IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 544 OF 2020

(Originating from an award of the Commission for Mediation and Arbitration at Temeke, Dar es Salaam in Dispute No. CMA/DSM/341/19/147 by Hon. M. Batenga, Arbitrator dated 13th November 2020)

BETWEEN

PASKAS RAUYA ..... APPLICANT

AND

TANZANIA CIGARETTE PLC ..... RESPONDENT

JUDGMENT

Date of last order: 23/03/2022
Date of Judgment: 8/4/2022

B. E. K. Mganga, J.

Employment relationship between applicant and respondent started way back on 16th December 2013 when the two entered one-year fixed term contract. The parties continued to renew the said fixed term contract up to 6th October 2015 when they signed the fixed term contract expiring on 15th December 2016. On 9th May 2016, the parties signed a new contract showing that employment terms of the applicant will change to

permanent with effect from 16th December 2016. From that date, applicant continued to work with the respondent in the position of Logistics Manager. On 4th January 2019, applicant was suspended on full pay allegedly, for failure to comply with company policies and procedures. On 12th June 2019, applicant was served with disciplinary charge with two counts namely, (i) gross negligence; contrary to clause 2.7, 3.1 and 3.9 of the TCC Disciplinary Action Code. Particulars of this count were that, being employed as a Logistic Manager, on the period between December 2013 and July 2018, applicant acted negligently in a manner that caused misuse of TCC funds which were used to pay customs duty for non TCC goods and production material processes linked to the payment of customs duty for TCC NTM and leaf materials and that he did not properly conduct, assess or independently verify monthly audit reports relating to the manufacturing under Bond, as a result of these breaches, applicant caused a potential loss to the company at the tune of TZS 698,536,884.95 and (ii) gross inefficiency in the performance of work. The second count was later withdrawn. The disciplinary hearing committee found applicant guilty as a result, on 4th July 2019, his employment was terminated.

Aggrieved with termination of his employment, on 25th July 2019, applicant filed Labour complaint No. CMA/DSM/TEM/34/2019 before the Commission for Mediation and Arbitration henceforth CMA at Temeke claiming to be reinstated without loss of renumeration. In the CMA F1, applicant showed that termination of his employment was procedurally unfair because " it was conducted by non-employees (two advocates) outside the working premises hotel on weekend"). On substantive fairness, applicant showed that there was no sufficient reason given.

On 13th November 2020, M. Batenga, arbitrator, having heard evidence of both sides issued an award dismissing applicant's complaint. In the award, the arbitrator held that termination was both substantively and procedurally fair. The arbitrator found that procedurally and in the circumstances of the complaint by the applicant, it was fair because Rule 13 of the Employment and Labour Relations (Code of Good Practice)Rules, GN. No. 42 of 2007 does not prohibit an employer to hold disciplinary hearing outside his premises during non-working hours and that applicant was not prejudiced.

Applicant was further aggrieved, as a result, he filed this application seeking the court to revise the said award. In the affidavit in support of the

notice of application, applicant stated that the disciplinary hearing was conducted on weekend at Serena Hotel and recommended his termination. In his affidavit, applicant raised five (5) grounds namely:-

1. *That the arbitrator erred in law and facts for failure to consider that there was no proof of loss suffered by the respondent from Tanzania Revenue Authority.*
2. *That the arbitrator erred in law and facts for failure to determine that I was condemned without being given chance to defend the charges raised against me by the respondent.*
3. *That the arbitrator erred in law and facts for failure to observe that those who chaired and investigated the dispute were from Mwema Advocates which was offending the rules against bias in the dispute at hand.*
4. *That the arbitrator erred in law and facts for failure of the respondent to prove that applicant benefited from the transactions.*
5. *That the arbitrator erred both in law and facts for failure to consider that the respondent's system was the cause of the problem and not the applicant.*

Respondent filed the counter affidavit sworn by Goodluck Kazaura, her principal officer to resist the application. In the counter affidavit, the deponent stated that applicant was afforded right to be heard.

During hearing of the application, applicant was represented by Mr. Thomas Massawe, learned counsel while Mr. Paschal Kamala, learned counsel represented the respondent.

On the 1st ground, Mr. Masawe submitted that, the arbitrator erred for failure to hold that there was no proof that respondent suffered loss. He submitted further that, both DW1 and DW2 did not prove loss of TZS 698,536,884.95. He argued that, these witnesses testified that there was a loss of about TZS 600 million. Counsel for the applicant argued further that, these witnesses were supposed to prove the whole amount appearing in the charge sheet. Learned counsel went on that, DW1 testified that they conducted forensic audit report, but the report was not tendered. Counsel submitted that respondent did not prove loss because the audit report was not tendered. Counsel also argued that the invoice from TRA was not tendered.

On the 2nd ground, counsel for the applicant submitted that arbitrator erred for his failure to hold that applicant was condemned unheard. Counsel for the applicant submitted that on 14th February 2019, applicant was suspended and on 12th June 2019, he was served with the charge requiring him to appear on the disciplinary committee on 14th June 2019 i.e. two days thereafter. Counsel for the applicant submitted that applicant was not afforded right to clarify the allegations in the charge sheet. He

argued that the law requires reasonable time to be given to the employee and that applicant was supposed to be given time to prepare his defence. Counsel for the applicant submitted further that in his evidence, DW2 admitted that applicant was not afforded right to answer allegations on the charge sheet hence denied right to be heard.

In the 3rd ground, learned counsel for the applicant submitted that, the disciplinary hearing committee was biased. He argued that Mwema Advocates are not part of management of the respondent. Chairman of the disciplinary committee was Emmanuel Msengezi, Advocate who was appointed by Mwema Advocates. Counsel submitted that, Guideline on the Code of Good Practice GN. No. 42 of 2007 requires a senior person in management to be a chairman of the committee. Counsel argued further that, the said Advocate was contracted to investigate the allegation but later, chaired the disciplinary committee. He went on that the prosecutor also was not part of the management contrary to Guideline 4(6) of the Code of Good Practice GN. No. 42 of 2007. Counsel for the applicant cited the case of ***Lucy Mandara V. Tanzania Cigarette Company Limited, Revision No. 185 of 2020*** (unreported) in which this Court held that

Chairperson must be impartial. Counsel for the applicant concluded by praying that the application be allowed, and the award be quashed and set aside.

Resisting the application, Mr. Kamala, learned counsel submitted on the 1st ground that, evidence of DW1 who tendered exhibit TCC 3 proved loss that respondent suffered loss as TZS 769,841,314/= due to negligence of the applicant. He went on, that exhibit TCC 3 shows items that respondent paid tax while those items did not belong to her. He responded further that, the second count on the charge sheet was dropped hence there was no need of tendering evidence from TRA.

Responding to the 2nd ground, counsel for the respondent submitted that, failure to tender investigation report is not fatal and went on that, Rule 13 of GN. No. 42 of 2007 requires investigation to be done for the employer to be sure of the charge to prefer against an employee. He cited the case of ***Ovadius Mwangamila & 2 Others V. Tanzania Cigarette Co. Ltd, Consolidated Revision No. 334 and 335 of 2020*** (unreported) to support his argument.

On the complaint that applicant was condemned unheard, counsel for the respondent submitted that the complaint is not valid because it is not a requirement of the law that after being served with the charge sheet the employee must reply thereto. He argued that, the law requires a charge sheet to be served to the employee and be heard in the disciplinary hearing. He concluded that all these were complied with.

Responding in relation to the 3rd ground, counsel for the respondent submitted that there was impartiality in the disciplinary committee. He argued that, it is true that the Chairperson should not be the one who was involved in investigation but there is no evidence showing that the Chairperson was involved in investigation. On the complaint that both the chairperson and the prosecutor were not employees of the respondent, counsel for the applicant submitted that, DW2 testified that applicant was in the managerial post and that all other employees were in the same level. That, to have fairness and transparency, chairperson and prosecutors were outsourced. Counsel went on that, according to evidence of DW2, all other Managers were prosecuted and terminated that is why, chairperson was outsourced. Counsel for the respondent submitted that **Mandara's case** is

distinguishable because Mr. Mseke, advocate was prosecuting cases on behalf of TCC hence likelihood of bias unlike the advocates who participated in the disciplinary hearing. Counsel for the applicant concluded by praying that the application be dismissed.

In rejoinder, Mr. Massawe, learned counsel for the applicant reiterated that applicant was not afforded right to reply on the charge and that the Chairperson was not impartial.

I have carefully considered submissions and evidence of both sides in the CMA record and find that their rival arguments centers on three issues namely (i) whether, there was valid reason for termination, and (ii) whether, the procedure were followed.

I have examined evidence of Eric Odhiambo Owino (DW1) from Price Waters Coopers and find that this witness testified that he conducted investigation at the office of the respondent and found that two individuals including Phineas James were involved in fraud. It was evidence of DW1 that Phineas James colluded with the outsiders to forge documents and replace TANSAD number. The effect is that TCC money was used to pay for other people's property because approval process was not done properly.

DW1 testified further that the Logistic Manager (the applicant) who was supposed to verify the documents and compare, could have seen the discrepancies and had access to TANCIS system. DW1 tendered duty payment forms (exh. TCC-2) and stated that applicant signed at Pages 9-18. It was evidence of DW1 that applicant was supposed to verify at page 12 and see that it matches with information at page 16 but did not verify as a result, the assessment did not tally with invoice details. DW1 testified further that out of 82 instances, applicant signed 77. That due to failure to verify, fraud was committed, and that beneficiary of this fraud includes Public and private individuals as per exh. TCC3. It was further evidence of DW1 that, due to non-verification by the applicant, and due to the said fraud, TCC lost TZS 770,000,000/= out of which applicant improperly signed for TZS 600,000,000/=. It was evidence of DW1 that some money of the respondent was paid to clear property that does not belong to the respondent. While under cross examination, DW1 maintained that the said loss was caused by both system and human error and that the actual loss was TZS 600,000,000/= but did not find evidence showing that applicant benefited from that fraud.

On the other hand, Gabriel Loriri Lebisa (DW2) testified that duty of the applicant was to verify documents for processing materials. That, applicant was suspended on 4th February 2019 as per suspension letter exh. TCC 8 and that applicant was notified of the disciplinary hearing committee that was held on 14th June 2019 as per the minute exhibit TCC 10 that recommended termination of employment of the applicant. That, applicant was terminated on 25th June 2019 according to termination letter (Exh. TCC11) and that on 28th June 2019 applicant appealed before DW2 as shown in the appeal (exh. TCC12). DW2 testified further that on 3rd July 2019, the appeal by the applicant was dismissed as shown in exhibit TCC13 and on 4th July 2019 applicant was notified that his appeal was dismissed and was issued with termination letter (exh. TCC14). In his evidence, DW2 testified that applicant was terminated due to gross negligence and that he was paid his salaries and entitlements as Manager. In his evidence, DW2 testified further that due to negligence of the applicant, the respondent suffered loss of Tzs 698,550,000/=. While under cross examination, DW2 testified that applicant was verifying hard copies shipping, exports and imports documents and sign because he had access to them and that DW2 himself had no proof of the loss the respondent incurred. During re-

examination, DW2 testified that there was loss and applicant was charged for gross negligence and not loss.

In his evidence, Paskas Ackley Rauya (PW1) testified that he was charged for gross negligence. He admitted that Logistic Department deals with verification of invoices of suppliers, TRA assessments and payment vouchers from TCC. In his words, PW1 was recorded testifying:-

> "*Upande was logistics unahusika na verification ya documents za invoice za suppliers, assessment za TRA Pamoja na hati ya malipo kutoka kwa TCC. Kabla ya kuverify, logistics wanatizama maeneo yanayoweza kuathiri kiwango cha ushuru unaoenda kulipwa na TCC...kwenye utendaji wangu documents zilikuwa zinarudishwa mara kwa mara...*"

While under cross examination, PW1 testified that his duties were as provided in exh TTC6 and that he had a duty to verify TANSAD. He admitted that he verified exhibit TCC 3.

The same evidence that PW1 was verifying description of material that belonged to TCC, supplier and value, was adduced by Besta George Sadala (PW2). While under cross examination, PW2 testified that applicant was terminated due to gross negligence and inefficiency. He admitted that Phineas and Mwafongo were employees in Logistics Department while the

complainant was their overall supervisor and that nothing could have been done by them without knowledge of the applicant. PW2 maintained that applicant had a duty to verify TANSAD.

From the afore evidence, it is my considered opinion that there were valid reasons for termination because according to evidence of DW1, there was loss that was caused by fraud committed in the department of the applicant. It is uncontradicted evidence of DW1 that one of the persons who participated and benefited in the said fraud is Phineas. The evidence of DW1 is clear that the said fraud was due to failure of the applicant to verify documents. It was argued by Mr. Massawe, counsel for the applicant that there was no reason for termination because witnesses for the respondent did not prove the exact amount of loss appearing on the charge sheet and further that the audit report was not tendered. It is my view that, failure to tender the audit report did not render evidence of DW1 value less. Because, that is not the requirement of the law. In my view, both documentary evidence and oral evidence carry the same weight provided that the court believes it to be true. This position was held by this court (Samata, J as he then was) in ***Julius Billie v. Republic [1981]***

TLR 333 The Court of Appeal in the case of ***Flano Alphonce Masalu @ Singu & others v. the Republic, criminal Appeal No. 366 of 2018*** (unreported) clarifying on what was held by this court in Billie's case held that:-

> *"non-production of a thing which is the subject- matter of court proceedings goes only to the weight and not to the admissibility of the evidence concerning or relating to it. The court did not lay down or restate any principle of law requiring the tendering of the stolen goods or the offensive weapon as a precondition for establishing the guilt of an accused person. Whether or not the prosecution must tender such items depends, on the whole, upon the circumstances of the case."*

I therefore hold that failure to tender the audit report by DW1 did not invalidate his evidence relating to loss the respondent suffered. More so, the evidence of both DW1 and DW2 was not shaken under cross examination and the arbitrator found these witnesses credible as I hereby do. In my view, the mere fact that DW1 did not state the exact amount appearing on the charge sheet doesn't mean that there was loss. In my careful examination of evidence of DW2, I have found that the amount stated in the charge sheet was TZS 698,536,884.95 but DW2 in his evidence stated Tzs 698,550,000/=. In my view, this is very minor

considering that respondent was not required to prove beyond reasonable doubt but at the balance of probability. I therefore dismiss the 1st ground and hold that there was valid reason for termination. In other words, termination of the applicant was substantively fair as it was held by the arbitrator.

It was argued by counsel for the applicant that termination of the applicant was unfair because he was condemned unheard and that he was not afforded right to clarify the allegations in the charge sheet. Counsel for the applicant argued that the law requires reasonable time to be given to the employee and that applicant was supposed to be given time to prepare his defence. It was further argued on behalf of the applicant that the disciplinary hearing committee was biased because it was conducted by persons who are not in the management of the respondent and that the chairman of the disciplinary committee was an Advocate who was contracted to investigate the allegation but later, chaired the disciplinary committee. It was further submitted that, Guideline on the Code of Good Practice GN. No. 42 of 2007 requires a senior person in management to be a chairman of the committee. It was also argued by counsel for the

applicant that Guideline 4(6) of the Employment and Labour Relations (Code of Good Practice) was violated because both the prosecutor and the chairperson of the disciplinary committee were not member of the management.

I have examined these complaints and evidence of the parties in the CMA record and find that they are not justifiable. It was evidence of DW2 that the chairperson of the disciplinary committee came out of the office because other members of the management were of the same rank and respondent's policy allows (exh. TCC15 clause 9.2.3.1) allow that procedure which is why, they outsourced both the disciplinary hearing committee and the prosecutor. This evidence was not contradicted on cross examination. In his evidence while on cross examination, applicant (PW1) testified that he was not prejudiced by the disciplinary hearing to be conducted on Saturday and further that he did not object the disciplinary hearing to be chaired by the outsider and the prosecutor too. It is my view that reasons advanced by DW2 are sound. I therefore associate myself with the holding of this court in the case of ***Pascal Otedo v. Tanzania Cigarette Company Limited, Revision application No. 364 of 2015***

(unreported) wherein it was held that the fact that the chairman of the disciplinary hearing committee was a person from outside does not of itself pollute the whole procedure of hearing, provided that, the basic requirement of natural justice are adhered to. I have examined the evidence on record and find that there is no proof that the chairperson of the disciplinary hearing committee participated in investigation. I have also read the minutes of disciplinary hearing committee and find that applicant was afforded right to be heard. I have read Guideline 4(6) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 and find that it was not violated. The said Guideline provides:-

> *"4(6)* ***A management representative*** *should present the case in support of the allegations against the employee and the* ***employee should be given an opportunity to respond to the allegations at the hearing*** *parties shall have the right to call witnesses and question any witnesses called by the other party."*

It is my considered view that both the chairperson and the prosecutor were representing the management hence there was compliance with the said Guideline. I have examined the minutes of the disciplinary hearing committee (exh. TCC10) and find that both sides called witnesses and were

afforded right *inter-alia* to cross examine. I therefore find that the 2nd and 3rd grounds also have no merit.

Arbitrator is criticized for failure to hold that respondent did not prove that applicant benefited from the transactions. This complaint cannot waste my time. It was testified by DW1 that some persons benefited from that fraud one of them being Phineas James. There is no dispute that the said Phineas James was subordinate to the applicant and that he was also terminated. According to the evidence of DW1, there is no evidence that applicant benefited. But the charge against the applicant that led to termination of his employment was not based on benefits from the alleged fraud, rather, it was that he was gross negligent as a result fraud was committed and some persons benefited. The 4th ground therefore is with no substance, and I hereby dismiss it.

In the 5th ground, arbitrator is criticized for failure to consider that the respondent's system was the cause of the problem and not the applicant. With due respect to counsel for the applicant, it is uncontradicted evidence of DW1 that the cause was both the system and huma error. On part of human error, DW1 testified that applicant was the cause for his improper

verification of documents. Therefore, I find that this ground too lacks merit.

For the foregoing, I hereby dismiss the application and uphold the CMA award that termination of the applicant was fair both substantively and procedurally.

Dated at Dar es Salaam this 8th April 2022.

B.E.K. Mganga
JUDGE

Judgment delivered on this 8th April 2022 in the presence of Thomas Massawe, advocate for the applicant and Pascal Kamala, advocate for the respondent.

B.E.K. Mganga
JUDGE