

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM**

CONSOLIDATED REVISION NO. 153 OF 2021

BETWEEN

DEOGRATIUS KIMAMBO.....APPLICANT

VERSUS

NAS DAR AIRCO CO. LTD.....RESPONDENT

AND

REVISION NO. 170 OF 2021

BETWEEN

NAS DAR AIRCO CO. LTD.....APPLICANT

VERSUS

DEOGRATIUS KIMAMBO.....RESPONDENT

*(Arising from Labour Dispute No. CMA/DSM/ILA/930/19 from the Commission for
Mediation and Arbitration of Dar es Salaam Zone - Ilala)*

JUDGEMENT

K. T. R. MTEULE, J.

27th June 2022 & 29th July 2022

These Consolidated Revision applications arise from the decision of Hon. Wilbard G.W, the Arbitrator delivered on 15th day of March 2020 in Labour Dispute No. CMA/DSM/ILA/930/19 in the Commission for Mediation and Arbitration (CMA) at Dar es Salaam, Ilala. The dispute was referred to the Commission by the employee **DEOGRATIUS KIMAMBO** against the employer, **NAS DAR AIRCO CO. LTD.**

following employer's decision to terminate the contract amongst them.

A brief historical background of the dispute is extracted from applicants' affidavit, the Respondent's counter affidavit, the submissions of the parties, and the CMA records as hereunder narrated. **Mr. Deogratius Kimambo** was a Ramp Supervisor Assistant working with **NAS DAR AIRCO CO. LTD.** which is a company involved in aviation industry. Mr. Kimambo was terminated on **11th November 2019** for an alleged misconduct, said to have committed gross negligence and dishonest which according to the **NAS DAR AIRCO CO. LTD.**, resulted into damaging the Company's image. The specific allegations which resulted to the termination were: -

- (a) Gross Negligence by failing to conduct proper walkaround and his failure to ensure retraction of the passenger bridge before commencement of operations.
- (b) Gross Dishonest by Concealing information on the 3rd November 2019 incident and failure to report the incident.
- (c) Damage of Company Image.

What occurred to lead to the charges against the employer took place on 3/11/2019 when aircraft TC 400 Boeing 787 - 800 wanted to take off to Bombay, the push back track having been engaged to lead the aircraft to a safe place of departure, the aircraft started moving while still attached with the passenger bridge which caused bruises on the aircraft. Following this incident, investigation was conducted which led to disciplinary proceedings against **Mr. Deogratius Kimambo** who was found to be guilty of negligence in allowing the aircraft to take off before proper walk around the aircraft and retraction of the passenger bridge.

The termination aggrieved **Mr. Deogratius Kimambo** who referred the dispute to the Commission for Mediation and Arbitration which decided that the termination was both substantively and procedurally unfair. The Commission ordered **NAS DAR AIRCO CO. LTD.** to pay **Mr. Deogratius Kimambo** 12 months remuneration as compensation. The total sum awarded was **TZS 16,440,000/=**. Both parties were not satisfied with the CMA's Award. Consequently, they both filed revision applications in this Court. **Mr. Deogratius Kimambo** filed Revision No. 153 of 2021 while **NAS DAR AIRCO CO. LTD.** filed Revision Application No. 170 of 2021. Both Revision

Applications have been consolidated by the order of this court following parties' request ease of convenience.

In **Revision No. 153 of 2021**, the Applicant **Mr. Deogratius Kimambo** advanced two legal issues one challenging **firstly**, the fairness of the arbitrator's order for only 12 months remuneration as compensation for unfair termination and **secondly**, the propriety of arbitrator's non issuance of severance pay to the applicant.

On the other hand, in Revision No. 170 of 2021, the Applicant therein, **NAS DAR AIRCO CO. LTD.** raised five legal issues based on the following assertions:-

1. Arbitrator's failure to consider and evaluate the Applicant's evidence.
2. Arbitrator's failure to determine the charges levelled against the respondent at the Disciplinary Hearing Committee.
3. Arbitrator's error on point of law and facts in holding that the respondent was unfairly terminated.
4. Arbitrator's failure to follow the employment termination procedure.
5. Justification of awarding Tanzania Shillings Sixteen Million four hundred and forty thousand (TZS 16,440,000/=) as

compensation for unfair termination.

The application was argued by a way of written submissions. **Mr. Deogratius Kimambo** was represented by Mr. Mlyambele Ng'weli, Advocate while **NAS DAR AIRCO CO. LTD.** was represented by Mr. Arnold Peter, Advocate.

Arguing for **Revision Application No. 153 of 2021**, on first issue Mr. Ng'weli submitted that the applicant's termination was both substantively and procedurally unfair. He asserted that **Mr. Deogratius Kimambo** was employed under a permanent term, so he was expecting to enjoy his retirement benefits. He is of the view that the arbitrator erred in law by awarding a lesser compensation (12 months remuneration) without giving reason and considering the circumstances of the matter. Mr. Ng'weli submitted further that the arbitrator having found unfairness in both procedure and reason in termination, more stiff punishment ought to have been issued against the employer. Supporting his submission, he cited different authorities including the case of **Pangea Minerals Limited v. Gwadu Majali, Appeal No. 504 of 2020, Court of Appeal of Tanzania, at Shinyanga, (unreported)**. Mr. Ng'weli is of the view that the applicant was entitled to 298 months compensation which is

estimated to be **Mr. Deogratius Kimambo's** salaries until his retirement which amounts to **TZS 408,200,000.00**.

Another reason advanced by Mr. Ng'weli was the hardship of finding another job for the applicant who was working in aviation industry. He cited the case of **Stanbic Bank versus Sioi Solomon Sioi, Revision No. 471 of 2015 at page 21**.

On the second issue, relating to severance pay, Mr. Ng'weli argued that since the applicant worked for more than twelve months continuously, he was entitled to be awarded such benefit plus certificate of service as it is statutorily provided for under **Section 42 (3) (a) of ELRA, Cap 366 R.E 2019** read together with **Rule 26 (2) (b) of GN. No. 42 of 2007**. Cementing his argument, he referred this Court to the case of **Barton Tanzania Limited v. Victoria Galinoma & Another, Civil Appeal No. 224 of 2019, Court of Appeal of Tanzania, at Dar es Salaam, (unreported)**.

In reply to **Mr. Ng'weli's** submissions, **Mr. Peter** is of the view that nothing bad in law for the arbitrator to award twelve months remuneration as compensation because the amount is well within the confines stipulated under **Section 40 (1) (c) of the Employment**

and Labour Relation Act, Cap 366 R.E 2019 where the arbitrator is satisfied with the unfairness of the termination. He stated that apart from the amount awarded still **NAS DAR AIRCO CO. LTD.** was not satisfied with the awards on reason that the termination was fair.

Replying on the second issue Mr. Peter submitted that as the respondent's termination was for misconduct, then the arbitrator was right by not awarding severance pay as provided under **Section 42 (3) of Employment and Labour Relation Act, Cap 366 R.E 2019.**

With regards to **Revision Application No. 170 of 2021**, starting with the first issue on asserted arbitrator's failure to evaluate evidence, **Mr. Peter** challenged the arbitrator's reasoning for missing a link between the disciplinary offences **Mr. Deogratius Kimambo** was charged with at the disciplinary hearing and the ones which were subject of termination at the CMA. Referring to page 8 of the award, **Mr. Peter** asserted that the arbitrator made cognizance of notification to appear at the Disciplinary Hearing through **Exhibits NAS 16 and NAS 18** but failed to consider the charges therein, departed from them and created new charges that were not subject

of termination. He alerted on the requirement of observing the proof on balance of probability as per **Rule 9 (3) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007.**

Mr. Peter blamed the arbitrator claiming that, he failed to balance evidence from both sides and failed to apply corroboration of the documentary evidence to the oral evidence. In his view, the arbitrator considered oral evidence not supported by any documentary evidence as indicated at page 9 of the CMA ruling which in his view contravenes rules of evidence. He alleged the arbitrator for having ignored the information given during examination of DW1, PW1 and PW2 that the applicant sent email to the Head of Department instead of the report on the incident, which indicates that there was concealment of information. **Mr. Peter** challenged the neutrality of the arbitrator in the statement "Kama ilivyoelezwa kwenye Ushahidi, hakuna ubishi kuwa mlalamikaji alitimiza wajibu wake kwa kiwango chake kwa mujibu wa Ushahidi wake uliotolewa" which according to **Mr. Peter,** is unbalanced. On such basis he asserted that parties' evidence especially that of the employer was not evaluated in reaching at a fair decision.

On the **second** issue regarding failure to determine the charges

levelled against **Mr. Deogratius Kimambo**, during the disciplinary hearing, **Mr. Peter** submitted that the arbitrator failed to determine the viability of the charges on balance of probability. He mentioned two issues which the arbitrator ought to have determined one being whether there was a proper walk around and the second one being whether there was a retraction of passenger bridge before commencing operations. According to **Mr. Peter's** description, walk around is the detailed activity performed to ensure that there is no visible damage or crack on the aircraft fuselage which is paramount to the safety of an aircraft and passengers. Referring to the evidence of DW1 and DW2, Mr. Peter submitted that **Mr. Deogratius Kimambo** had a duty to ensure that proper walk around was conducted, and the passenger bridge retracted before commencing the aircraft which according to CMA Exhibit NAS 4 was the cause of incident. In further reference to **CMA Exhibit NAS 2**, and **Exhibit NAS 12** (Airport report governing Machinery) Mr. Peter is of the view that the **Mr. Kimambo** acknowledged to have failed to conduct proper walkout which caused the incident which confirms that there was inadequate walk around by headset man who was **Mr. Deogratius Kimambo**. In his view, the exercise was important to

inform the Operator to disconnect Push Back (PBB) before commencing it.

Mr. Peter stated further that the respondent concealed information by not reporting the incident by producing his report to the Authority but rather an email.

In Mr. Peter's view, all evidence indicated that **Mr. Deogratius Kimambo** was fairly charged with an offence whose gravity justifies termination of the employment.

On the third issue as to whether the arbitrator erred in law in holding that the respondent's termination was unfair, Mr. Peter argued that respondent's termination was of valid reason as per S.37 (2) (a), (b) (i) of the Employment and Labour Relation Act, Cap 366 R.E 2019 read together with Rule 12 (i) (a) (b) (i)-(v) of the **Employment and Labour Relation (Code of Good Practice) (GN. No. 42 of 2007)** since the gravity of the offence attract termination as a proper sanction since the already had a warning as per Exhibit NAS 7 (warning letter).

With regards to the fairness of procedure Mr. Peter submitted that the applicant followed all procedure required by the law as per **Rule**

13 of GN. No. 42 of 2007 which included conducting investigation as per Exhibit NAS 2.

On Reliefs, Mr. Peter submitted that nothing should be awarded as the respondent's termination was both substantively and procedurally fair, and his terminal benefits were already paid as per Exhibit NAS 19.

Opposing the application by **NAS DAR AIRCO CO. LTD.** on first issue **Mr. Ng'weli** submitted that all evidence submitted by the applicant were fully considered but found to be not persuasive, including the evidence on failure to report the incident to the Authority, which in his opinion, was actually reported to his supervisor who never reported as per Exhibit NAS 3.

Regarding the alleged negligence, **Mr. Ng'weli** submits that it was addressed by the arbitrator who was lead by two reasons one being the contended shortage of workers on the material day, and the other one being lack of testimony of a person who participated in the Disciplinary Hearing. He added that the respondent was never issued with neither headset communication nor Ramp Supervisor education. He attributed the causes of the incidence with the

employer who in his view, was a causative of the incident.

Arguing on the second ground as to whether the arbitrator failed to determine the charges levelled against the respondent Mr. Ng'weli submitted that all charges were addressed by the arbitrator starting with negligence, basing on the evidence adduced by the parties including the shortage number of employees. He challenged the propriety of the conduct of investigation for having not interrogated a Bridge Operator who was a key witness. Stressing on the importance of proper investigation, Mr. Ng'weli referred to the case of **Novati Rupia v. Tanzania Zambia Railway Authority, Revision No. 786, High Court of Tanzania, Labour Division, (unreported)**.

Submitting on walkaround, **Mr. Ng'weli** averred that the activity ought to be performed by seven employees as was testified by PW1 but on the date of incident **Mr. Deogratius Kimambo** was alone with the absence of the Bridge Operator leaving the bridge uncontrolled.

Disputing on alleged non reporting of incidence, Mr. Ng'weli submitted that the incidence was reported by the respondent to DW1 and it was not replied till date. He refuted any concealment of

information by **Mr. Deogratius Kimambo**, arguing that he dutifully revealed such information to the applicant through his supervisor, DW1.

On third issue Mr. Ng'weli is of the view that the trial arbitrator was right in holding that there was no valid reason for termination and that, even the warning as per Exhibit NAS 7 was issued for the incidence resulted from shortage of employee as what happened the instant matter.

Relying on **Mr. Deogratius Kimambo**,s lack of training, using that weakness to terminate the employment was unfair.

Lastly regarding reliefs Mr. Ng'weli submitted that they fault the arbitrator's award only to the extent of issuing a minimal amount rather than issuing heavier punishment to the applicant, as the termination was both procedurally and substantively unfair.

In rejoinder the applicant's counsel insisted that the respondent owed duty to conduct walkaround as a Ramp supervisor and not Bridge Operator.

Having considered parties submissions, this Court is determined to address two issues which are; ***whether the Applicant adduced***

sufficient reasons for this Court to exercise its revision power

and the second issue is ***what reliefs are parties entitled to?***

In addressing the first issue two aspect of termination need to be taken into account and these aspects lies at the center of the parties' dispute. The first one is the fairness of the reason for termination and the second one is the fairness of procedure for termination.

Termination is said to be fair if the employer observes **Section 37 of Cap 366 R.E 2019** in implementing termination. The provisions provided:-

"37 (2) - 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."

It is the stand of this Court that termination is fair only if it was fairly effected in terms of both reasons and procedure. I make reference to

one of these case which is **Tanzania Revenue Authority V. Andrew Mapunda**, Labour Rev. No. 104 of 2014 where it was held:-

"(i) It is the 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, under Section 37 (2) of the Act.

(ii) I have no doubt that the intention of the legislature is to require employers to terminate employees only basing on valid reasons and not their will or whims."

Starting with the reason for termination, the respondent was terminated for allegedly committing a gross negligence that is a breached of the common law of acting in good faith and therefore becoming dishonest as per Exhibit NAS 19 (Notice of termination). Having gone through the record I have noted that it is undisputed that on 3rd November 2019 there was an incidence of damaging carriers of the aircraft with Reg. No. 5H-TCJ resulted from failure to follow proper procedure especially by not conducting a proper walk around including ensuring retraction of the passenger bridge before

commencing operations as well as to ensure that the aircraft is clear from all obstacles from the aircraft path. The question is whether this incident was caused by the negligent act of **Mr. Deogratus Kimambo** which was the reasons for his termination after being so confirmed by the disciplinary committee.

The Arbitrator, guided by the provision of Rule 12 of **GN. No. 42 of 2007**, came with opinion that there was no negligence on the part of the Respondent which could justify termination on disciplinary ground. The arbitrator was convinced by the evidence of having shortage of staff on the date of incident, long working hours of Mr. Deogratus Kimambo which could impair his performance, the absence of bridge operator who left and neglected his duty to remove the bridge, and the contributory negligence of the employer who assigned fewer number of employees compared to the required standard. The arbitrator was further guided by the definition of negligence as defined in the case of **Twiga Bancorp (T) Ltd. versus David Kanyika, Lab. Div., DSM, No. 346/2013, Rweyemamu, J.** The other reasons for arbitrator's decision was based on finding of no enough evidence to prove negligence. These

led to a finding that there was no fair reasons for termination on disciplinary ground.

Mr. Deogratius Kimambo contends that he had never committed any misconduct as there was a shortage of working staff which resulted the occurrence of the incidence and, he reported the same to the High Authority via e mail. On other hand **NAS DAR AIRCO CO. LTD.** maintained that Mr. Kimambo committed gross negligence by not conducting proper walk around for the aircraft safety before its operation.

It is on record that the respondent was employed in a capacity of Ramp Supervisor as per **Exhibit NAS 14** (employment contract and offer of employment) collectively, thus means the applicant had a duty of supervising the Ramp Department.

From the record, Exhibit NAS 3 (job description) state very clearly how Ramp Supervisor is supposed to perform his duty including reporting and resolving shortage of manpower as stated at clause 9 and 19 of the Job Description. Was he negligent in undertaking this duty? Guided by the case of **Twiga Bancorp** cited by the arbitrator negligence need to be measured by existence of a duty of care that and

if a person breached that duty as a result of which, the other person suffers loss or injury/damage, and a person acts negligently, when he fails to exercise that degree of care which a reasonable man/person of ordinary prudence, would exercise under the same circumstances.

By the test of reasonable man, there could have been no means under which **Mr. Deogratius Kimambo** could have managed all the tasks with such a shortage of employees. It is on this basis that I agree with the arbitrator that there was a contributory negligence from some other authorities. To what extent the Mr. Kimambo was able to resolve the staff shortage desired so much from the employer to clarify in the CMA to refute Mr. Kimambo's assertion. On this reason, I agree with the arbitrator that there was no sufficient prove of reasons for termination hence the termination was correctly held to be unfair in terms of reasons.

Having found that there was no valid reason for termination the next question is on procedural aspect, at CMA it was found that applicant's termination was procedurally unfair as the employer failed to call a key witness (bridge operator) and applicant's supervisor at disciplinary hearing hence affecting the status of investigation report.

In answering this question, as the termination was for misconduct the relevant provision is Rule 13 of the Code. Apart from rival submissions regarding this aspect in respect of investigation report I find worth to reproduce the provision which provides that:-

*"Rule 13 (1) the **employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held.**"*

The above provision, speaks itself that the purpose of investigation is to establish whether there is ground of initiating hearing. In the instant matter it's undisputed that investigation was conducted, what is disputed is who was supposed to appear or called as a witness at Disciplinary Hearing. The employer had a freedom to choose the kind of witnesses to bring to the committee to prove his case. Basing on the nature of this application as the applicant was charged with the offence and afforded with an opportunity to defend himself and appealing as per **Exhibit NAS** (response to appeal), I find no need to challenge the whole procedures effected in applicant's termination. There are several court decisions regarding the procedure for termination, that they should not be followed in a checklist form. In

the case of **Justa Kyaruzi V. NBC Ltd.**, Revision No. 79 of 2009, Lab Division at Mwanza, it was held that:-

"What is important is not application of the code in the checklist fashion, rather to ensure the process used adhere to the basics of fair hearing in the labour context depending on the circumstances of the parties, so as to ensure the act to terminate is not reached arbitrarily. Admittedly, the procedure may be dispensed with as per Rule 13 (12) of the Code."

Therefore, since the principles of natural justice were adhered to by the respondent, as the applicant was charged, and reply thereon made, and given right to having been exercised, then, I differ with the arbitrators finding that, the termination was procedurally unfair. In my view, the procedure was fair.

Regarding relief of the parties, a debate lies on the amount of compensation of 12 months remuneration which is a total of **TZS 16,440,000.00**. This amount could have been varied to award more months for compensation if this court could have found unfairness in both procedure and reason. Since it is only one aspect of procedure which was found positive to justify the termination, I will not vary anything on the reliefs awarded in the CMA.

Finally, I find that the **NAS DAR AIRCO CO. LTD.** managed to adduce good reason for this Court to depart from Commission for Mediation and Arbitration on the aspect of procedural fairness. In both Revision applications I uphold the CMA reliefs awarded in Labour Dispute No. CMA/DSM/ILA/930/19 which is compensation of 12 months remuneration to the tune of **TZS 16,440,000.00**. No order as to costs.

It is so ordered.

Dated at Dar es Salaam this 29th day of July, 2022.



KATARINA REVOCATI MTEULE

JUDGE

29/07/2022