IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT DAR ES SALAAM

REVISION NO. 92 OF 2021

BETWEEN

W.W.F TANZANIA PROGRAM COUNTRY OFFICE ..... APPLICANT

VERSUS

BERTHA MINJA ..... RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J:

This judgement is in respect of the application for revision filed by the applicant beforehand challenging the decision of the Commission for Mediation and Arbitration for Kinondoni ("CMA") delivered on 01st February, 2021 by Hon. Wilbard, G.M in Labour Dispute No. CMA/DSM/KIN/800/19/411 "the Dispute". The applicant herein was the respondent in the referred dispute at the CMA whereby the respondent herein successfully lodged a dispute on allegation of unfair termination by the applicant herein. Aggrieved by the award, the current application is lodged by a notice of application and Chamber Summons supported by an affidavit of Mr. Lucason Maiga, applicant's Operational Manager dated 11th day of March, 2021. The applicant is moving the court for the following orders:

1. That this Honourable Court be pleased to revise the CMA award in Labour Dispute No. CMA/DSM/KIN/800/19/411 delivered on 01st February, 2021 by Hon. Wilbard G.M, Arbitrator.
2. Any other relief this Honourable Court may deem fit and just to grant.

On the other hand, the respondent challenged the application by filing the counter affidavit sworn by Mr. Godfrey Tesha, respondent's Counsel on the 29th day of April, 2021.

The dispute between the parties arose out of the following background; the respondent was employed by the applicant in the capacity of People and Culture Manager from 05th June, 2012 in a fixed term contract of two years renewable by mutual consent. After expiry of the said contract the parties continued to renew the relevant contracts in fixed terms. The last contract of the parties which is the subject of this application commenced on 05th June, 2019 and agreed to end on 04th June, 2021. However, on 15th October, 2019 the respondent was terminated from employment for misconducts namely breach of respect at work place and failure to manage and implement HR processes as per the applicant's Human Resources Policy.

Aggrieved by the termination the respondent successfully referred the matter to the CMA in which after considering the evidence of both parties, the CMA decided in favour of the respondent. The applicant was ordered to pay the respondent a total of Tshs. 186,700,000/= being 19 months salaries as remaining period of the contract and Tshs. 10,000,000/= as general damages. Being dissatisfied by the CMA's award the applicant filed the present application on the following grounds:-

i. That the award is illogical for the Arbitrator's failure to properly analyze the applicant's/employer's evidence in toto and by not giving the testimony of DW1 one Lucason Maiga the evidentiary weight it deserves.

ii. That the award was improperly procured for the fact that the Hon. Arbitrator failed to take into consideration the role of the respondent in policy formulation, implementation as the Human resource Chief Advisor of the employer and the bindingness nature of the said policy to the applicant's employees.

iii. That sequel to ground 2 above, the award is illogical as the Honourable Arbitrator erred by agreeing with the respondent's

testimony which categorically intended to deny her duties as the Human Resources Manager.

iv. That the award is illegal as the Hon. Arbitrator ipso facto denied the case by mistakenly mixing up the standards of proof and deciding the case in the strictest sense basing her decision on the 'beyond reasonable doubt of standard' instead of deciding the case on 'balance of probabilities standards'.

The application was argued by way of written submissions. Before this court the applicant was represented by Mr. Kennedy Alex Mgongolwa, learned counsel from Excellent Attorneys whereas Mr. Godfrey Tesha, learned counsel from Law front advocates was for the respondent.

Arguing in support of the application Mr. Mgongolwa joined ground 1 and 3 while the remaining grounds were submitted separately. On the 1st and 3rd grounds, Mr. Mgongolwa submitted that the CMA erred in law to hold that there was no reason for termination while there was concrete evidence to prove the reasons for termination. He stated that at page 10 of the impugned award, the Arbitrator acknowledged that the respondent was terminated basing on the charges brought by the whistleblowers. He added that the applicant tendered the investigation

report (exhibit W2) which expressly showed that a number of individuals were contacted and provided corroboration during investigation.

As to termination procedures Mr. Mgongolwa maintained that the same were followed as required by the law. He stated that DW1 testified that the witnesses were not disclosed because the HR Policy allowed the same and the respondent also happened to implement and supervise them. He submitted further that the CMA erred by stating that the procedures were not observed because the name of the investigators were not disclosed. That the essence of not disclosing their names is well found in the applicant's HR policy which is to avoid the enmity/hostility.

It was further submitted that the applicant brought witnesses at the CMA to prove the allegations levelled against the respondent, however such evidence was not given much weight by the Arbitrator. He elaborated that as testified by PW1, it was normal procedure for the disciplinary hearing to be conducted by zoom meeting since it involved persons from various countries. He added that it was also normal for any applicant's employee to be terminated on the ground of the whistleblowers complaints if the allegation is proved after investigation.

Regarding the second ground, it was submitted that the respondent herein not only participated in the policy formulation, she also implemented the same against applicant's employees. He added that the respondent was well aware of the applicability of the said policy in terms of procedures for termination of the applicant's employees. He further submitted that the said policy is binding to all employees of the applicant including the respondent yet the CMA disregarded that fact and the testimony of the parties.

As to the last issue, Mr. Mgongolwa submitted that in determining the matter at hand, the CMA applied the beyond reasonable doubt standard of proof which is contrary to Rule 9 (3) of the Employment and Labour Relations (Code of Good Practice) Rules, GN 42 of 2007 (GN 42/2007). He stated that the applicant discharged his duty of proving the misconduct levelled against the respondent on balance of probabilities. In conclusion, the counsel urged the court to revise and set aside the CMA's decision.

In reply, while responding to ground 1 and 3 Mr. Tesha submitted that the testimony of DW1 was taken in its great weight it deserves by the CMA. He stated that the offences charged were too general and the evidence tendered did not prove how and when they were committed by

the respondent. He challenged the investigation report by starting that it is full of opinion of investigators and mere words that the whistleblowers told them. Mr. Tesha went on submitting that there was no evidence of the purported employees who reported the allegation of whistleblowers or any evidence to prove the same. He added that even the country director Mr. Amani Ngasaru who accused the respondent to have committed the alleged offences did not appear to the disciplinary hearing to justify the allegations. Mr. Tesha argued that the applicant's evidence is based on hearsay evidence.

Mr. Tesha went on to submit that since all applicant's witnesses who appeared at the CMA to testify did not appear at the disciplinary hearing, their evidence at the CMA were afterthought and CMA cannot weight it as reliable which is against the law and procedure. He added that their evidences also based on hearsay.

After considering the submissions for and against the application I find the court is called upon to determine the following legal issues; whether the Honourable Arbitrator was right to find and determine that the termination was unfair both substantively and procedurally and what reliefs are the parties entitled to.

As to the first issue, whether the Honourable Arbitrator was right to find and determine that the termination was unfair both substantively and procedurally. I will start with substantive fairness of termination; the record shows that the respondent was terminated from employment for two misconducts namely, breach of respect in the workplace and failure to manage and implement HR process. The applicant is strongly alleging that the Arbitrator failed to properly analyse the evidence on record because they have tendered sufficient evidence to prove the charged misconducts. Mr. Mgongolwa stated that the evidence of DW2 and DW3 is sufficient to prove the misconducts in record.

As to misconduct of breach of respect in the workplace, I have gone through the testimonies of all witnesses on record, DW2 and DW3 and the investigation report EXW2. The witnesses testified that the respondent altered disrespectful words towards them. The alleged disrespectful words referred by DW2 are *'shukuru unafanya kazi hii kwani wengine hawana'*. Whereas DW3 stated that the disrespectful words altered to her were as follows; *'ushukuru Mungu hata kwa nafasi hii maana ulikuwa intern kwa mshahara wa Tshs. 400,000/= tu, shukuru una bima ya afya, uridhike nayo usilalamike. Hata wakisema upewe kiasi gani sikupi*. Both witnesses allege that the disrespectful words altered to

them were in due course of negotiating their salaries with the respondent. In my view the words uttered to DW2 and DW3 were strong ones affecting their salary increments. One may ask as to why, if it is true that the respondent stated so, the witnesses should have reported the respondent to the higher authority. I don't want to go into details of that because one, it is obvious that the respondent was the Human Resources Manager responsible for the two witnesses' well being, reporting her might have been a high risk for them. However, DW2 testified to have reported the respondent's behaviour to the Project Manager who reported the matter to the higher authority.

Going to the EXW2, the investigation report. In this report it was clearly explained that the respondent was charged with several misconduct including inappropriate behaviour at work place, breaching the conflict of interest policy by hiring relatives and unsatisfactory handling of salary reviews, among others. The report also states that the management, being aware of issues surrounding the conduct and performance of the respondent, the country director wrote to all staff in August 2019 encouraging the "speak up policy". It resulted in several anonymous reports and a number of staff confiding in the new Regional Director when she visited Dar-es-salaam offices in August 2019. The

report further revealed that about 90% of the staff had issues with their salaries. Some of the employees did not want to be named for fear of retaliation but the staff confirmed that Bertha was dismissive and rude.

However, in the same report, the applicant admitted that the investigation did not find corroborating evidence that the respondent hired a relative and proceeded to make a finding that the allegations were unsubstantiated. The same was the case of allegations of kickbacks, they were found to be unsubstantiated. However the allegations of lack of respect at workplace were substantiated. On the allegations of failure to manage human resource policies, the report indicated that 90% of the staff had cause to raise issues and the applicant was concerned with the number of staff with the concern. The respondent was found to even lie to staff about their issues being rejected by higher authorities and the applicant found that these allegations were substantiated. Therefore the contents of the investigation report show that it was not biased as some of the allegations against the respondent were found to be unsubstantiated.

At this point, I am in agreement with Mr. Mgongolwa that the applicant tendered the investigation report (exhibit W2) which expressly showed that a number of individuals were contacted and provided

corroboration during investigation. It is further undisputed that even at page 10 of the impugned award, the Arbitrator acknowledged that, the respondent was terminated basing on the charges brought by the whistleblowers. I have noted that the arbitrator faulted the findings of the applicant because witnesses were not called at the hearing. In my view the arbitrator failed to consider the concept of whistle-blowers. The DW1 was clear that the investigation was a result from whistleblowers reporting.

In order to understand the concept of whistle-blower, I will borrow the spirit of the Whistle-blowers and Witness Protection Act, No 20 of 2015. The purpose of the said is summarised as "to promote and facilitate reporting of organised crimes, corruption offences, unethical conduct, abuse of office, illegal and dangerous activities; to provide for the protection of whistleblowers and witnesses against potential retaliation or victimization;" . The key words which I need to emphasise in whistle-blowing are the protection of whistle-blowers against potential retaliation or victimization. Therefore Purpose of allowing whistle-blowers in some aspects is to protect these people from vulnerability that they will be exposed post the utilisation of the information they rendered.

As to the accusation of failure to manage and implement HR process, although the alleged policy was not elaborated or tendered to prove its existence, the respondent being a person at high rank managerial position was aware of it and she did not deny the existence of the report. The report showed that 90% of the employees had issues with their salaries, and that the respondent was misleading the employees about salary allocation and many of them had discontent about salary allocation. The report further shows that the respondent was misleading the staff, telling them that their issues were reported to and rejected b ROA something which was not true. What the respondent did was to simply deny all allegations (AW4). In the termination letter (AW6), it is even indicated that the respondent did not accept any key role and responsibility to ensure that employees fully understood the process and reason for their salary grades, yet she was the Human Resource Manager.

If the policy was in existence and the respondent was aware of it, something which was not in dispute during arbitration, then subjecting the applicant into an obligation to produce witnesses under the circumstances will be highly unfair. So for as long as the investigation report was sufficient to prove the allegations against the appellant, it

In the usual course of happening as it is common in the Labor Dispute, it is the management who is holding disciplinary action and reporting misconduct of the subordinate employees. In this case, it was the subordinate employees that had a grievance against a member of the management. What the arbitrator ought to have done is to appreciate the fact the applicant has such an arrangement in her office because even at page 4 of the EXB4, the respondent admitted knowledge of the whistleblower process and that she respected it. The arbitrator should have taken further consideration the fact that the applicant was a high rank officer, Human Resource Manager hence for the subordinate employee, testifying against her or making any report against her is something that is out of the ordinary. We should appreciate the fact that at least the applicant has set this mechanism to ensure that the employees are not exploited by management, bearing in mind that the respondent was in a high managerial position. Under the circumstances, we as courts should be careful in determination before reinstating such a character to the same position would be detrimental to a larger part of the workforce, the non-managerial employees which are usually larger in numbers.

cannot be said that the termination of the respondent was substantively unfair. Therefore, the Arbitrator erred in finding that the applicant failed to prove the misconducts levelled against the respondent. Hence, as determined above, there was a valid reason for termination. I therefore set aside that part of the finding of the CMA and make a finding that the termination of the respondent was substantively fair.

On the second limb of termination, the procedural aspect. Unlike the Arbitrator's findings, I have no problem of conducting disciplinary hearing by way of online zoom meeting, which in my view following the advancement of technology globally such transformation cannot be escaped so long as sufficient evidence against the accused employee is tendered. The respondent was informed of the allegations levelled against her and the investigation report availed to her. She replied the allegations via exhibit AW4, hearing was conducted EXB4, she filed a notice of appeal EXW7 and the outcome of appeal was issues EXW8. I am therefore satisfied that the termination procedures on the ground of misconduct as provided for under Rule 13 of the Code were to a large extent complied with. My conclusive finding is that the procedure for termination was fair.

In the basis of the foregoing analysis, it is my view that in this case the respondent's termination was fair both substantively and procedurally. Owing to that, I allows this revision by revising quashing and setting aside the award of the CMA is hereby revised and set aside.

Dated at Dar es Salaam this 14th day of March, 2022.

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S.M. MAGHIMBI

JUDGE