IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

(AT DAR ES SALAAM)

REVISION NO. 291 OF 2021

BETWEEN

TANZANIA OCCUPATIONAL HEALTH SERVICE ..... APPLICANT

VERSUS

JEREMIAH MUSIBA ..... 1ST RESPONDENT

JUDGMENT.

S.M. MAGHIMBI, J:

The respondent was employed by the applicant as a Chief Internal Auditor on a three years fixed-term contract commencing on the 02nd January, 2019. He was subsequently confirmed in the position following a successful completion of probation period. The employment relationship started to run into bumps on the 10th December 2019 when the respondent received a letter from the applicant notifying him of allegations of misconduct against his employer, tailored in the form of gross dishonesty and gross negligence (Exhibit P3). On those allegations, he was suspended in order to give room for investigation (Exhibit P4).

Sometimes in December 2019, a special audit was conducted by the applicant through an external auditor who reported numerous irregularities and shortcomings in the finance department due to what was alleged as the Respondent's negligence and failure to perform his duties diligently. The respondent was eventually terminated on the 17th January, 2020 (Exhibit P9).

Aggrieved by the termination, the respondent referred a dispute at the Commission for Mediation and Arbitration for Temeke ("CMA"), which was registered as Labor Dispute No. CMA/DSM/TEM/65/2020/43/2020 ("the Dispute"). The award of the CMA was in favor of the respondent in which the applicant was ordered to pay the respondent a compensation at the tune of Tshs. 83,125,000/- being his salaries for the remaining period of the contract and gratuity.

The applicant was not satisfied with the said award and has preferred this Revision under the provisions of Sections 91(1)(a),(b) 91(2)(a)(b) and (c) of the Employment and Labour Relations Act No. 6 of 2004 ("the Act") and Rule(1),(2),(a),(b),(c),(d),(e) and (f) and (3)(a),(b),(c) and (d) 28(1)(a)(b)(c)(d) and (e) of GN. No. 106 of 2007 ('the Rules'). Her main

reason for the dissatisfaction was that the Award of the CMA is unlawful, illogical and or irrational on the following grounds;

1. That the Award of the Trial Commission of Mediation and Arbitration is unlawful, illogical and irrational.
2. The Hon. Arbitrator erred in law and fact in failing to find that the Respondent was appropriately dismissed from his employment.
3. That the Award of the Trial Commission for Mediation and Arbitration contains an error material to the merits of the said Award and which has resulted injustices onto the Applicant.

He therefore moved the court for orders that costs incidental to this Application abide by the results of the Application and any other and further orders and reliefs the Hon. Court will deem just and fit to grant. In her affidavit in support of the Chamber Summons, the following legal issues were raised:

1. The Award does not conform to the legal requirements of an Award as it if fails short of the reasons of which the arbitrator had reached her findings and fails to analyze the evidence.
2. The Trial Arbitrator erred in law and fact in failing to find that the Respondent was appropriately dismissed from his employment.

3. That the Trial Arbitrator erred in law and fact in failing to consider and analyze all evidence provided by the Applicant in reaching her findings.

The application was disposed by written submission, the applicant being represented by Mr. Ezekiel Fyantomo, learned advocate while the respondent was represented by Mr. Lijiso Ndelwa, learned advocate. Both parties filed their respective submissions as per the court order.

Having considered the submissions of the parties and records of this Revision particularly the pleadings herein, I find the issues raised and argued narrow my duty into determining whether the termination of the respondent was substantively and procedurally fair.

Starting with substantive fairness, Mr. Fyantomo submitted that there was a valid reason for the termination as proved in the investigation report (EXD5) and the Disciplinary hearing proceedings (EXD3 & D4), where Mr. Fyantomo argued that the applicant never disputed the allegations. That the evidence available was sufficient to prove that the respondent was dishonest and negligent in executing his duties, a result which caused the applicant a huge loss. That the witness testified to that effect during disciplinary hearing. Citing Rule 12(3) of the Employment and Labour

Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007 ("the Code") Mr. Fyantomo argued that Gross Dishonesty is a serious misconduct that makes a continued employment relationship intolerable hence justifies termination.

In reply, Mr. Ndelwa submitted that analyzing the available evidence, it is without traces of doubt that negligence and dishonesty were never proved. That first, before the CMA and the Disciplinary Committee, no documentary or oral evidence was tendered to substantiate that the respondent provided false information or did not disclose information or partake in deception or fraud. Secondly, he submitted, no document was brought even before the CMA to prove that the respondent ever received money from the Director of Finance contrary to work rules. Thirdly, that no minutes of the management meetings were tendered to prove that the respondent deluded the management to change imprest retirement forms. His fourth argument was that no internal audit report prepared by the respondent while at work was tendered by the applicant to prove that the respondent manipulated the board or negligently reported that statutory deductions were remitted timely.

He then argued that be it as it may, the applicant did not adduce any evidence before the CMA to show that statutory deductions were not remitted to the relevant authorities and that sixth, the applicant did not produce any document authored by the respondent stating that cash was deposited timely. Lastly, he submitted, the applicant's employment was confirmed on 2nd July 2020 as per Exhibit P2, therefore the allegations of being dishonest and negligent in January, February, March, June and July 2019 were false. Further that the applicant had monitored and evaluated the respondent at that time and established that his work performance was exemplary hence confirming him as admitted by DW1 during cross-examination.

Mr. Ndelwa submitted further that the applicant did not tender any fraudulent receipts, letters, minutes of the Board Audit committee showing fraud or letters from NSSF showing that there was dishonest or negligent reporting. He pointed out that DW1 and DW2 admitted that there were no such receipts or letters and that in an attempt to swim against the tides, the applicant has submitted that fair reasons were shown in exhibit D5. His argument is that the submission is misleading because DW2 admitted that the respondent was not interviewed during the investigation. He pointed

another evidence of DW1 and DW2 who stated that exhibit D5 was confidential to the applicant and hence the report was not given to the respondent. Further that DW2 admitted not to have background in IT and as such, he could not audit the applicant's payment system. The same DW2 admitted that he did inquire with TANESCO and NSSF as to whether the receipts were fraudulent or that statutory deductions were not remitted therein and that he did not read any internal audit report prepared by the respondent.

Mr. Ndelwa submitted further that exhibit D3 and D4 do not show anywhere that the evidence of negligence or dishonesty was tendered before the Disciplinary Committee. He concluded that the single-sided special audit report which was not backed up by evidence cannot be sufficient reason to prove dishonesty and negligence against the respondent and that the applicant's witnesses did not substantiate any loss as suggested by the counsel for the applicant.

On the issue of misconduct, Mr. Ndelwa cited the case of **Kilombero Sugar Co. Ltd v Hamis Kitole Hamisi & Another Revision No. 02 of 2021** where the court defined the word dishonest to mean:

"Dishonesty is however not defined by the law, but I think, it may include acts done without honesty. It is used to describe a lack of integrity, cheating, lying, or deliberately withholding information, or being deliberately deceptive or a lack of integrity."

He then submitted that the relevant provision is Rule 12 (1) (a) and (b) of the Code which mandated the arbitrator to consider whether the employee contravened a rule regulating the conduct of employment, whether or not the rule or standard contravened was reasonable, clear and unambiguous. He then argued that the CMA correctly held that the respondent did not contravene any rule regulating his employment because the applicant neither tendered any rule nor the respondent's job description. He submitted further that Section 39 of the ELRA mandates the employer to prove that termination was fair, of which on the balance of probabilities, the applicant failed to prove that there were valid reasons to end the respondent's contract hence the applicant breached the contract.

Having considered the submissions of parties, it is now to see whether the applicant managed to prove the misconduct allegations leveled against the respondent. Under Article 4 of the **ILO convention on Termination of Employment, 1982 (No. 158)**, an employer is prohibited from

terminating employment of an employee unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

In our law, the convention is covered under Section 37(1)(2)&(3) of the ELRA which makes it unlawful for an employer to terminate the employment of an employee unfairly. The law has further elaborated that a termination of employment by an employer is unfair if the employer fails to prove that there was a valid or fair reason for the termination. Section 37(2) (b) (i) provides that a fair reason is a reason related to the employee's conduct, capacity or compatibility. In this case, the reason for termination of the respondent was gross dishonesty and gross negligence which according to Rule 12(2)(3)(a)&(d) of the Code, the two offences justify termination.

Looking at the records to see whether the two offences were proved, as found by the CMA, although the DW2 testified to the effect that the respondent was called in a disciplinary hearing but he was defensive and rude and the auditors could not interrogate him, a testimony which was not backed by any evidence.

On the issue that the respondent was terminated after confirmation, and that the period of probation fell within the time he was alleged to have committed the misconduct, the arbitrator used this as a reason for declaring that the termination was unfair, a finding which I agree with the arbitrator. If the respondent was under probation, one of the duties of the employer was to assess his performance before confirming him/her. Fairness would require employees to be informed of how their probationary period will be managed and assessed and the criteria for assessment should be set. Although there are no hard and fast rules on the criteria for probationary period, the most important criteria for determining the success of a probation period may include employee's performance in meeting the goals of the employer at the required standards. Behavior and conduct is also another important aspect in assessing an employee during probation and the employee has to also demonstrate that he has the capability and skills or experience in the job. Now looking at the evidence, if the misconducts were alleged to have been conducted while the respondent was still on probation, then what was the criteria used to confirm him in employment? If the employer did not perform due diligence then, but proceeded to confirm the respondent then he cannot later

condemn the employee for something he did while he was still under probation and before he was confirmed.

Further to the above, Mr. Fyantomo argued that there was a valid reason for the termination as proved in the investigation report (EXD5) and the Disciplinary hearing proceedings (EXD3 & D4) and the applicant never disputed the allegations. I have also gone through the EXD5, the special audit report which revealed flaws and losses of the company, however, surprisingly so, the allegations against the respondent seem to involve other people who were even superior to him. For instance, according to the evidence of DW1, the respondent had caused loss in the company by having the procedure for imprest retirement changed on his influence by having the same signed by the Director of Finance instead of the Director General. At this point, I have posed to ask myself how a superior officer could be influenced by a junior officer. The Director of Finance is supposed to be someone of high caliber and an expert in issues of finance, he should not be in a position to be manipulated by his subordinates like the applicant. Being a superior officer, the applicant ought to have also showed how the Director of Finance was dealt with for being influenced by the respondent. Rule 12(1)(b)(iv) of the Code requires that in deciding whether

termination was fair, the arbitrator or judge must see whether the rule or code contravened has been consistently applied by the employer. If the alleged misconduct that the respondent is alleged to have conducted involved issues authorized by a superior officer, one would ask if the superior officers were any how included in the alleged misconduct. There is no evidence to show that they were so dealt with, an act which is contrary to the Rule 12(1)(b)(iv) of the Code.

The same contravention is manifested in the evidence of DW2 who testified that there were issues in bank reconciliation forms, security systems etc, payment of electricity bills and the like. However, the applicant did not give evidence to show how the people responsible for those systems were dealt with and how the respondent was involved. The only ground given by the DW2 was that being an internal auditor, the respondent was required to report the weaknesses to his employer, something which he failed to do. There is no evidence to show how those people who were actually supposed to do what the respondent ought to have monitored were punished, which is, as said earlier, in contravention of Rule 12(1)(b)(iv) of the Code.

Further to the above, as rightly submitted by Mr. Ndelwa, no internal audit report prepared by the respondent while at work was tendered by the applicant to prove that the respondent manipulated the board or negligently reported that statutory deductions were remitted timely. Neither did the applicant adduce any evidence before the CMA to show that statutory deductions were not remitted to the relevant authorities. At this point therefore, it is safe to conclude that the applicant failed to prove that the substance of the termination of the respondent was fair. The respondent was therefore unfairly terminated, substantively.

Going to the procedural fairness, Mr. Fyantomo submitted that the procedure followed in terminating the employment of the applicant was fair and in accordance with Rule 13 of the Code. That the applicant conducted investigation and upon discovering that there were grounds for hearing, the respondent was notified and appeared in the hearing. That he was afforded an opportunity to present his defence which he failed and given a right to appeal which he didn't exercise and instead, he wrote a letter on 13/01/2020 and expressed his dissatisfaction of the verdict of the disciplinary committee instead of lodging a formal appeal. He then pointed out that on page 22 the arbitrator based his decision on the ground that

the respondent was not given a chance to defend himself and that his right to be heard was robed, a reasoning which according to him, was illogical and irrational because the respondent was afforded an opportunity to be heard and all his rights were observed and procedure followed.

He submitted further that the CMA based her findings on the reason that the respondent was not given a chance to question allegations against him while he was called for hearing. Further that the respondent was availed with the external audit report beforehand which was proved by his letter dated 13/07/2020 whereby he admitted the fact and challenged the report. That the respondent was supposed to bring his concerns at the hearing when he was given a chance but he did not. He hence argued that the arbitrator erred in holding that the applicant did not adhere to Rule 13(7) of the Code by not affording the respondent an opportunity to defend himself while the evidence proves that the respondent was duly called for hearing and given a chance to defend himself which he failed to do. He therefore prayed that the court revise and set aside the award of the CMA.

In reply, Mr. Ndelwa submitted that the special audit report EXD5 was not availed to the respondent before the disciplinary hearing, neither was it tabled therein on a ground that the DW2 termed as "confidential" report

for the applicant only. He supported his submission by citing the case of **KBC(T)Limited Vs. Dickson Mwikuka (2013) LCCD 132** where the court emphasized that the fact that the respondent was not interviewed raised a lot of doubts on how the investigations were conducted. Mr. Ndelwa submitted further that the external auditor did not interview the respondent during the audit.

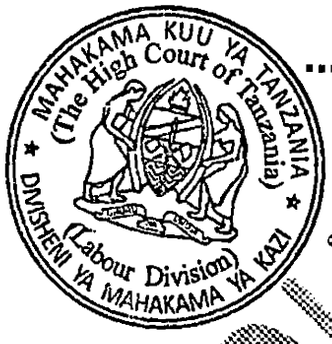
On this point I am in agreement with Mr. Ndelwa that if the basis of termination of the respondent was an external audit, then he was supposed to be availed with the investigation report and the external audit report so that he could prepare his defence. This is even cemented with the fact that the respondent was on suspension to pave way for investigation after an external audit report, the employer was bound to avail him with all the reports that established the misconduct against him.

In addition to the above, the records show that there were members of the Disciplinary Hearing Committee who were junior officers to the respondents. This was evidence adduced by DW1 and DW3 who admitted that the Chairman of the Committee was an officer junior to the respondent and so were other members of the committee. This is contrary to the Code.

Bearing in mind that the yardstick in proving labor cases is fairness, given what I have observed above, the procedure in terminating the respondent was also not fair hence the termination was procedurally unfair.

On those observations and findings, the conclusion is that the termination of the respondent was both procedurally and substantively unfair. I therefore see no need to interfere with the findings of the CMA. The application is hereby dismissed in its entirety.

Dated at Dar-es-Salaam this 10th day of June, 2022.



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S.M. MAGHIMBI

JUDGE