IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT DARES SALAAM

LABOUR REVISION NO 466 OF 2021

(Originating from Labour Dispute No CMA/DSM/TEM/576/19/09/2020)

SAHARA TANZANIA LIMITED ..... APPLICANT

VERSUS

FELIX MAFIKIRI & TWO OTHER ..... RESPONDENTS

JUDGMENT

K. T. R. Mteule, J

15 August 2022 & 22 August 2022

This is an application for revision where the Applicant is seeking for this Court to call for and examine the record of the proceedings and the award of the Commission for Mediation and Arbitration in Labour Dispute No. CMA/DSM/FEM/576/29/09/2020 dated 4th Day of March 2021 which was delivered by Hon. M. Batenga, Arbitrator.

The Applicant advanced the following grounds of revision: -

(a) That the Arbitrator erred in law and facts by not considering the evidence showing that the complainants were well acquainted with the language used.

(b) That, the Arbitrator further erred in law and facts by holding that reasons for termination were not proven.

(c) That the Arbitrator erred in law and fact by raising new issues unnecessarily on her own motion that never existed during, the trial,

(d) That the Arbitrator erred in law and fact by erroneously interchanging between breach of contract and unfair termination as the matter instituted before Commission for mediation & arbitration was for breach of contract and not unfair termination,

According to the Affidavit, counter affidavit, CMA record and the Applicant's submissions, the facts leading to this application can be briefly narrated as follows: - The Respondents were employed by the Applicant in different times, Hassan Simba starting from 31st August 2018, Felix Mafikiri from 1st April 2019 and Arnold Mashenga from 1st June 2019.

The Applicant implicated the Respondents with a theft incident where oil pumps located in the Applicant's premises were stolen by disconnecting the pulsar from the valve located at the loading bay to bypass the loading gantry meters and illegally top-up trucks to sell oil in the black market.

After an investigation, a disciplinary hearing was conducted, and the Respondents were issued with letters of termination. They unsuccessfully pursued an appeal against the decision of the disciplinary committee. Being dissatisfied with the termination, the Respondent preferred the Labour Dispute No. CMA/DSM/TEM/376/2021 claiming for a breach of Contract against the Applicant. Upon determination of the matter, the CMA awarded the Respondents a total of TZS 27,891,840.9 for breach of Contract. It was the finding of the CMA that there were no fair reasons to terminate the Respondents. The reasons for the decision based on arbitrator's view that the Respondents were terminated basing on an offence which they were not charged with, and that Mr. Hassan was never told which offence he was being charged with.

The arbitrator further found that there was unfair procedure which was used to effect the termination on reasons that no investigation report was produced to prove that there was investigation, that documents were in English language while the Respondents were not conversant with the language and no translation services were offered and that the Respondents were not given a chance to mitigate.

Being dissatisfied with the CMA decision, the Applicant lodged this Application for revision on 30th November 2021, seeking for revision basing on the following grounds:

(1) That the Arbitrator erred in law and facts by not considering evidence showing the Respondents (Complainants in the CMA dispute) were well acquainted with the language used,

(2) That the Arbitrator further erred in law and facts by holding that the reasons for termination were not proved.

(3) That the Arbitrator erred in law and fact by on her own motion, unnecessarily raising new issues which never existed during the trial.

(4) That the Arbitrator erred in law and facts by erroneously interchanging between a breach of Contract and unfair termination as the matter instituted before the Commission for mediation & arbitration was for breach of Contract and not unfair termination.

The Application was heard by a way of written submissions. Parties were assigned schedules for filing their written submissions. The Applicant's

counsel undertook to notify the Respondents on the schedules vide a letter which was produced in court. The Applicant filed her submissions timely, but the Respondent never replied. On the part of the Respondent, although the notice of opposition was duly filed, the Respondents never appeared and never filed Written Submission in reply. Upon the Applicant's request, the Court decided to proceed with the matter ex parte where Judgment will be delivered basing on the available submissions from the Applicant. The Applicant used to be represented by Mr. David Kassanda Advocate from KKB Attorneys (Advocates) but her submissions were drawn by Mr. Frank Kifunda from the same law form.

Addressing the **first** ground that " the Arbitrator erred in law and facts by not considering evidence showing that the Respondents (Complainants) were well acquainted with the language used," Mr. Kifunda submitted that the Arbitrator failed to consider the fact that all relevant documents relating to the Respondents which were tendered at the Commission for Mediation and Arbitration were in English language. He mentioned the said documents to be the Employment Contracts which were read and signed by the Respondents, show cause Letters from the Applicant which they replied in English language. He further

stated that the disciplinary hearing was conducted by Disciplinary Committee in the English language. He challenged the Arbitrator for recording that the presence of the Translator who communicated to the Respondents in the Swahili language shows that they did not understand English. He cited **Rule 13 (2) of the Employment and Labour relations (Code of Good Practice) Rules, GN. NO 42/2007** which provides; -

> *"Where a hearing is to be held, the employer shall notify the employee of the allegations using a form and language that the employee can reasonably understand"*

He further cited the cases of **Darlson Noel Mideke and Another Vs Tanzania Breweries Limited (Revision 453 Of 2019) [2021] TZHCLD 493 On Pages 8-9**, and **Marco M.S. Katabi Vs Habib African Bank (T) Ltd (Revision Appl. 744 OF 2018) (2020] TZHCLD 180 on page 10**.

It is the submission of Mr. Kifunda that the Respondents did not explain how they were prejudiced by the documents used during the Disciplinary Hearing which were in English language and that if there was any prejudice, such would mean that the Respondents would have not been

able to reply to the show cause Letters as they were in English language. He commented that there were no complaints from the Respondents that they did not understand the language. He questioned how they could have understood the language used in the Disciplinary Hearing with no concern raised during the hearing. He further questioned why the Applicant failed to ask for an assistance from the translator who could assist in translating English to Kiswahili during the Disciplinary Hearing, despite the fact that the Disciplinary Hearing notice (internal memorandum) in paragraph 7 clearly stated whoever needed a translator to make the request.

Mr. Kifunda considered the Applicant's act of participating in the Disciplinary Hearing in English without asking for a translator as an understanding of the language used and therefore it is wrong to hold that the entire proceedings were conducted in a language that the Respondents never understood. He challenged the Arbitrator for having failed to consider important evidence during the Disciplinary Hearing which shows that Respondents understood the language used, hence this signifies a material irregularity.

Submitting on the **second** ground "That the Arbitrator further erred in law and facts by holding that the reasons for termination were not

proved," Mr. Kifunda submitted that the Applicant had a valid reason to terminate the Respondents basing on the disciplinary ruling of misconduct on the part of the Respondents which was confirmed after an investigation and committee hearing. He referred to all documents tendered before the Commission to prove how the process went through which included the show cause letter and the Disciplinary Hearing decision.

Mr. Kifunda challenged the arbitrator's finding where he ruled that the Applicant had no reasons for terminating the Respondents on the ground that no specific rule in the code of good conduct was established to have been breached, and that two of the Respondents were not given room for explanations. According to him, both Respondents were given room for explanation as provided in their replies to show cause Letters (internal memorandum).

Trying to fault the Arbitrator's finding that Mr. Hassan was terminated without his misconduct being mentioned as per the minutes of the Disciplinary Meeting, Mr. Kifunda submitted that the misconduct done by Hassan was also outlined in the show cause Letter (internal memorandum) being "misconduct regarding the series of illicit disconnection of the pulsar from the valve at loading bay to bypass the

loading gantry meters, thereby illegally toping up trucks". He further referred the Disciplinary Hearing Forms which clearly showed that after the investigation done by Kunle Onadeko as the Terminal Manager, both Respondents noted that they were aware of the allegations against them.

It is the submission of Mr. Kifunda that the reason for termination was proved because all of the documentation and notices clearly stated the Respondents' misconduct and the Respondents admitted to being aware of the theft incidents but still neglected to report the same, thus very justifiable grounds to warrant termination after the Disciplinary committee found out that the Respondents were negligent in administering their duties.

According to Mr. Kifunda, the misconduct of the Respondents is supported by the Guidelines for Disciplinary procedures stipulated in the **Employment and Labour relations (Code of Good Practice) Rules, GN. NO 42/2007** whereby "Habitual, substantial or wilful negligence in the performance of work" is described to constitute offenses which may constitute serious misconduct leading to termination of an employee.

On this ground Mr. Kifunda concluded that Respondents' termination was justified, and valid, because they were aware of the said actions and have admitted to knowing the allegations and specifically the particulars of misconduct asserted by the Applicant during the Disciplinary Hearing.

Citing page 4 of the CMA award, paragraph 3, Mr. Kifunda submitted that during the Disciplinary Hearing, a witness called Halfani Said Suleiman tendered evidence called "Daily stock report" which was admitted as Exhibition S-9 which confirmed the loss of oil which proved that there was tampering with one of the equipment at the gantry and there was the removal of some of the cables and pipes from April to September 2019. According to him the Respondents knew about the ongoing discrepancies as per the records of the Disciplinary Hearing Forms, but they neglected to inform the management.

Mr. Kifunda is of the view that when it comes to misconduct on the ground of negligence, any employer can terminate an employee in the course of employment. To support this assertion, he cited the case of **Bank of Africa (T) Limited Vs Karim A. Hassan (Revision 123 OF 2020) [2021] TZHCLD 295, on pages 15- 16, Honourable MWENEGOHA J.**

Mr. Kifunda concluded that, the Arbitrator misdirected himself and wrongly assessed the evidence brought to arbitration thus issuing an unjust award because the investigation and the Disciplinary Hearing with its forms show that the Respondents were negligent by their failure to report the ongoing discrepancies at the time of their occurrence.

Arguing on the **third** ground that the Arbitrator erred in law and fact by on own motion and unnecessarily, raising new issues which never existed during the trial, Mr. Kifunda mentioned the said new issue to the mitigating factors on page 11 of the Award, that the Respondents were never given a, thus rendering the procedure unfair. According to him, this issue was neither raised, discussed, or addressed before the Commission at any time, neither during the pleadings nor during the Disciplinary Hearing; hence chance to mitigate this prejudice both parties of their right to be heard on the said issue.

He cited the case of TANLEC Limited Vs the Commissioner General Tanzania Revenue Authority, Civil Appeal NO. 20 OF 2018, where Honourable JUMA C.J emphasized; -

> *"In a view of the clear stand which this court took in cases of NG'WALIDA and VIP (supra), to the effect that the right of a party to be heard before an*

adverse action or decision is taken against such party is a basic constitutional duty, and that which any violation of which nullifies the entire proceedings."

He cited the case of **Lilian Ndeya V. Mwananchi Communication Limited Revision No**. 736 OF 2018, where Honourable A.E MWIPOPO. J, in a similar situation was of the following view: -

"The Applicant submitted that the issue of the dispute to be referred out of time was never raised by parties or the Commission during hearing. Thus, the Commission was not justified to dismiss the dispute on matters not disputed by the parties. ...It is my view that the act of the Arbitrator to raise an issue of jurisdiction in the course of writing an award without giving both parties the opportunity to be heard on the respective issue is wrong. It is a procedural irregularity as both parties were denied the right to be heard on the issue."

He is therefore, of the view that the Applicant had right to be heard in addressing the raised issue which the arbitrator deprived.

On the **fourth** ground "That the Arbitrator erred in law and facts by erroneously interchanging between a breach of Contract and unfair termination, the applicant stated that the matter instituted before the Commission for mediation & arbitration was for breach of Contract, but

the majority of the Arbitrator's opinions were based on unfair termination rather than breach of contract. He considered the Arbitrator's views to be contrary to the pleadings of the Respondents.

Taking note of the cardinal rule that the burden of prove in claims for unfair termination is vested on the Employer as provided under section 39 of the Employment and Labour relation Act

(CAP 366 RE. 2019), Mr. Kifunda submitted that when it comes to the breach of Contract, a burden of proof lies to the alleger who is an employee. In support of this argument, he cited the case of **Abdulrazak Jabilly Nabibakshi Vs Sea Sweet Royale Confectionery Ltd** (REV. APPL. 771 OF 2019) [2021] TZHCLD 225 on Page 5, where Honourable G MURUKE,J stated:-

> *"It is the principal of evidence law that, one who alleges must prove. The same is provided under Section 110(1) and, 111 of Cap. 6, the Law of Evidence Act. 'Section 110 (1) says whoever distress any Court to give judgment as to any legal right or lability dependent on the existence of facts which he asserts, must prove that those facts exist. Section 111. The burden of proof in court proceedings, lies on that person who would fail if no evidence at all were given on either side.' In the circumstances of*

this matter, the Applicant failed to justify his claim that he was terminated by the Respondent."

It is Mr. Kifunda's view that, the Respondents were required to prove every claim to a balance that the Contract was indeed breached, for instance, proving that the language used was not understood to which they have failed in proving so.

He insisted that "Parties are bound by their pleading" hence the Arbitrator ought to make weight on the Parties' respective assertions particularly CMA Form No. 1 of the Respondents as a pleading provides for the breach of Contract as a nature of the dispute, but the Arbitrator continued to refer to issues of unfair termination.

Mr. Kifunda finally submission that this Court be pleased to quash and set aside the Arbitrator's Award.

From the above submissions, the issue is **whether there are sufficient grounds for this court to revise, quash and set aside the decision of the CMA.**

To determine the above main issue, the grounds of revision will be determined one after another. In the **first** ground the Applicant challenged the arbitrator for failure to consider the evidence showing

that the complainants were well acquainted with the language used. It was not in dispute that use of English language in the Applicant's office was not done for the first time in the disciplinary committee meeting. According to the Applicant's submissions all documents relating to the Respondent's employment affairs were in English and they used to correspond in English. The documents in English language included the Employment Contracts which were read and signed by the Respondents, and the show cause Letters which they replied in English language. Further to this, is not disputed that there was a translator in the disciplinary committee who was there to assist the Respondents in case of a need of translation. I will borrow a leaf from my fellow sisters Hon. Muruke, J in **Marco M.S. Katabi Vs Habib African Bank (T) Ltd (Revision Appl. 744 OF 2018) (2020] TZHCLD 180 on page 10** and Maghimbi J in **Darlson Noel Mideke and Another Vs Tanzania Breweries Limited (Revision 453 Of 2019) [2021] TZHCLD 493 On Pages 8-9.** The Respondents quoted from **Darlons's case** the relevant words thus: -

> *"On those findings, I find that the employer complied with Rule 13 of the Code of Good Practice, G.N No. 42/2007 on the fairness of the 8 procedures, the employees were notified of the allegations and there*

was no complaint that he didn't understand the language. He was afforded a reasonable time to prepare, hearing was within reasonable time, evidence was presented, and he had time to defend himself and the decision was communicated to him. He was even accorded a right to appeal within the internal procedures before he approached the CMA. The termination was hence procedurally fair under Section 37(1)(c) of the EURA."

From Marco M.S. Katabi's case ***supra***, the relevant statement was:-

"The Applicant alleged that language used in disciplinary records that the charge and proceedings were in English language only during the Disciplinary hearing the Swahili language was used. Equally, the Applicant did not raise that at the disciplinary hearing. More so he was able to the respond to all the proceedings. He did not explain how he was prejudiced against the same. I believe that the Applicant was in a good position to understand the charge and defended himself, as correctly reflected in his mitigation factors reproduced above.

Therefore, I find that the Respondent adhered to the procedure for termination basing on the principles of natural justice."

I will be guided by the same view. The fact that all the Applicants contract and other important documents were in English language and

that the Respondents have never complained, indicates that the English language was an acceptable language of conversation in the Respondent's employment. Furthermore, the availability of a translator in the disciplinary committee should not be treated as hinderance to communication but rather as a tool to ease communication. I therefore hold that I see no language barrier which could have been constrained the Respondent's understanding of the language used. I therefore differ with the arbitrator on this aspect.

On the second ground that the Arbitrator erred in law and facts by holding that the reasons for termination were not proved. I have noted from the award, the arbitrator found that the Applicant did not have a valid reason to terminate the employment of the Respondents on reason that they were never charged with the offence they were convicted with. The Arbitrator was guided by Rule 12 (1) (a), (b) of The Employment and Labour Relations (Code of Good Practice) G.N.42/2007 ("The Code") which provides:-

> *"12 (1) Any employer, arbitrator or judge who is required to decide as to termination for misconduct is unfair shall consider-*
>
> *(a) Whether or not the employee contravened a rule or standard regulating conduct relating to employment;*

(b) If the rule or standard was contravened, whether or not-

(i) It is reasonable;

(ii) It is clear and unambiguous:

(iii) The employee was aware of it, or could reasonably be expected to have been aware of it:

(iv) It has been consistently applied by the employer; and

(v) Termination is an appropriate sanction for contravening it."

Guided by the above provision, the arbitrator examined the charges against the Respondents and the findings of the disciplinary committee and noted that the charges which were laid against the Respondent contained a different offence from what was confirmed in the outcome of the disciplinary committee. The charges against Felix and Anold were:-

> "*That on the 7th of October, information was received by the Sahara Tanzania Management team that a group of gantry operators and other employees have been conniving and illicitly disconnecting the pulsar from the valve located at the loading bay to bypass the loading gantry meters to illegally top up trucks in order to sell in the black market. "*

In the outcome of the committee Felix and Anold were convicted with negligence and poor performance (Uzembe na utendaji mbovu). Furthermore, the arbitrator found that employee Hassan was found guilty of unknown offence. That offence was styled as

"The committee found out that the employee committed offence which constitute serious misconduct and leading to termination of an employee." In arbitrator's view, this statement does not tell which kind of offence or misconduct was Hassan found with.

The arbitrator found further that the Applicants were not informed of any rule or regulation or policy which was breached by the Respondents prior to the termination. He thus found that there were no valid reasons for the termination.

I have considered the entire scenario which led to the applicant's termination. As it was with the arbitrator, I as well could not find anywhere where the Respondents were informed of the law, rule, regulation or policy which they breached. They were charged with an offence which they were not convicted with. According to Mr. Kifunda, the misconducts of the Respondents were supported by the Guidelines for Disciplinary procedures stipulated in the **Employment and Labour**

relations (Code of Good Practice) Rules, GN. NO 42/2007 whereby "Habitual, substantial or wilful negligence in the performance of work". However, the said guidelines were not cited anywhere in the disciplinary proceedings. My question is, does this omission go to the reasons or the procedure? In my view, this is a procedure. From the forms of proceedings and the findings of the committee, it is not disputed that there was a theft of oil which was committed in an area of duties assigned to the Respondents. The committee was convinced that the respondents were placed in a position where they could prevent the theft by reporting it to the authority if not directly involved in the actual theft. In my view, this was a valid reason to terminate an employee, but the omission to mention the Law which was breached goes to error in procedure.

In my view, there were valid reasons for termination but there was an error which resulted to unfair procedure in conducting the disciplinary hearing.

With regards to the **third** ground of the arbitrator raising an issue which was not pleaded, I agree with the Applicant that the arbitrator errored in raising the issue of chance to mitigate suo motu as it was not in the pleadings.

On the fourth ground the applicant asserted that the arbitrator focused his award on termination of contract while the pleadings were on breach of contract. Again at this point, it is obvious in the award that although the matter was based on breach of contract, the resultant was a termination of the fixed term contract. I do not see any errors on the part of the arbitrator in her finding on this aspect because, the Respondent were finally terminated from their employment before the expiry of their fixed term. This assertion is unfounded.

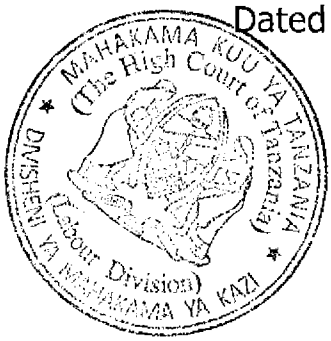
Having addressed all the grounds of revision, my next task is to answer whether there are sufficient grounds to warrant quashing of the award. Although I found an error in finding unfairness in the reason, It is apparent that there was unfair procedure because the Respondents were not informed of which rule did they breach. This renders the termination to be unfair. The unfairness entitles the Respondent to be paid the salaries remaining for the period of their remaining months in their remaining term of contract. In my view what was awarded by the arbitrator was just and fair and I see no reason to differ.

The revision is only successful as far as the fairness of the reasons for the Respondent's termination but the findings in terms of procedure

remains the same. I therefore uphold the reliefs granted in the award. The revision is half successful.

It is so ordered.

Dated at Dar es Salaam this 22nd Day of August 2022



KATARINA REVOCATI MTEULE

JUDGE

22/8/2022