IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 344 OF 2020

STEPHEN JOHN KAIHULA ..... APPLICANT

VERSUS

TELESECURITY COMPANY LIMITED..... RESPONDENT

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

(Chuwa: Arbitrator)

dated 10th July 2020

in

REF: CMA/DSM/KIN/365/19

JUDGEMENT

25th March & 6th April 2022

Rwizile J

This application arose from the decision of the Commission for Mediation and Arbitration (The Commission). It is challenging the award made by the Commission on 10th July 2020, which dismissed the claims of the applicant. It was factually stated that the applicant was employed as an Information Technology Officer. His contract of employment was for a fixed term of three years commencing from 02nd January 2017 at the considered monthly pay of TZS 600,000.00. Due to misconduct, the

applicant was terminated on 29th April 2019. In what he considered unfair termination, he filed a dispute at the Commission.

Upon, hearing of his claims, he was not successful. Before this court, he has filed this application on four grounds stated in paragraph 8 of his affidavit supporting this application, coached as hereunder;

(i) *That the honourable trial arbitrator erred in law and fact by ignoring the applicant's evidence without any justifiable reason.*

(ii) *That the award was given without consideration of the law specifically the provision of section 40(a) and (c) of the Employment and Labour Relation Act No. 6 of 2002 which is clear on how many months to be compensated upon an employer's failure to prove fair termination.*

(iii) *That the trial Arbitrator erred in law and fact by not awarding the applicant while the procedures were not followed by the respondent.*

(iv) *That, the honourable trial arbitrator erred in law and fact by relying on the oral evidence by the respondent's witness who was introduced to be Tanzania Revenue Authority's officer.*

At the oral hearing, although his personal representative Mr. Denis Mwamkwala from (DOSHITWU) pledged to argue all raised grounds, he ended up making general arguments on the same as follows; he said, indeed the applicant admitted before the Commission that he was called before the disciplinary hearing committee. In his view, exhibit D8 which was taken as the disciplinary hearing shows, Mr. Masumbuko appeared in the meeting but did not state his position. He further said, the meeting and members who attended the meeting did no sign the minutes. According to Dw1, he argued that the alleged signature in the exhibit was not that of the chair but it was due to exhibit D7.

Mr. Mwamkwala went on submitting that the same did not use the prescribed form since they are governed by the law. To be clear, he cited Rule 11(6) of GN No. 42 of 2007. He argued that the forms are scheduled and so failure to apply the same is against the law. He said, the forms contain three parts which are not evident in exhibit D8. He further said, it is the General Manager who appeared in the meeting in contravention of Guideline 4 of the disciplinary hearing rules GN No. 42 of 2007. Conclusively, he argued that there were no valid reasons for termination and that the procedure was not followed. He asked this court to fault the decision of the Commission.

On party of the respondent, one Conseta Boniphace learned advocate appeared to argue the case in reply. She was of the view that the Commission considered all evidence, exhibits and arrived at the reasoned decision. The learned advocate further said, this court has to examine exhibit D10 to be able to appreciate her submission. She said, exhibit D8 was a proper document so executed in terms of the law. To support her argument, the case of **Knight Support (T) Ltd vs Bwiko Nyamasyeki**, Revision No. 927 of 2019 was referred. She therefore asked this court to dismiss this application for want of merits.

Having heard the parties' submissions, it is in essence that the applicant has disputed the procedure for termination. But all in all, in order this matter to be properly determined, this court is required to not only determine if there were valid reasons for termination but also if the procedure employed was fair.

It was held by the Commission that the applicant committed serious misconduct of dishonesty. According to the evidence by the respondent, the applicant was given money to purchase tools of work. Apart from purchasing different items as ordered by his employer, he did not retire the amount spent. He had no receipts to show if he purchased them. In law, misconduct of dishonesty merits termination as under rule 12(3) of

GN No. 42 of 2007. I have no doubt therefore that evidence on this aspect falls short of merit. Substantively therefore, the decision of the commission was right in so holding that termination was grounded on reason.

In terms of procedure, the applicant attacked the disciplinary hearing as to have been faulty in terms of procedure. The reason is that, the disciplinary hearing was not conducted in a manner which is in compliance with Rule 11(6) of GN No. 42 of 2007 and Guideline 4 of the Schedule to the same rules. According to the rules, disciplinary hearing starts with the charge and notification to the employee. Exhibit D6 shows he was given more than 48 hours' notice within which to attend the disciplinary meeting. Exhibit D8 is the outcome of the disciplinary hearing. It shows the findings of the team and the penalty to be imposed. Exhibit D7 shows how the hearing was conducted. Further to that, exhibit D10 shows how the hearing was conducted and its outcome, that the applicant appealed against. However, his appeal was dismissed as per exhibit D9. This led to termination as per exhibit D11.

The applicant also gave evidence disputing what was stated by the respondent. He was of the evidence that he did not take part in the

hearing and that has never been punished before. This in his view would prove he had bad character leading to misconduct.

Venturing into the evidence of the respondent especially Dw2 and measuring the intensity of evidence especially the EFD receipts tendered as exhibits D-4(b) and D-4(d). The applicant may have forged the same. In his evidence, Dw2 said, the same had no features present in the purely issued EFD receipt, since it lacked a unique identification number and also it shows a Tax Identification Number (TIN) with 8 digits instead of 9. This evidence was not controverted by the applicant.

In my considered view, measured from both angles- applicant and respondent, the evidence against the alleged misconduct is clear and convincing. The test to be applied is that the same is unequivocal and manifest and it is persuasive to the high standard appropriate to the gravity of the allegation levelled against the applicant. There is therefore proof that the applicant committed the misconduct, serious in nature as to merit termination.

From the foregoing, I am convinced that termination was not only done but it also complied with the law. To my understanding, if there were errors in the same procedure for termination, one finds, it was not a substantive one as to lead to absurdity in the proceedings. I therefore

hold that the application has no merit. It is dismissed with no order as to costs.

A.K. Rwizile

JUDGE

06.04.2022