IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 92 OF 2022

BETWEEN

COCA COLA KWANZA LIMITED ..... APPLICANT

AND

VENANCE MLEKAN ..... RESPONDENT

JUDGMENT

Date of last Order: 17/05/2022
Date of Judgment: 10/06/2022

B. E. K. Mganga, J

On 1st November 2007 applicant employed the respondent as Assistant Accountant for unspecified period. On 7th February 2014, applicant served the respondent with the disciplinary charge for gross negligence. The particular of the charge shows that, "Venance Mlekani, the respondent, being Assistant Accountant, on 20th March 2014, did neglect or fail to carry out duties by making payment of TZS 476,651,308/ to Omega Nitro instead of TZS 47,651,308". The said charge was signed by Michael Mlingi and Sigifridi Faustine. On 22nd April 2014, respondent was served with a termination letter showing that his

employment was terminated with effect from 23rd April 2014. Respondent was aggrieved by the said termination, as a result, on 19th May 2014 he filed Labour Complaint No. CMA/DSM/KIN/ARB.76/14 before the Commission for Mediation and Arbitration (CMA) at Kinondoni claiming to be paid unpaid salaries, unpaid leave, reinstatement, severance allowance and be issued with a certificate of service on ground that he was unfairly terminated.

On 28th September 2020, Hon. Alfred Massay, Arbitrator, having heard evidence of both sides held that the conduct complained of was ordinary negligence that does not attract termination of employment and not gross negligence hence termination was unfair. The arbitrator issued an award ordering the applicant to pay (i) TZS 17,052,000/= as 12 months' salary compensation for unfair termination, (ii) TZS 1,421,000/= being notice pay and (iii) TZS 2,678,038.46 being severance pay.

Applicant was aggrieved by the said award hence this application for revision. In the affidavit in support of the notice of application, Scolastica Augustine, the Human Resources Manager of the applicant

raised one ground, namely, that the arbitrator erred in law and fact in holding that termination was not a proper sanction to the respondent.

Respondent resisted the application by filing the counter affidavit stating that there are no justifiable reasons for the award to be revised.

When the application was called for hearing, Mr. Innocent Mushi, learned counsel appeared and argued on behalf of the applicant, while Ms. Regina Herman, learned counsel appeared and argued for and on behalf of the respondent.

Mr. Mushi learned Counsel for the applicant submitted that the charge sheet (Exh. CKL1) shows that respondent was charged for gross negligence and that in terms of Rule 13(2) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007, the penalty for gross negligence is termination. Counsel submitted further that respondent paid TZS 476,000,000/= instead of TZS 47,000,000/= to Omega Neutral Tanzania Ltd, the service provider of the applicant. He went on that; respondent had a duty of effecting payment as an Accountant. Counsel submitted further that, in the award, the arbitrator found that act as an ordinary negligence and not gross negligence. He insisted that the act is not an ordinary negligence because this was not

the first time according to Exhibit VRM4 and 5. Counsel submitted that in all incidences, respondent pleaded that it was human error. In his submission, counsel conceded that exhibit VRM4 and 5 were neither the charge nor the base for termination of employment of the respondent.

Counsel for the applicant submitted further that in the award, the arbitrator held that failure to impose a proper punishment is unprocedural termination and proceeded to award respondent 12 months compensation. Counsel for the applicant also submitted that there was valid reason for termination and the procedure was followed. He submitted in the alternative that, even if this Court finds that termination was not the proper sanction, the award of 12 months is not proper. He cited the case of ***Felician Rutwaza v. World Vision Tanzania,*** Civil Appeal No. 213 of 2019 CAT (unreported) to support his point that when reason for termination is valid but there is unfair termination based on procedure, the Court is supposed to impose nominal termination.

Resisting the application, Ms. Herman, learned counsel for the respondent submitted that in the application at hand, the Court must assess whether there was valid reason for termination and whether

procedures were adhered to. She submitted that it was alleged that respondent violated Rule 17(h) of the applicant's handbook (disciplinary code) but according to the evidence adduced at CMA, none of the witnesses testified that the said Rule 17(h) was violated by the respondent hence there is no evidence to prove that respondent committed the alleged misconduct. She went on that it was testified by Malingigwa (DW1), the Finance Manager for the applicant, that respondent was not responsible in effecting payments but that the persons responsible were Wema Mbogo (the final signatory), David Chait, Luis Cotts, Erick Wangara, Erastus Mtui, Basil Godzell, Peter Mgalla and Michael Mlingi. She submitted further that, DW1 testified that respondent was preparing invoice and send to signatories for payment. Ms. Herma submitted further that, the persons who signed and authorize payment to Omega Nitro are Wema Mbaga and Michael Mlingi and that the respondent did not effect payment hence there was no valid reason for termination. Ms. Herman continued to submit that DW1 testified further that the alleged payment was done on 20th March 2014 but was reversed on 14th April 2014. She went on that Sigifridi (DW3) testified that respondent is not a signatory to the cheque hence has

nothing to do with the alleged payment. Ms. Herman, counsel for the respondent submitted further that those who committed the misconduct were not punished but punished the one who did not commit the misconduct. She maintained that termination was unfair for want of reasons.

On procedure of termination, Ms. Herman submitted that the complainant was Sigifridi and Michael Mlingi the Supervisor of the respondent. In the disciplinary committee, both Sigifridi and Michael Mlingi participated as member and Chairperson respectively of the disciplinary hearing committee. Ms. Herman, counsel for the respondent went to submit that Michael Mlingi who was the signatory and signed the payment in question, shifted liability to the respondent. She submitted further that the charge was signed by both Sigifridi and Michael Mlingi.

On the remedies that were awarded to the respondent, counsel for the respondent submitted that ***Rutazwa's case*** (supra) is distinguishable and not applicable in the circumstances of this application because termination was both substantively and procedurally

unfair unlike to the said case where the court found that termination was substantively fair but procedurally unfair.

In rejoinder, Mushi, learned counsel for the applicant submitted that the Arbitrator held that there was valid reason for termination. Respondent did not file revision and cannot now argue that there was no valid reason for termination. But during his submissions, counsel for the applicant conceded that the Court can examine the record and come up with its conclusion as to whether there was valid reason for termination or not. Counsel for the applicant submitted that the Chairperson of the disciplinary hearing committee was Rajabu Ottien, but Sigifridi was Secretary. He conceded also that Sigifridi signed the charge sheet.

I have examined the CMA record and considered submissions of the parties in this application and find that the central issue is whether termination of the respondent was fair or not. It was submitted by counsel for the applicant that the only issue is on fairness of procedure but counsel for the respondent was of the view that it is on both fairness of reason and procedure. Initially counsel for the applicant was of the view that counsel for the respondent is barred to submit on fairness of

reasons because there is no revision filed on behalf of the respondent challenging the award. In my view, counsel for the applicant on second reflection, correctly conceded that in the application at hand, the court is entitled to evaluate evidence and come to its own finding whether there was both fair reason and procedure for termination.

As pointed out herein above, respondent was charged for Gross negligence, the particulars showing that he neglected or failed to carry out duties by making payment of TZS 476,651,308/ to Omega Nitro instead of TZS 47,651,308. In my view, the charge itself is problematic. I am of that view because in the charge it is said that respondent (i) he neglected or failed to carry duties and (ii) paid TZS476,651,308/ to Omega Nitro instead of TZS 47,651,308. The Particulars of the charge is irreconcilable. The person cannot be said to have neglected or failed to perform duties at the same time performed the duties by paying extra money than he was supposed to pay. Possibly, applicant in the said charge intended to say that respondent negligently paid the said money to Omega Nitro. Reading the charge in its totality, I am convinced that applicant intended to show that respondent negligently paid the alleged money to the said Omega Nitro and not neglected or failed to carry

duties. Having so said, I am not substituting the charge from the one that was served to the respondent. In my view, as the charge stands, respondent did not prove or adduce evidence showing that responded neglected or failed to carry duties. In fact, there is no even a single drop of evidence suggesting to show that respondent neglected or failed to discharge duties.

Apart from what I held hereinabove, the issue between the parties is whether there was evidence to support the conclusion that respondent was negligent if at all we take that applicant meant that respondent was negligent. Having carefully read evidence in the CMA record, my answer to that issue is in the negative. This is because in his evidence, Anhija Malingigwa (DW1) testified that there are persons who are supposed to verify payment is exceeding Ten Million Tanzanian Shillings of which respondent is not among. DW1 testified further that in any amount exceeding Ten Million Tanzanian Shillings, a cheque must be signed accompanied by Telegraphic transfer signed by the signatory. According to DW1, Signatory were the Finance Manager and Country Finance Manager, who, at the material time, were Wema Mbogo and David Chart respectively. DW1 testified further that, the person who

authorized money that was paid to Omega Nitro is Michael Mlingi and the persons who authorized the cheques or signed the cheques are Wema Mbogo and David Chart. In addition to that, Sigfred Faustine Mlay (DW3) testified that respondent was not a signatory hence did not authorized payment. DW3 testified further that, the supervisor was duty bound to ensure that the amount payable is correct. On the other hand, respondent testifying as PW1, distancing himself from the alleged claims. It is my firm view, based on evidence of both DW1 and DW3 that, respondent had nothing to do with the alleged payment and that there was no valid reason for termination. I am of that view because the persons who participated in effecting payment to Omega Nitro were left untouched, but respondent was made a scapegoat. I find that the complaint by counsel for the respondent are justifiable. That said, I revise the CMA award and hold that termination was substantively unfair.

On procedural fairness, I agree with the arbitrator that it was also unfair because the person who signed the charge sheet as the complainant seat in the disciplinary hearing committee.

It was submitted by counsel for the applicant relying on ***Rutwaza's case*** (supra) that the arbitrator erred to award the respondent to be paid the amount stated hereinabove. With due respect to counsel for the applicant, ***Rutwaza's case*** (supra) cannot apply in the circumstances of this application because termination was both substantively and procedurally unfair. Unlike in ***Rutwaza's case*** where termination was substantively fair but procedurally unfair.

For the foregoing and in the upshot, I find that the application is devoid of merit and I hereby uphold CMA awards and dismiss it.

Dated at Dar es Salaam this 10th June 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 10th June 2022 in the presence of Godfrey Ngassa, Advocate holding brief of Innocent Mushi, Advocate for the applicant but in the absence of the respondent.

B. E. K. Mganga
JUDGE