoho substantiated strongly that the termination was based on fair reasons and fair procedure upon following all prescribed procedural rules.

However, the parties are at one on the settled position of law in respect of termination of employment, that the employer should not terminate the employee unless there is a substantive reason and by strictly following the required procedures. In any case where the employee has been terminated, under section 39 of the Act, the employer bears the duty to prove that that termination was on fair grounds and that the legal procedures were followed. Failure to prove the above, termination will be rendered unfair as per section 37 of the Act as quoted hereunder: -

> *"A termination of employment by an employer is unfair if the employer fails to prove (a) that the reasons for termination was valid (b) that the reason is a fair reason (c) that the employment was terminated in accordance with fair procedure"*

In **Asanterabi Mkonyi Vs. TANESCO, Civil Appeal No. 53 of 2019,** the Court of Appeal interpreted section 37 of **the Act as follows**: -

> *"The above provision creates the concept of unfair termination of employment by defining "unfair termination of employment" as a termination where the employer fails to prove that the termination was for a valid and fair reason and that fair procedure was followed"*

Along with the above, regulation 8 of **GN. No. 42 of 2007** discusses on fairness of procedures and reason for termination where termination is on misconduct. Likewise, rule 13 provides for procedures to be adopted;

investigation must be conducted to establish if there is a need for a disciplinary hearing; notification of the employee on the allegations while giving reasonable time to prepare for the hearing; and the right to be assisted during hearing. Right to put mitigation facts when the employee is found guilty and be afforded reasons for termination. These are statutory procedures to be adopted by an employer prior to termination of employment.

In the case at hand, when the dispute arose the applicant's contract of service was intact and expected to last on December, 2023. On the 15th June, 2020 the applicant's employment was terminated through a letter served on same date. Reasons for termination, among others was misappropriation of employer's fund, gross misconduct, negligence and dishonesty.

The above being not is dispute, two minor points of contention between the parties remain; *whether the employer had a valid reason to terminate the employee* on one hand and whether termination followed a fair procedure.

Considering the nature of submission by the parties, on the first question, I am obliged to discuss on what constitutes fair reason for termination. Under section 37 (2)(b), of **The Employment and Labour Relations Act,** fair reason is given by attribute to be; misconduct, incapacity and operational requirements. The case at hand being that of a fixed term contract, termination of a contract under rule 3 (2) of **the Employment and Labour Relations (Code of Good Practice), Rules GN. 42 of 2007** is applicable.

According to the record, before the CMA the applicant was terminated on the grounds of misconduct. Following section 37 and 39 of **The Employment and Labour Relation Act,** the employer had the duty to prove the said misconduct as a ground for termination of the employee.

As such the evidence of DW1, the applicant issued goods on credit and without the employer's permission contrary to the company's policy. He wrote an apology and offered to make good the loss through deduction from his salary. Later on, more credits were discovered and rightly as Mr. Mwansoho submitted, by audit and debt collection follow ups undertaken by DW2 from NCCL, it was discovered that, some debts were fictitious (see evidence of DW2). That, he was collecting the proceeds from the business without depositing the same. Other products were missing from the stock as per exhibit DD4 and testimony by DW3 who was involved in physical stock verification. All these were positively supported by DW5. The total of loss occasioned by the applicant was to the tune of TZS. 61,703,700/=.

In the circumstances of this application, I tend to agree with advocate Mwansoho that such acts of the applicant amounted into intolerable misconduct subject to dismissal from employment. Considering the fact that the applicant committed serious misconducts, which under the Guidelines for disciplinary procedure attracts termination of employment, this court concludes that the employer had a reasonable ground to terminate the employee. Therefore, the CMA did not fault in its decision.

The remaining question is whether the termination was procedurally fair and according to law. I wish to begin with the constitution of the disciplinary committee. The applicant's counsel disqualified the chairman of the committee who was an Accountant on the ground that he was an

officer junior to the applicant who was the area manager. The arbitrator was of the view that seniority was immaterial.

Rule 13(4) of **the Employment and Labour Relations (Code of Good Practice), Rules GN. 42 of 2007** provides that the Disciplinary Committee is to be chaired by a sufficiently Senior Management representative who should not have been involved in the circumstances of the case. I have gone through the whole regulation and particularly subrule four (4) and interpret that the law did not intend that the chairperson should necessarily be senior by comparing to the person accused before the committee, but sufficiently senior representative of the management. And that he must not have been involved in the raising of the dispute. The spirit behind this provision, I comprehend is to maintain neutrality and independence of the committee while carrying out its function. In our case, there is no evidence to suggest that the chairperson was involved in the circumstances from which the case arose. The chairperson himself stated that he was a senior officer from the headquarters of the respondent company. I find that the CMA did not contravene the law. This ground therefore bears no merit, same is dismissed.

Having done with the constitution of the committee, this court will now deal with the issue of procedure adopted by the committee. The basis upon which the procedure is going to be tested is provided for in section 37 and 39 of **The Employment and Labour Relations Act** together with rule 11, 12 and 13 of the **the Employment and Labour Relations (Code of Good Practice), Rules GN. 42 of 2007.** Rule 11, 12 and 13 have been referred in brief summary. Under the rules, employers are allowed to implement disciplinary policies and procedures which may vary

on the nature of the business. Such rules must be easily discernible and available to the employees. Corrective efforts should be gradual. Counselling and warning to apply before applying any serious measure. Fairness of termination depends on nature of the breach and whether was an appropriate sanction considering seriousness of the misconduct, likelihood of repetition and other circumstances of the employee.

Generally, employee should not be terminated on first offence unless proved to be serious making employment relationship intolerable. Gross dishonesty and gross negligence are among acts that may justify termination.

From the records of CMA, a charge and summons to appear before the Disciplinary Committee were served to the applicant (exhibit DD 7). He appeared and hearing was conducted by availing him the rights allied to the disciplinary hearing. The testimony of DW4 who was the committee chairman, along with exhibit DD8 (disciplinary proceeding) show that the hearing adhered to all the basic procedures and natural justice. It shows, after disciplinary hearing, the applicant was found guilty of gross misconduct(s) and the committee suggested to terminate his employment. Accordingly, the termination letter (exhibit DD 9) was issued to the applicant.

I accept that, the procedures were not beyond reproach. Minor errors existed; *one* - considering that hearing was to be conducted at Arusha when the applicant was in Morogoro, a four days' notice was short. *Two* – Mitigation of the applicant is not reflected in the disciplinary hearing and *three* - the letter which notified the applicant about termination did not expressly state the reason, instead it referred to the disciplinary hearing

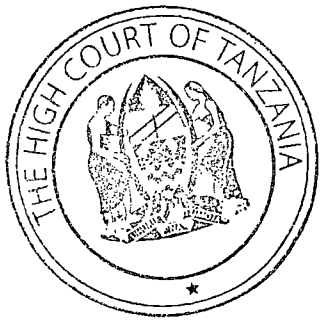
and notified that the outcome of the said hearing is termination of his employment.

These are few weaknesses contrary to rule 13 of **GN 42 of 2007** referred above. However, what the law requires is the minimum standard of fairness in the procedures, which in this matter I am settled in my mind that the process adopted by the disciplinary committee was in compliance with section 37 of **the Employment and Labour Relations Act** along with rule 11, 12 and 13 of **GN. 42 of 2007**.

Following the above, this application cannot succeed. What the applicant invites this court to exercise under section 91 (2) of **the Employment and Labour Relations Act** has not been grounded. Accordingly, the application is dismissed entirely. Considering that this is a labour matter, I award no order as to costs.

It is so Ordered.

Dated at Morogoro this 30th day of November, 2022.



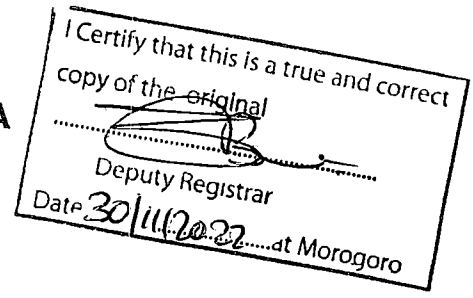
P. J. NGWEMBE

JUDGE

30/11/2022

Court: Ruling delivered at Morogoro in Chambers on this 30th day of November, 2022, **Before Hon. J.B. Manyama, AG/DR** in the presence of Mr. Baraka Lweeka, Advocate for the Applicant and in the Absence of the Respondent.

Right to appeal to the Court of Appeal explained.



SGD. HON. J.B. MANYAMA

AG/DEPUTY REGISTRAR

30/11/2022