IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 151 OF 2022

(Arising from an Award issued on 25/4/2022 by Hon. Muhanika, J, Arbitrator, in Labour dispute No. CMA/DSM/KIN/175/21/93/21 at Kinondoni)

LULU RASHID HAMED ..... APPLICANT

VERSUS

RIGHTWAY NURSERY AND PRIMARY SCHOOL..... RESPONDENT

JUDGMENT

Date of last Order: 09/08/2022
Date of Judgment: 24/08/2022

B. E. K. Mganga, J

Lulu Rashid Hamed, the herein applicant, was an employee of the respondent in a position of Accountant with effect from 1st July 2019. She served the respondent until on 12th February 2021 when she was terminated by the respondent. Aggrieved with termination, applicant decided to file labour dispute No. CMA/DSM/KIN.175/21 before the Commission for Mediation and Arbitration (CMA) at Kinondoni. In the referral form referring the dispute at CMA (CMA F1), she alleged that she was unfairly terminated and prayed to be paid TZS. 20,899,038/= being twelve (12) months' salary as compensation, severance pay and

leave pay. In the said CMA F1, applicant prayed also to be issued with a certificate of service.

Having heard evidence of the parties, on 25th April 2022, Hon. Muhanika, J, arbitrator, issued an award in favour of the respondent that termination was both substantively and procedurally fair. The arbitrator therefore dismissed the claim by the applicant.

On the second bite, applicant filed this application for revision seeking the court to revise the said award. In her affidavit in support of the Notice of Application, applicant raised the following issues: -

1) *Whether the arbitrator was correct not to record and consider closing arguments of the parties.*
2) *Whether failure of the applicant to pay school fees for her children studying at the respondent's school constitutes a valid reason for termination.*
3) *Whether the arbitrator was right to hold that applicant admitted the misconduct without proof that the alleged misconduct relates to her employment.*
4) *Whether it was correct for the arbitrator to hold that there was no need of conducting investigation and disciplinary hearing.*
5) *Whether the arbitrator was right to hold that failure of the applicant to pay school fees is a misconduct, and*
6) *The arbitrator erred in law and fact by failure to differentiate duties of an employee and that of the parent.*

In refuting the application, respondent filed the counter affidavit of Mercy Mchechu, her Principal officer.

At the hearing of this application, applicant enjoyed the service of Mr. Felix Makene, learned Advocate, while respondent enjoyed the service of Ms. Matinde Waisaka, learned Advocate.

Arguing on the 1st issue, Mr. Makene submitted that Rule 27(3)(d) of the Labour Institution (Mediation and Arbitration Guidelines) Rules, GN. No. 67 of 2007 requires arbitrator to given summary of evidence and arguments of the parties and consider closing arguments. He submitted further that; the arbitrator did not consider closing arguments of the parties contrary to Rule 27(3)(d) of GN. No. 67 of 2007(supra). He went on that, he cross examined DW1 and DW2, but it is not reflected in the award. He argued further that, that was contrary to Rule 25(1)(d) of GN. No. 67 of 2007(supra). He therefore concluded that arbitrator had a decision in her mind.

Mr. Makene argued the 2nd, 3rd, 5th and 6th issues jointly by submitting that, the center of the dispute at CMA was that applicant was terminated for failure to timely pay school fees of her children who were studying at respondent's school. He submitted further that, termination letter (exhibit P5) shows that applicant lacked trust and lived by false pretense. He went on that one of the issues at CMA was whether, failure to pay school fees in time constitutes a valid reason for termination of

employment. In his submissions, counsel for the applicant insisted that failure to pay school fees within time cannot constitute a valid reason for termination. He added that, having found that applicant failed to timely pay school fees for her three children, respondent discontinued the said three children of the applicant. He submitted further that, through exhibit P3, applicant prayed the respondent to deduct school fees of her three children from her salary, but the prayer was not honored. He concluded by submitting that the arbitrator erred to hold that termination of employment of the applicant was substantively fair.

Submitting on the 4th issue, counsel for the applicant argued that it was not proper for the arbitrator to hold that it was not necessary to conduct investigation. He argued further that, it was not proved that applicant committed the alleged misconduct. Counsel insisted that termination of employment of the applicant was unfair. To strengthen his submission, Mr. Makene cited the case of ***Ezekia Samwel Ndehaki v. Tanzania one Mining Ltd***, Revision No. 59 of 2013, HC (unreported), ***Balton Tanzania Limited v. Vedastus Maplanga Makene,*** Revision No 571 of 2019, HC (unreported) to support his submission that employer has a duty to prove both fairness of reason and procedure.

In opposing the application, Ms. Waisaka learned advocate for the respondent submitted on the 1st issue that, reasons and arguments of the applicant were recorded and considered in the award. She went on that counsel for the applicant has failed to show injustice that was occasioned for the alleged failure of the arbitrator to consider arguments of the parties.

Submitting on the 2nd, 3rd, 5th and 6th issues, Ms. Waisaka, learned counsel for the respondent argued that applicant was terminated due to lack of trust and false pretense as shown in exhibit P5 and not failure to pay school fees of her children. She cited Section 37 of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] and argued that the said section provides that for termination to be fair, there must be valid reason. She went on that; valid reasons include conducts of an employee. She maintained that applicant used her position as chief accountant to conceal that her children did not pay school fees for one year. She went on that, concealment of the fact that applicant's children did not pay school fees was a misconduct. She submitted further that, after being served with notice, applicant prayed that school fees be deducted from her monthly salary. She concluded that applicant used her position to conceal the information to the respondent and that,

according to school regulations, the issue of school fees was dealt accordingly.

Arguing the 4th issue, Ms. Waisaka submitted that applicant admitted in writing (exh. P3) to have committed the misconduct hence there was no need to conduct investigation and to hold disciplinary hearing. She cited the case of ***Nickson Alex v. Plan International,*** Revision No. 22 of 2014 HC(unreported), ***Mantra Tanzania Ltd v. Daniel Kisoka***, Revision No. 267 of 2019 and ***Adam Maulid Matumla v. Mobisol Uk Ltd,*** Labour Revision No. 79 of 2020 to support her submissions that what matters is that an employee was afforded with a right to be heard and not mere compliance with the Code of Good Practice GN. No. 42 of 2007. She strongly submitted that applicant was afforded with a right to be heard. Counsel distinguished **Ndehaki's case** (supra) on ground that in the application at hand, applicant admitted of having committed the alleged misconduct while in the said case it was not. She therefore prayed that the application be dismissed.

In rejoinder, Mr. Makene reiterated his submissions in chief and submitted further that lack of trust and false pretense are not misconducts in Labour Law. Mr. Makene submitted further that an argument that applicant used her position to conceal information that

her children had not paid school fees are unfounded because there was no document showing that applicant indicated that her children paid school fees while they have not paid. Counsel for the applicant distinguished **Kisoka's case** (supra) arguing that in the application at hand, respondent neither notified the applicant nor complied with procedure for termination unlike to what happened in **Kisoka's case**. He also distinguished ***Alex's case*** (supra) arguing that in the said case, there were minutes of the disciplinary hearing unlike to the application at hand. He concluded that exhibit P3 was a prayer by the applicant to the respondent to deduct her salary and not admission of the alleged misconduct.

I have examined evidence in the CMA record and considered submissions made on behalf of the parties in this application and find that the main issues of controversy are (i) whether termination of employment of the applicant was fair both substantively and procedurally and (ii) what relief(s) are the parties entitled to. I am of the view that these two issues cover all issues raised by the applicant and respondent to, by counsel for the respondent.

On the first ground Mr. Makene for the applicant submitted that arbitrator acted contrary to the provisions of Rule 27(3)(d) of GN. No. 67

of 2007 (supra) which requires arbitrator to give summary of evidence and arguments of the parties. He further submitted that evidence of Mary Gabriel Kisanga (DW2) was conducted only in examination in chief without cross examination in violation of Rule 25(1)(b) of G N. No. 67 of 2007(supra). I have cautiously examined the CMA record and the impugned award and find that, arbitrator complied with the requirement of the two cited Rules. That complaint is unmerited.

It was submitted by Mr. Makene, counsel for the applicant that Mary Gabriel Kisoka (DW2) was not cross examined and that this was in violation of the law. With due respect to counsel for the applicant, the record shows that DW2 was cross examined. That complaint therefore has no merit too.

It was submitted on behalf of the applicant that the arbitrator did not consider closing arguments of the applicant. Rule 27(3) of GN. No. 67 of 2007 provides that the award shall contain (i) details of the parties, (ii) the issue(s) in dispute, (iii)background information i.e., information admitted by the parties, (iv)summary of the parties evidence and arguments, (v) reasons for the decision and (vii) the order i.e., precise outcome of the arbitration. It is true therefore that the award is supposed to contain summary of arguments of the parties as submitted

by counsel for the applicant. I have read the award and find that it does not contain arguments of the parties, but the rest conditions were met. Notwithstanding, that failure cannot invalidate the award. I am of that view because closing arguments are not evidence. At any rate, it was not submitted by counsel for the applicant how that omission prejudiced the applicant. In my view, this court has power to step into shoes of the arbitrator with a need to do justice and analyze evidence and consider submissions thereto. I have taken that stance because in my view, failure to consider submissions of the parties or failure of the award to contain summary of arguments of the parties cannot be a base of nullification of the award. My stance to this is that, closing arguments or submissions are not evidence. See ***Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman, Bunju Village Government & 11 Others***, Civil Appeal No. 147 of 2006, **Rosemary Stella Chambejairo vs David Kitundu Jairo,** Civil Reference 6 of 2018 [2021] TZCA 442**,** ***Shadrack Balinago vs Fikir Mohamed @ Hamza & Others,*** Civil Application 25 of 2019 [2021] TZCA 45**,** ***DRTC Trading Company Ltd vs Malimi Lubatula Ng'holo & Another***, Civil Application 89 of 2020) [2022] TZCA 352 to mention but a few. In all these cases the Court of Appeal held that: -

". . submissions are not evidence. Submissions are generaiiy meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."

It is my view that, since evidence of the parties remained intact, this court has power to re-evaluate the evidence to see if it can arrive on the same conclusion.

The essence of the remaining grounds is on availability of valid reason for termination and the compliance of the procedure for termination. Section 37 of the Employment and Labour Relations Act[Cap. 366 R.E. 2019] provides that, in any termination of employment contract, the employer must establish that she had a valid and fair reason for termination and further that such termination, was conducted in accordance with the fair procedure of termination. For clarity, but with a detriment of making this judgment length, I reproduce the said section 37(2) of the Employment and Labour Relations Act, Cap. 366 RE 2019, hereunder:-

"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'.

(Emphasis added).

The above quoted section is in line with Article 4 of the International Labour Organization Convention on termination of employment namely Termination of Employment Convention, 1982 (No.158) which provides that:-

> *The employment of a worker shall not be terminated 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.*

On reason for termination, it was submitted by Mr. Makene learned counsel for the applicant that the reason for the respondent to terminate employment of the applicant was that the latter failed to pay school fees for her three children who were schooling at the respondent's school where applicant was employed. On the other hand, Ms. Waisaka, learned counsel for the respondent contended that applicant was terminated due to lack of trust and false pretense. According to Waisaka learned counsel for the respondent, the reason for termination of employment of the applicant was not failure to pay school fees of her three children, rather, it was due to lack of trust and false pretense.

With due respect to Ms. Waisaka, I have read the letter terminating employment of the applicant (exhibit P5) and find that applicant was terminated due to failure to pay school fees of her children. Respondent took that failure to pay school fees as indication of not being trustworthy and that applicant was living under false pretence. In fact, evidence of the respondent bears this conclusion. Richard Sheim Mahanga (DW1) testified both under examination in chief and cross examination that applicant was terminated due to her failure to pay school fees for her three children who were schooling at the respondent. While under examination in chief, DW1 categorically stated that applicant did not pay school fees for her 3 children for the years 2020. When he was under cross examination he stated: -

> *"…**Msingi wa kuachishwa kazi ni kushindwa kulipa ada na kudanganya mwaka mzima alikuwa akionesha kuwa alikuwa akilipa**. Sikuona nyaraka iliyonesha kuwa alionesha kuwa alikuwa ana lipa…"*

On her part, Lulu Rashid Hamed (PW1), the applicant admitted that at the timer of termination of her employment, she had not paid school fees for her three children for the year 2020 and that this was not peculiar to her because there are other children also who had not paid their school fees. She testified further that she prayed that school fees be deducted from her monthly salary but instead of doing so, the

respondent terminated her employment and expelled her children from the school. She testified further that payment of school fees had nothing to do with her employment.

It is clear from the above quoted piece of DW's evidence that applicant's termination was due to failure to pay school fees and giving false information that she paid. DW1 conceded in his evidence while under cross examination that he did not see any document showing that applicant falsified to show that she paid school fees for her children. I have painstakingly read evidence of Richard Sheim Mahanga (DW1) and Mary Gabriel Kisoka (DW2), the only witnesses who testified for the respondent, and find that there is no scintilla of evidence proving that applicant was living under false pretense or that she was not trustworthy. In scrutiny of evidence, I have found that evidence of DW1 is hearsay because his evidence is based on the information he received from the Managing Director of the respondent, who, did not appear at CMA to give evidence. The whole evidence of DW1 is based on the discussion between the Managing Director of the respondent and the applicant but in the absence of DW1, which, discussion, DW1 cannot be said was privy. That being the case, since DW1 was not privy to that discussion, he cannot state what was discussed and that lead to termination of the applicant. On the other hand, evidence of DW2 was

not so material to the dispute because her evidence shows that when she was unable to pay school fees for her children, she wrote a letter to the Managing Director and time for payment was extended. It is not known as to whether that was open to all employees and was a well-known practice to pin down the applicant. In absence of more evidence, I find that respondent was duty bound to bring her Managing Director in the witness box and explain exactly what happened between herself and the applicant.

From the foregoing, I am of the considered opinion that failure to pay school fees of her three children, cannot be a valid reason for termination of employment of the applicant. I am of that strong view because, (i) employment contract of the applicant had nothing to do with her children and this was not part of the conditions in their employment contract and (ii) as testified by the applicant (PW1) other parents also failed to pay school fees of their children. There is no evidence showing what was done by the respondent to parents who, were not employees of the respondent and failed to pay school fees for their children. Applicant (PW1) testified that she was terminated from employment and her children were expelled from school. This, in my view, was very harsh to say the least. I therefore conclude that

termination of employment of the applicant was substantively unfair and did not comply with the law.

Procedural fairness of termination is provided for under Rule 13 of the Employment and Labour Relation (Code of Good Practice) GN. No. 42 of 2007. That procedure includes the requirement of the employer (i) to conduct investigation- Rule 13(1), (ii) afford an employee reasonable time to prepared defence -Rule 13(2) and (3) etc. This procedure is in compliance with Article 7 and 11 of the Termination of Employment Convention, 1982 (No.158) that reads:-

> *Article 7*
> *The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.*
> *Article 11*
> *A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period.*

In the application at hand, applicant testified that she was no given an opportunity to be heard or defend. It was submitted by counsel for the applicant that arbitrator erred to hold that in the circumstances of the application at hand, there was no need for the respondent to

conduct investigation. It was the findings of the arbitrators that upon employees' admission to the allegations, then, respondent was not bound to adhere to the procedure for termination. The arbitrator based her findings on the provisions of Rule 13(11) of GN. No. 42 of 2007 (supra). With due respect, in the application at hand, there is no proof that applicant admitted having committed the alleged misconduct. Whatever the case, there is a distinction between the role of an employee and that of the parents of children schooling at the respondent. From the evidence adduced in the record, there is no proof that applicant admitted having not paid school fees of her children as part of her false pretense and lack of trust. As pointed hereinabove, evidence of DW1 is hearsay hence cannot be acted upon. It is therefore unclear as to what was admitted by the applicant for the requirement of conducting investigation and disciplinary hearing all together to be dispensed with. It is my view that, if respondent felt that applicant failed to pay school fees of her three children as part of living on false pretense, then, she was supposed to comply with fairness procedure of termination provided for under Rule 13 of GN. No. 42 of 2007 (supra) by inter-alia serving the applicant with the notice containing the alleged misconduct, conduct investigation to know how the alleged misconduct

was committed, conduct the disciplinary hearing and afford the applicant right to defend.

In the application at hand, the evidence of the applicant (PW1) that she was not afforded right to be heard is unchallenged. The Court of Appeal has insisted in the compliance of procedures for termination in a numbers of cases including the case of **Paschal Bandiho vs Arusha Urban Water Supply & Sewerage Authority** (AUWSA) Civil Appeal No. 4 of 2020 [2022] TZCA 42 wherein it quoted the South African case of **Avril Elizabeth Home for the Mentally Handicapped vs. *CCMA*** *[2006] ZALC 44* where it was held that: -

> *"This conception of the right to a hearing prior to dismissal... is reflected in the Code. When the Code refers to an opportunity that must be given by the employer to the employee to state a case in response to any allegations made against that employee, which need not be a formal enquiry, it means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss. In the absence of exceptional circumstances, the substantive content of this process as defined by Item 4 of the Code requires the conducting of an investigation, notification to the employee of any allegations that may flow from that investigation, and an opportunity, within a reasonable time, to prepare a response to the employer's allegations with the assistance of a trade union representative or fellow employee. The employer should then communicate the decision taken, and preferably communicate this in writing."*

As pointed out hereinabove, there was no justification for the respondent to dispense with compliance of the provisions of the law

relating to fairness procedures of termination. I therefore hold that termination of employment of the applicant was procedurally unfair.

Having found that applicant's termination was unfair both substantively and procedurally, I hereby order that applicant be paid TZS. 18,900,000/= being twelve (12) month's salary compensation for unfair termination.

For the foregoing, I hereby revise, quash, and set aside the CMA award and allow the application for being merited.

Dated at Dar es Salaam this 24th August 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 24th August 2022 in the presence of Felix Makene, Advocate for the applicant and Matinde Waisaka, Advocate for the respondent.

B. E. K. Mganga
JUDGE