IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 150 OF 2022

(Arising from an Award issued on 18/3/2022 by Hon. Nyagaya P, Arbitrator, Arbitrator in Labour dispute No. CMA/DSM/KIN/19Q1/21/79/21 at Kinondoni)

PETER MATHIAS SEMAGONGO ..... APPLICANT

VERSUS

RIGHTWAY NURSERY AND PRIMARY SCHOOL ..... RESPONDENT

JUDGMENT

Date of last Order: 25/07/2022
Date of Judgment: 22/08/2022

B. E. K. Mganga, J.

On 31st July 2018 the respondent employed the applicant as cleaner for unspecified period. On 11th February 2021, respondent served the applicant with a notice to give explanation following missing of undisclosed property of the respondent. On 22nd February 2021, respondent terminated employment of the applicant with effective from 28th February 2021 for lack of trust.

Applicant was aggrieved with termination, as a result, he filed Labour dispute No. CMA/DSM/KIN/91/21/79/21 before the Commission for

Labour Court Tz.

Mediation and Arbitration at Kinondoni claiming that he was unfairly terminated. On 18th March 2018, Hon. Nyagaya P, Arbitrator issued an award that termination of the applicant was fair. Further aggrieved, applicant filed this application seeking the court to revise the said award. In his affidavit in support of the application, applicant raised the following issues: -

1. *whether the arbitrator was correct to issue an award in favour of the respondent who failed to comply with Rule 26(1), (2), (3) and (4) of GN. No. 67 of 2007.*
2. *Whether the arbitrator was correct by not giving summary of party's arguments and not giving reasons for the decision as required by Rule 27(3)(d) and (e) of GN. No. 67 of 2007.*
3. *Whether the arbitrator was right for not considering contradicting evidence of DW1 and DW2 and charge sheet (Exhibit D4).*
4. *Whether the arbitrator was right to hold that applicant confessed without considering as to what he confessed in terms of Exhibit D3 and Exhibit D4.*
5. *Whether there was no need to conduct investigation and conduct disciplinary hearing.*

When the application was called on for hearing, Mr. Felix Makene, Advocate appeared and argued for and on behalf of the applicant, while Ms. Matinde Waisaka, Advocate appeared and argued for and on behalf of the respondent.

Labour Court TZ

Submitting on the merit of the 1st issue, Mr. Makene argued that applicant Rule 26(1) of the Labour Institutions (Mediation and Arbitration Guideline) Rules, GN. No. 67 of 2007 requires parties to file final submissions. He argued that respondent did not file final submissions contrary to Rule 22(2)(d) of GN. No. 67 of 2007(supra). He went on that; respondent was supposed to prove fairness of reasons for termination and fairness of procedure. Mr. Makene argued that the arbitrator stepped into the shoes of the respondent by proving the dispute that respondent followed the procedures for termination. During submissions, Mr. Makene conceded that closing arguments/final submissions are not evidence but substantiates the facts and evidence of the parties. He was, however, quick to submit that failure to file submissions is as good as the party failed to appear.

The 2nd issue, whether the arbitrator was right for not giving summary of parties' arguments and not giving reasons for the decision as required by Rule 27(3)(d) and (e) of GN. No. 67 of 2007(supra), Mr. Makene submitted that, the said Rule requires the arbitrator to give summary of the parties' evidence and arguments and give reasons for the decision, but the arbitrator did not comply with this Rule. He went on that,

Labour Court TZ

Applicant filed final/closing arguments but there is no portion of summary of that submissions in the award and no reasons were given by the arbitrator on the decision she reached. He strongly submitted that it was not sufficient for the arbitrator to hold that the claims by the applicant were dismissed without assigning reasons.

The 3rd issue, whether the arbitrator was right for not considering contradictory evidence of DW1 and DW2 and charge sheet (Exhibit D4), Mr. Makene submitted that, it was alleged that applicant caused loss of the respondent's property. He submitted that exhibit D4 did not disclose the type and number of the property allegedly lost. He went on that DW1 was testifying in chief he stated that the property that went missing is 20 pieces of Iron sheet but that while under cross examination, DW1 testified that only four (4) pieces of Iron sheet went missing. He therefore submitted that, there is contradictions in the evidence of the respondent. Mr. Makene submitted further that in his evidence, DW2 testified that only 4 pieces of Iron sheet went missing. He argued that but in Exhibit D3, DW2 reported to the Director of the respondent, that only two (2) Iron sheet were missing. He argued that respondent was supposed to prove the quantity and the type of the property that went missing.

Labour Court Tz.

On the 4th issue, whether the arbitrator was right to hold that applicant confessed without considering as to what he confessed in terms of exhibit D3 and exhibit D4, Mr. Makene submitted that in the award, the arbitrator relied on exhibit D3 while the said Iron scrapers were not mentioned in exhibit D4, and their amount does not tally to the amount stated in evidence of the respondent. He therefore concluded that the arbitrator erred to hold that arbitrator confessed.

On the 5th issue, whether there was no need to conduct investigation and conduct disciplinary hearing, Mr. Makene submitted that in the application at hand, there was neither investigation report nor disciplinary hearing. He argued that in the circumstances of the application at hand, both investigation and disciplinary hearing were supposed to be conducted to give room to the applicant to be heard including but not limited to call witness and to cross examine witnesses for the respondent. Counsel relied on the provisions of Rule 13(1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 and submit that the said rule requires the employer to conduct investigation to enable her whether to hold disciplinary hearing or not. He submitted further that, respondent violated Rule 13(5) of GN. No. 42 of 2007(supra) and cited the

Labour Court TZ

case of ***Ezekia Samweli Ndehaki V. Tanzaniteone Mining Ltd***, Revision No. 59 of 2013 and ***Balton Tanzania Ltd V. Vedastus Maplanga Makene,*** Revision No. 571 of 2019, HC (unreported) to bolster his argument that failure to conduct investigation amounted unfair termination. He concluded by praying that CMA award be revised and order applicant be paid the relief he claimed.

Resisting the application, Ms. Waisaka, advocate for the respondent submitted on the 1st issue that, the requirement of Rule 26 of GN. No. 67 of 2007(supra) is not mandatory. She argued that the said Rule requires the arbitrator to allow the parties to file final/closing submission and that the said Rule was complied with. She argued further that the issue that respondent did not comply with the order of filing closing argument does not affect evidence that was adduced during hearing. She went on that that default did not prejudice the arbitrator who was bound to weigh evidence adduced.

Ms. Waisaka submitted that closing arguments are distinguishable from submissions. She submitted that Rule 26(4) of GN. No. 67 of 2007(supra) provides that closing arguments are mere clarification on evidence adduced. She maintained that absence of closing argument does

Labour Court TZ

not affect the matter and that the arbitrator did not error to issue an award based on evidence that was available even though no closing arguments were filed by the respondent.

On the 2nd issue, counsel for the respondent submitted that the arbitrator abided by the law. She submitted that the arbitrator analyzed evidence, issues and gave reasons for her decision on every issue. She concluded that Rule 27(3)(d) and (e) of GN. No. 67 of 2007(supra) was complied with.

On the 3rd issue, Ms. Waisaka, submitted that applicant confessed/admitted the loss of the property of the respondent as evidenced by exhibit D3 and D5. She went on that, in exhibit D4, applicant was required to explain why disciplinary actions should not be taken. She submitted further that DW1 testified explaining the property that went missing but she conceded that evidence of DW1 does not mean that applicant was the cause for that loss. She maintained that regardless of the amount that went missing, applicant admitted loss. She went on that in such circumstances, contradiction in the amount does not mean that applicant did not cause loss. She argued further that, admission by the applicant was sufficient for disciplinary action to be taken against him and

Labour Court TZ

cited the case of ***National Microfinance Bank V. Andrew Aloyce,*** (2014) LCCD 145 to the position that when there is admission, no need to call witnesses to prove misconduct.

On the 4th issue, counsel for the respondent submitted that the base of the complaint and misconduct against the applicant is not on the amount of the property, rather, on involvement of the applicant in the misconduct that led to missing of property of the respondent. She therefore submitted that in exhibit D3, applicant admitted that he took Iron scrapers, the property of the respondent and sold them without consent of the respondent as reflected in exhibit D5.

On the 5th issue, Ms. Waisaka submitted that when an employee admits the misconduct, investigation and disciplinary hearing are dispensed with. To bolster her submissions, counsel cited the case of ***Nickson Alex V. Plan International***, Revision No. 22 of 2014, HC (unreported). In her submissions, counsel for the respondent conceded that no disciplinary hearing was held.

In rejoinder, Mr. Makene, counsel for the applicant reiterated his submissions in chief and went on that the allegations against applicant were unclear and evidence of the respondent was contradictory. He

Labour Court Tz.

maintained that admission of the respondent did not warrant respondent to dispense with procedural requirements relating to termination. He distinguished **Alex's case**, (supra) by submitting that in the said case the procedure was complied with, unlike the application at hand.

Having heard submissions by counsel for the applicant and the respondent, and having examined the CMA record, I will dispose the application in the order it was argued by the parties.

To start with the 1st issue, applicant's counsel submitted that arbitrator erred in law by issuing an award in favour of the respondent who failed to comply with Rule 26 (1), (2) (3) and (4) of the labour Institutions (Mediation and Arbitration Guidelines) GN. No. 67 of 2007 that requires parties to file closing argument. The said Rule provides: -

"26 – (1) having presented the evidence parties are given opportunity to make closing argument based on the facts admitted or presented to the arbitrator.

(2) the arbitrator may choose to alert the parties to specific issues to be canvassed during their closing arguments.

(3) the closing argument shall contain the following

a) A restatement of the issue or issue in dispute.

b) An analysis of the facts; and

c) Submissions.

(4) parties shall address the arbitrator with persuasive versions supported by most legal principles or authorities shall be provided to support their case."

Labour Court TZ

From the cited provision of the law, parties are required to make their closing submissions. It is undeniable fact that on 03rd December 2021 arbitrator ordered the parties to submit their closing arguments. It is also undisputed that respondent did not comply with the order. I have considered the submissions of both counsels in this issue, and I am of the view that, the closing arguments are not evidence. They are just supplement or clarifications of their submissions made while presenting their case. I am of the considered view that final determination of a case is based on the evidence adduced by the parties on record and not on strength of submissions. Therefore, I agree with submissions by counsel for the respondent that, absence of the respondent's final argument did not affect determination of the dispute. Further to that, Mr. Makene did not state how applicant was prejudiced by the respondent's omission to file closing arguments. It is my findings that this ground lacks merit.

On the 2nd issue, counsel for the applicant submitted that the arbitrator in her award failed to adhere to the requirement of Rule 27(3) (d) and (e) of GN. No. of 2007(supra), as the award did not contain summary of parties' argument and reasons for decisions. Having keenly gone through the award, I must state that this issue cannot detain me

Labour Court TZ

much as the award clearly shows the summary of evidence and arguments of both parties and the arbitrator gave the reason for her finding that applicant's termination was fair both substantively and procedurally. It is my view that, though that finding may not be correct, but it was reached, and reason was given. The reason given by the arbitrator in her findings that termination was substantively fair was that applicant admitted having committed the alleged misconduct. On procedural aspect, the arbitrator found that termination was procedural fair on reason that the law allows the employer to dispense with procedures upon the applicant's admission.

On the issue relating to failure to summarize closing argument, I have held herein above that closing argument are not evidence. They only intend to buttress the evidence adduced by the parties. Therefore, the fact that the same were not summarized in the award, cannot change the validity of the award. Above that, when taking summary of the evidence and arguments of the parties, it is not necessary to repeat verbatim as it was adduced, rather, the gist of the evidence must be included in the summary. In my view, the mere fact that arbitrator did not use the similar words used by the witness at the time they were testifying, does not mean

Labour Court TZ

that the evidence was not summarized. On such basis, I also find this issue as unfounded.

As regard to the 3rd and 4th issues, Mr. Makene submitted that arbitrator failed to consider contradictions between the evidence DW1 and DW2) and the letter served to the applicant (exh. D4) showing that applicant committed a misconduct. He submitted further that the said letter did not disclose the type and number of properties alleged to have been lost. Mr. Makene submitted that DW1 stated the property that went missing is20 pieces of iron sheet but in cross examination he stated that it was 4 pieces. He submitted that DW 2 testified that only 4 pieces were lost. I had a glance on the CMA record and find that it is true that there is contradiction in the respondent's evidence concerning the quantity of the property that went missing. It is equally correct that exhibit D4 did not disclose the type of the property in question. I have noted further that the said exhibit D4 was written on 11th February 2021 following the applicant's letter of admission to have taken 2 pieces of iron sheets which he referred to them as scraper as evidenced by his letter dated 09th February 2021.

After considering the parties submissions, it is my opinion that despite variations in the quantity of the iron sheets, applicant himself

Labour Court Tz.

through exhibit D3 and D5 admitted that he took pieces of iron sheets which belong to the respondent without permission and sold those pieces. As submitted by counsel for the respondent, the said contradiction cannot change the fact that applicant admitted having caused loss to the respondent. His act led to breach of trust between the two consequently there was valid reason for termination. Therefore, under such circumstance, I am in line with the arbitrator that in circumstance, applicant's own confession proved the alleged misconduct on balance of probability. There was therefore valid reason for termination. It is my view that the said contradiction did not go to the root of the matter. I am alive that contradictions are always there, but what matters is whether the same has gone to the root of the matter in such a way that it cannot be reconciled by other available evidence. In my view, the contradiction in evidence by the respondent was minor and was reconcilable with applicant's evidence.

As regard to the 5th issue, counsel for the applicant submitted that arbitrator erred to hold that termination was procedural fair while there was neither investigation nor disciplinary hearing which was conducted by the respondent. The argument by applicant's counsel goes to procedural

Labour Court TZ

fairness of termination. Section 37 of Employment and Labour Relations Act [Cap. 366 RE 2019] provides that for termination to be fair, there must be valid reason and procedure must be followed. In terms of Rule 13 of the employment and Labour Relations (Code of Good Practice) Rules. GN.No.42 of 2007, employer is required to conduct investigation to ascertain whether there are grounds for a hearing to be held. It is through the said hearing; the employer is required to prove the charge against the employee and affording an employee an opportunity to defend himself. In the application at hand, there was neither investigation nor disciplinary hearing conducted against the applicant. Counsel for the respondent submitted that respondent dispensed with the procedure after the applicant's confession that he committed the alleged misconduct. With due respect to counsel for the applicant, in the circumstances of the application at hand, it was not proper for the respondent to dispense with the requirement of holding disciplinary hearing. I therefore find that termination was procedurally unfair. I therefore revise the CMA award to such extent. Guided by the decision of the court of Appeal in the case of ***Felician Rutwaza v. World Vision Tanzania***, Civil Appeal No. 213 of 2019 (unreported), I hereby order that applicant be paid TZS. 1,980,000/=

Labour Court Tz

being six (6) months' salary as compensation for procedural unfairness, TZS. 330,000 one (1) month salary as leave pay. Since there was valid reason for termination, in terms of Section 42 (3)(b) of [Cap. 366 RE 2019], applicant is not entitled to be paid severance pay.

Dated at Dar es Salaam this 22nd August 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 22nd August 2022 in the presence of Fauster Daniel, Advocate holding brief of Felix Makene, Advocate for the applicant and Matinde Waisaka, Advocate for the respondent.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) Labour Division DIVISHENI YA MAHAKAMA YA KAZI

B. E. K. Mganga
JUDGE

Labour Court Tz.