IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 339 OF 2020

BIDCO OIL AND SOAP LTD .....APPLICANT

VERSUS

RICHARD ZINGANISA ..... RESPONDENT

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

(Muhanika : Arbitrator)

dated 21st July, 2020

in

REF: No. CMA/DSM/KIN/R.751/17

JUDGEMENT

14th February & 03rd March 2022

Rwizile J.

The applicant employed the respondent. The employment commenced 1st April 2007 to 24th March 2017, when his termination occurred for gross negligence. Being aggrieved, the respondent filed a labour dispute No. CMA/DSM/KIN/R.751/17.

The CMA award was issued in favour of the respondent hence this application. The applicant is applying to revise and set aside arbitration award. The application is supported by the affidavit of Flora Emmanuel, principal officer of the applicant advancing the following issues;

1. *That, the mediator had no jurisdiction to determine the matter*
2. *That Arbitrator erred in law and fact by failing to explain when the respondent was terminated, further the arbitrator failed to state when the Commission for Mediation and Arbitration received the respondent's CMA form No. 1 and 2 in order to satisfy itself whether the commission had the mandate to entertain the dispute or not.*
    (i) That the mediator erred in law by granting the application for condonation to the applicant (the respondent herein) contrary to the law.
3. *Whether it was proper for the Honourable Arbitrator to ignore and failed to consider the applicant's documentary evidence tendered and admitted by the Commission and considered only the hearsay evidence of the respondent without any proof.*

4. *Whether it was proper for the honourable arbitrator to grant leave pay without considering that the complainant had already been paid leave arrears.*

    (i) *That the arbitrator erred in law and in fact by awarding the respondent the claims which were not raised in CMA Form No. 1.*

In disposing of the application, hearing was by way of written submissions. Ms Victoria Mgonja, an Employment Standard Consultant, represented the applicant while Edward Simkoko, Legal Secretary from TASIWU appeared for the respondent.

The first issue was argued with the second one, it was stated that the mediator had no jurisdiction to determine the matter and that the arbitrator erred in law by granting the application for condonation to the respondent.

It was submitted that, Rule 3(1) of the Labour Institutions (Mediation and Arbitration Guidelines) GN No. 67 of 2007, provides that a person independent of the parties is to be appointed as mediator. In this case, it was submitted that condonation hearing was heard by a mediator who also sat as such in the same matter. She continued to argue, that the certificate

issued did not identify the nature of the dispute, it did not say as well if the issue was resolved. In her view, it is against Rule 3(5) of the guidelines which reads: -

> *The mediator shall issue a certificate at the end of the mediation identifying the nature of the dispute and stating whether the dispute has been resolved or not. The certificate may be issued within 30 days.*

On the second issue, she further submitted that, the arbitrator erred in law and fact by failing to show when the respondent was terminated. As well, for not showing when the CMA form No. 1 and 2 were filed. In her view, this was important to satisfy itself as to whether the commission had jurisdiction to entertain the dispute. She was vehement that the CMA form No. 1 is not dated. It is therefore hard, she added, to know when it was filed.

She said, it is against Rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, 2007 GN. No. 64 of 2004 which provides for 30 days within which a disputed is filed with the Commission. For that reason, she was of the view that the dispute was heard by the commission without dealing with time limitation.

It was further argued that, the mediator allowed the application for condonation basing on his opinion. To fortify her argument, she referred this court to the cases of **Bushiri Hassan v Latifa Lukio Mashayo** Civil Appeal No. 3 of 2007 and **Tanzania Fish Processors Ltd v Christopher Luhangula**, Civil Appeal No. 161 of 1994 CA, (Unreported). She argued that the duty of the mediator was to look at the degree of lateness and the reason thereof but not to decide a matter from his opinion.

The third issue was, whether it was proper to ignore the applicant's documentary evidence. Ms Victoria stated that the applicant tendered exhibit D1 which is a letter informing the respondent of his misdeeds and D2, a hearing form, but still the arbitrator claimed that the respondent was never informed of his offences. It was her submission that evidence was recorded and the respondent was given a chance to defend himself.

The fourth issue hinged on whether it was proper to award payment of leave without considering that the complainant had been paid leave arrears. For the applicant, it was said, the commission erred in awarding the respondent what was not claimed in CMA Form No. 1. She therefore held the view that the respondent could not have claimed what was already paid to him. This court was therefore asked to allow this application and set aside the award.

When opposing the application, it was argued for the respondent on the first issue that, the mediator was duly appointed under section 86(3)(a) of the Employment and Labour Relations Act [CAP 366 R.E 2019] to mediate the matter. It was argued, that this was therefore in compliance with the law.

Arguing the second issue, it was stated that extension of time to file a dispute may be granted upon showing sufficient reason. In principle, it was argued, it is at the discretion of the mediator. The same therefore has powers to consider reasons for lateness as it was done in this case. Mr. Simkoko added that since the commission decided on the matter, it is binding on the parties, by the principal of estoppel. He was also quick to point out that the situation is governed by section 9 of the Civil Procedure Code. The point, he further argued, has been decided and finally determined.

Responding to the third issue, it was submitted that the applicant failed to prove that the respondent failed to inspect the cars. The respondent, he argued was with his boss Niraj, who had authority to inspect the motor vehicles. It was stated that the same could not be punished for the offences of his boss.

It was further submitted that, the applicant failed during disciplinary hearing to call key witnesses such as Mr. Niraj and a security Guard. Instead, it was his view that, only hearsay evidence from witnesses was tendered. The respondent held the view that the applicant did not prove if there were reasons for termination and if the same reasons were fair as stated under section 37(2)(a)(b) of ELRA and Rule 13(1) of Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007.

The law, it was added, provides for investigation to be conducted. He went, since it is a mandatory procedure, it ought to be proved done.

In response to the fourth issue, it was submitted that, the respondent upon termination was only paid the last salary. The arbitrator, according to him, correctly held. In conclusion, it was argued that the applicant did not follow the terms of section 39 of ELRA. It was therefore not proved that termination was fair. He prayed, this application be dismissed for want of merit.

Having heard both parties, the first point to determine is whether, the arbitrator had jurisdiction. Section 86(3)(a) of the ELRA states in clear terms that upon receipt of the referral, the Commission has to appoint a mediator to mediate the dispute. It was argued that the dispute was heard/arbitrated

by the one who mediated it. In law, mediation is the stage that comes before arbitration. If the matter is successfully mediated, the dispute comes to an end. But in the event, as in this case, mediation is not successful, then arbitration takes place. In normal terms, the mediator, given the stages of mediation, is not required to arbitrate the matter.

But in my view and based on rule 20 and 30 of the GN. 67 of 2007. There is nothing that prevents mediation and arbitration to be done by one person and at the same time. For this double process to merit, parties must be in agreement and this depends on the nature of the case and the need to expedite that matter. The applicant has complained at this stage, but did not raise an alarm at the stage of the trial. Based on the nature of the application, I think, this point is baseless. It is dismissed.

It is a legal requirement that CMA Form No. 1, institutes the claims at the CMA. It should therefore, as a matter of law be fully completed. The applicant was present since the trial commenced to its finality. It is cardinal, that issues at the revision stage must be those raised before the commission. The court is of the view that, the applicant had to raise this at CMA during hearing. Raising it now, in my view is a new fact not maintainable. In support, is the case **Magnus K. Laurean vs Tanzania Breweries Limited**

Civil Appeal No. 25 of 2018 of Court of Appeal where, a point of objection to admissibility of the document ought to be done at the trial stage, it was therefore stated:

> *"...The appellant's claim that the report, being an email as asserted by DW2, could only be admissible if it met the requirement of section 18 of the Electronic Transactions Act, 2015 is clearly an afterthought. It was never raised before the CMA when the document was tendered in evidence for the arbitrator to determine if the document complied with the rules of authentication under the said section nor was it brought to the attention of the High Court. Since the appellant did not object to its admissibility at the time it was tendered, as shown at page 112 of the record of appeal, we find no basis to entertain this belated grievance..."*

But that notwithstanding, the CMA form is clear and it has been fully filled. It has the date when it was filed and show when the cause of action arose, that is why there was an application for condonation. This issue therefore is baseless.

The other ground was that condonation was based on mediator's opinion. Indeed, all court decisions are based on the opinion of their authors. But the opinion should be grounded on reason and principles stated in the statutes or legal precedents. It has been clearly stated that condonation is in the absolute discretion of the mediator. This court has examined the record to see if the discretion was properly exercised. To be able to appreciate that, the extract in the award dated 16th February 2018, at page 5 states;

> *"...tume inaweza kumhurumia aliyewasilisha mgogoro kama atakuwa na sababu ya msingi...nikizungumzia sababu hii ya kwamba mleta maombi alifungua mara ya kwanza kwa wakati lakini alikosea kwa kutumia fomu ambazo zilishafutwa na tume iliamua kuondoa mgogoro huo na kumpa fursa tena ili afungue upya kwa kutumia fomu mpya...hivyo basi katika minajili ya kutenda haki na kutokana na ufafanuzi huo nilioeleza hapo juu ni kwamba maombi haya yana sababu ya msingi...kwa mantiki hiyo ninayakubali kama yalivyowasilishwa na kuridhia mgogoro huu kusikilizwa katika hatua ya usuluhishi..."*

There is no doubt that the mediator, heard the reasons for delay. Having considered the reasons given, a decision was made to condone the delay. In

my considered view, the decision was properly guided by the law and the discretion was properly exercised. This point has no merit too.

The third issue was on failure of the arbitrator to consider documentary evidence tendered. It was argued that exhibits D1 and D2 were not considered. Apparently, the proceeding and the award shows exhibits stated were considered. The arbitrator applied exhibit D2, at the hearing which proves that the disciplinary hearing was conducted and the arbitrator made a determination based on it.

The next issue is on reliefs awarded but allegedly not raised in CMA Form No. 1. As it was held by the arbitrator, the respondent was already paid leave arrears, exhibit D4, as payment of the salary with its deduction was produced as the proof of payment. This ground fails for lack of merit.

The last point raises the issue of whether what was awarded was raised in the CMAF.1 (CMA Form No.1). The court is of the view that the respondent filed a dispute claiming for terminal dues for unfair termination. Remedies due to unfair termination are provided by the law. Section 40(1) of the ELRA, is alive on this point and it states thus;

"Where an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer-

(a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or

(b) to re-engage the employee on any terms that the arbitrator or Court may decide; or

(c) to pay compensation to the employee of not less than twelve months remuneration."

From the foregoing, it needs to be pleaded in the CMA Form No.1 that there was unfair termination. The consequences of unfair termination therefore are payment of compensation. This issue therefore fails.

Finally, the central issue to be determined after having considered the grounds raised and argued is whether, there was proof of fair termination. Starting with the reason for termination, the relevant provision is section 37(2) of ELRA, which states: -

"A termination of employment by an employer is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason is a fair reason-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer

(c) that the employment was terminated in accordance with a fair procedure."

It has been consistently held that for termination to merit, it has to be grounded not only on valid reasons but also reasons for termination have to be fair. This must be proved to the required standard. As such, it is the duty of the employer as provided under S. 39 of the ELRA. The applicant did not prove that there were valid reasons for termination.

On whether termination was procedurally fair. In this point fairness of procedure is a question of fact and law. The applicant as a matter of procedure is required to prove the law was followed. The procedure starts by investigation. It has been submitted that; the respondent was summoned

for a disciplinary hearing. He was represented by a representative from TUICO. After hearing, he was found guilty and terminated. He was paid his terminal dues. There is no evidence that shows investigation was done before the hearing was conducted.

It can be safely held therefore that, failure to conduct an investigation, the respondent, was denied his right to defend his case as investigation sets ground for hearing, as provided for under Rule 13(1) of G.N No. 42 of 2007 which states;

> *"The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held."*

Therefore, in all forms of termination, the law must be complied with. It is the employer's duty to prove termination was fair as under section 37 (2) and 39 of the ELRA. Further, in the case of Tanzania **Revenue Authority v Andrew Mapunda,** Labour Rev. No. 104 of 2014, it was held that: -

> *"...It is established principle that for the termination of employment to be considered fair it should be based on valid reasons and fair procedure. In other words, there must be substantive fairness and*

procedural fairness of termination of employment, section 37(2) of the Act..."

For the foregoing reasons, I agree with the commission that the applicant did not prove that termination was both substantively and procedurally fair. This application therefore has no merit. It is hereby dismissed. No order as to costs.

A.K.Rwizile

JUDGE

03.03.2022