IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 452 OF 2021

(Arising from the award of the Commission for Mediation and Arbitration at Dar es Salaam in CMA/DSM/KIN/572/2020/279)

BETWEEN

DHL TANZANIA LTD ..... APPLICANT

VERSUS

RAMADHANI HAMIS HASSANI ..... RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J.

The application is made under Section 91(1)(a), (b), 91(2), (b), (c) and 94(1)(b)(i) of the Employment and Labour Relations Act, Cap. 366 [R.E. 2019] ("ELRA"), Rules 24(1), Rule 24(2), (a), (b), (c), (d), (e), (f), Rule 24(3), (a), (b), (c), (d) and Rule 28(1), (a), (b), (c), (d) and (e), of the Labour Court Rules GN. No. 106 of 2007 ("LCR"). The applicant prayed for the following orders: -

1. That this Honourable Court be pleased to call for the records of the Commission for Mediation and Arbitration at Dar es Salaam Zone, and revise the proceedings and awards issued in CMA/DSM/KIN/572/2020/279 dated 18th October, 2021 and set aside the said award on the following grounds, namely:

(a) The said award is unlawful, illogical or irrational; and

(b) The award is improperly procured

2. Any other reliefs as this Court may deem just to grant.

The application arose out of the following context; by a contract dated 01st September, 2011, the Respondent was employed by the applicant on permanent terms and served as a bond Agent with an initial salary of Tshs. 537,500/=. Sometime in May, 2020 emerged allegations against the respondent on serious misconduct in the performance of his duties. Accordingly, on the 04th June, 2020 the respondent was given a notification to attend a disciplinary enquiry on the 10th June, 2020. The said notice also informed the Respondent of the charges against him, which were gross negligence, failure to follow the applicant's procedure and bringing the Applicant's name into disrepute as amply clarified in the charge sheet annexed to the said notice. The disciplinary Committee found the respondent guilty with the charged misconducts hence on 30/06/2020 the respondent was terminated from employment. Aggrieved by the termination the respondent filed a dispute of unfair termination at the Commission for Mediation and Arbitration ("CMA").

After considering the parties evidence on 18th October, 2021 the CMA delivered an award that the respondent was unfairly terminated

employment. Hence, the applicant was ordered to reinstate him to his employment and if not pay the monetary compensation amounting to 51,646,896/= within a period of 21 days from the date of the award. Being dissatisfied by the CMA's award the applicant filed the present application urging the court to determine the following legal issues;

i. The legality and correctness of the Commission's finding that the Applicant had no valid and fair reason to terminate the Respondent's employment;

ii. The legality and correctness of the Commission in failing to determine whether the Applicant did not follow fair procedure in terminating the Respondent's employment;

iii. The legality and propriety of the Commission in failing to consider and rejecting the Applicant's evidence on the reason for termination of the Respondent's employment;

iv. The propriety and legality of the Commission's order to re-instate the Respondent and at the same time ordering compensation for termination;

v. The legality, propriety and validity of the Commission's order that the Respondent be paid monetary relief of Tshs. 51,646,896/= within a period of 21 days from the date of the award.

On the other had the respondent strongly challenged the application by filing the counter affidavit sworn by himself on 03/02/2022. The application proceeded by way of written submissions. before the court the applicant was represented by Mr. Philip Lincoln Irungu, Learned Counsel from a firm trading as B & E Ako Law whereas Mr. Fredrick Winston Kitwika Learned Counsel from a firm styled as Jonas & Associates Law Chamber.

Submitting on the first issue, Mr. Irungu submitted that the respondent was terminated for gross negligence, that is release of customer's shipment identified as AWB4457519791 from the applicant's warehouse facility without necessary paperwork for that shipment or proof of payment of duties and tax prior to the release. He argued that the act in itself being gross negligence amounted to misconduct that resulted to the late payment of government tax which was paid after the consignment had been released hence tarnishing the applicant's brand and name.

Mr. Irungu submitted further that the applicant had valid reason to terminate the respondent pursuant to Section 37(2)(a), (b)(i)(ii) of the ELRA together with Rule 12 of the Employment and Labour Relations (Code of Good Practice) Rules, GN 42 of 2007 ("the Code"). That the mentioned provisions provide for the reasons that may lead to termination and gross negligence and it is one of the valid reasons. He submitted that as reflected at page 5 paragraph 1 of the award, DW1 testified that the respondent's password and username were used to release the shipment, the fact which was also admitted by the respondent during disciplinary hearing.

Mr. Irungu submitted further that the respondent attended course of Information Security awareness which was about information systems and the use of password by the user. He stated that by sharing the username and password the respondent breached clauses 8.2.3, 8.2.7 and 8.2.10 of the Applicant's Human Resources Disciplinary Policy and Procedure (exhibit D8). The Counsel added that the testimony of DW1 was supported by that of DW2 who also testified that the respondent was given password which he was using on Air Cargo automation system (ACA system) and the released shipment was through his

password. He insisted this meant that the respondent was personally and directly involved in the offence.

Mr. Irungu went to submit that the respondent's misconduct prompted the applicant to write a voluntary self-disclosure letter dated 21/05/2020 to the Tanzania Revenue Authority ("TRA") availing the authority 67 shipments under investigation including the shipment of the respondent. He stated that by a letter dated 09/06/2020, TRA required the applicant to explain why legal proceedings should not be taken against him, the evidence which attest the gravity and seriousness of the offence committed by the respondent. Mr. Irungu further submitted that in his testimony, the respondent admitted that his password was used by unidentified person who released the shipment but, he never made effort to identify the alleged person or report the same to the applicant for necessary steps or investigation. He added that during disciplinary hearing, the respondent asked to be punished for sharing his password however, sharing of password in the applicant's office is an offence which punishment is termination. He argued that having admitted to have committed the said offence, it constituted fair and valid reason for termination as it was held in the case of **Nickson Alex**

Vs. Plan International, Revision No. 22 of 2014, High Court of Tanzania, Mwanza (unreported) it was held that:-

> *"the applicant in this case admitted having committed such a misconduct of misappropriation of his employer's monies and he made an apology for his act and asked for opportunity to repay the said monies this is evidenced by Exhibit D8..... exhibit D8 a letter written by applicant himself in admitting the offence in my view is evidence which clearly give facts in issue* ***..... In light of the above I hasten to conclude that the applicant termination was for valid reasons".***

Mr. Irungu then submitted that during cross examination, DW2 testified on how the respondent's password was used to release the shipment, he stated that there was an output system that showed who or which username and password released the shipment. He stated that basing on the seriousness of the offence committed by the respondent, termination was the appropriate sanction. To support his submissions, he referred to numerous court decision including the Court of Appeal decision in the case of National Microfinance Bank Vs. Leila Mringo & others, (Civil Application 316 of 2020) [2021] TZCA 233 (07 June 2021). He concluded that the applicant had a valid and fair reason to terminate

the respondent's employment thus, the CMA's findings to that effect was erroneous.

Coming to the second issue Mr. Irungu submitted that as per DW1's testimony, the applicant having noticed the commission of the offence investigation was conducted. That the applicant was served with the notice to attend disciplinary hearing which was also held as reflected in the disciplinary hearing minutes (exhibit D3). The counsel argued that the procedures for termination on the ground of misconduct are provided under Rule 13 of GN. 42/2007 which includes investigation, notification of the alleged disciplinary hearing and decision of the committee. It was submitted that in this case the respondent was given 5 days to prepare for the disciplinary hearing and at the hearing he was given an opportunity to defend himself and he was afforded an opportunity to mitigate.

DW2 testified went on to submit that the Arbitrator failed to examine the evidence on record and reached to an erroneous decision that the termination procedures were not followed as held under page 16 of the impugned decision. He added that the award did not state exactly which procedure was not followed by the applicant. He therefore

insisted that the applicant followed all required termination procedures and acted in compliance with section 37(2)(c) of ELRA.

As to the third issue Mr. Irungu submitted that DW1 and DW2 tendered documentary evidence to prove that there was valid reason for termination of the respondent's employment which includes the Disciplinary hearing minutes (exhibit D8). He insisted that the Arbitrator failed to analyse the evidence of the applicant and accord the same the weight it deserves as per Rule 9(3) of the Code which require the standard of proof to be on balance of probabilities. To support his submission, he cited the case of **Amina Ramadhani Vs. Staywell Apartment Ltd, (Revision 461 of 2016) [2018] TZHCLD 18 (13 April 2018)** where it was held that:-

> *"... the burden of proof lies with the employer but it is sufficient for the employer to prove the reason on balance of probabilities ...."*

Regarding the fourth issue, Mr. Irungu submitted that Section 40(1) of ELRA provides for remedies of unfair termination which are reinstatement, re-engagement and compensation. He argued that each relief is awarded independently and not conjunctively as it was held in the case of **National Microfinance Bank** (supra). He added that the

Arbitrator wrongly awarded compensation as well as reinstatement as reflected at page 18 of the impugned award.

Coming to the last issue Mr. Irungu reiterated hiss submissions on the fourth issue. He alluded that the order of payment of TZS. 51,646,896/= being a substitute for the granted reliefs of reinstatement and compensation was wrongly made by the Arbitrator. He added that the law does not allow the CMA to impose time limit within which the awarded party to be paid because it's a matter which involves execution process pursuant to Section 89(2) of ELRA.

In alternative Mr. Irungu submitted that since the respondent's termination was fair, he is not entitled to reliefs awarded by the Arbitrator. To support his submission, he referred the Court to the case of **Tanzania Breweries Limited (TBL) Vs. Luciano Ngallya Maganga, Labour Revision No. 90 of 2019** (unreported). In the upshot, the counsel urged the court to allow the application, revise and quash the CMA's award.

In reply, Mr. Kitwika started with the first issue where he submitted that the CMA had a genuine gist that the Applicant had no valid reason to terminate the Respondent. He stated that on the basis of the evidence of DW1 and DW2, the applicant failed to prove the validly

of the termination. That TRA which has authority and mandate on tax and other duties on behalf of the Tanzanian government proved that the release of the customer's shipment identified as AWB4457519791 was done on proper procedure. He went on to submit that the applicant wrote a letter to TRA notifying the Agency regarding non-declaration of certain import consignments into Tanzania and subsequent non-payment of the fiscal liabilities due on these shipments. He stated that on the said letter, it contained a list of sixty-seven (67) consignment names and number in which the consignment No. AWB4457519791 which form the reason for termination was included. That in reply TRA notified the applicant sixty-four (64) consignments from the attached list did not follow procedures while three (3) consignments including consignment No. AWB4457519791 Ramani Investment Limited was excluded from the list hence; there was no valid reason for termination. It was further submitted that the respondent tendered release order (Exhibit C2) to prove payment of tax of the contested consignment.

Mr. Kitwika submitted further that the respondent has never admitted that his signature was used instead, he requested the applicant to provide footage of CCCTV camera because in the bonded warehouse there are more than 20 CCTV cameras, and the CCTV will directly show

who used the password and who move the consignment which is said to have more than 46 kg. Further that the respondent was not working in the bond department which has its own management, adding that the release of a consignment is not a task of one person therefore it was not possible for the respondent to accomplish the same.

Mr. Kitwika submitted further that the respondent requested for the **IP address** of the laptop used to login but the applicant ignored his request. That DHL employees are required to have a registered finger print access to enter the bonded warehouse therefore, the CCTV footage was necessary. He went on to submit that the voluntary self-disclosure letter dated 21st May 2020 availed a list of sixty-seven (67) consignment under investigation including the shipment alleged to respondent. He stated that TRA replied the letter on 09 June 2020 to the applicant and in the availed list TRA excluded 3 shipments which are no. 4457519791, 4920543353 and 2020743550 all for Ramani Investment Limited and the respondent alleged shipment No. 4457519791 Ramani Investment Limited was among of the excluded consignment. He insisted that TRA confirmed the shipment to have followed all the procedures but yet the applicant maliciously accused the respondent knowingly he has no reasonable reasons for those allegations.

As to the allegation that the respondent admitted the allegations Mr. Kitwika strongly disputed the same. He submitted that employers are required to terminate employee on valid reason as was held in the case of **Youth Dynamix v Fatuma A. Lwambo Revision No. 427 of 2013** (unreported). He further argued that if the reason for termination is not fair and is unreasonable, it amounts to unfair termination as it is the decision in the Court of Appeal case of **Elia Kasalile& 20 others v. The Institute of Social Work, Civil Appeal No. 145 of2016 - [2018] TZCA 92**

As to the second issue Mr. Kitwika submitted that the procedure was not fair as DW1 was riding two horses at the same time. He was the complainant, supervisor, manager and at the same time member of disciplinary committee who ruled over the unfair termination. He submitted that the supervisor of the bond where the allegation occurred was never the complainant nor the witness as this alert malice, and the respondent was served with two charge sheets. Mr. Kitwika argued that being the complainant and at the same time the decision maker/member at the disciplinary committee forms an alert to malice and whims hence unfair termination. He therefore urged the court to dismiss or strike out this Application with costs due to maliciously allegations.

Mr. Kitwika continued to submit that the grounds for termination were gross negligence, failure to follow company procedures and bringing the DHL brand into disrepute, grounds which don't fall under the four grounds that may justify termination. He insisted that the respondent herein has never committed any misconduct for Nine (9) good years while working as an employee of the applicant into different capacities or given any oral or written notice for misconduct.

Regarding the third issue, Mr. Kitwika submitted that the applicant failed to argue on illegality of award and fail to note the arbitrator is not bound to consider the evidence even if its immaterial evidence thus, the revision lacks merit and attracts a dismissal.

As to the last issue Mr. Kitwika submitted that there are no conflicting views as to whether the Arbitrator may award reinstatement and payment of the salary which the respondent deserves when he was not at the office at the time of the unfair termination. That the interpretation of the provisions of Section 40 (1) (a) of the ELRA literally empowers the arbitrator to order reinstatement and payment of salaries respondent missed when he was out of office for unfair termination.

It was further submitted that the applicant is trying to mislead translation of the said provision of the law which provide for an award of

not less than twelve months. He argued that for the certain cases arbitrator may award compensation of more than 12 months salaries with efficient reason on the same. That it's clear on the said Section the compensation is monetary and not a substitute of any other relief. He added that the same is also the position in the case of **Edwin Ntundu v. Plan International Tanzania, Revision. No. 250 of 2013** where it was held;

> *"In my view the arbitrator was wrong to reach such a decision because the law provide for an award of not less than twelve months remuneration"*

Mr. Kitwika submitted further that the relief of reinstatement and compensation are not dependent on each other arguing that it is a trite law that failure to order reinstatement as prayed by the complainant in the case of unfair termination amounts to compensation of not less than 12 months. Mr. Kitwika stated that the respondent herein prayed for 60 months' salary at CMA because nevertheless, the unfair termination the applicant herein has defamed the respondent by the first charge of dishonest and fraud which caused difficulty for the respondent to get another job due to bad job history which was unfairly terminated. On

the reasons stated above, Mr. Kitwika urged the court to dismiss the application for lack of merit. In rejoinder Mr. Irungu reiterated his submissions in chief.

After considering the rival submissions of the parties, CMA and court records as well as relevant laws I find the court is called upon to determine the following issues; whether the applicant had valid reason to terminate the respondent, whether the applicant followed procedures in terminating the respondent and what reliefs are the parties entitled to.

Starting with the first issue as to whether the applicant had valid reasons to terminate the respondent; it is trite law that employers are required to terminate employees only on valid and fair reasons in terms of Section 37 of ELRA. The relevant provision is in line with Article 4 of the **Convention No. 158** of International Labour Organization which provides inter alia 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 operation*

requirements of the undertaking, establishment of services." (Emphasis is mine).

In the matter at hand, the respondent was terminated on the ground of misconduct at it is reflected in the termination letter (exhibit D7). The respondent strongly alleges that he was unfairly terminated on the ground of misconduct because he has never been charged with the mentioned misconduct. After examining the record, I have noted that when summoned at the disciplinary hearing (exhibit D2) the respondent was informed of the following misconduct; gross negligence, failure to follow company procedures and bringing the DHL brand into disrepute. Looking at the nature of the charged offences, it is my view they all fall under misconduct. Therefore, the respondent's allegation that he was terminated with the offence which he has never been charged with lacks merit. The disciplinary hearing committee found the respondent guilty with all the charged misconducts as reflected on the disciplinary hearing minutes (exhibit D3).

Beginning with the misconduct of gross negligence, the same was defined in the case of **Twiga Bancorp (T) Ltd. vs. David Kanyika, Lab. Rev. No. 346 of 2013** Dar es Salaam where Rweyemamu J. (Rtd) defined it as:-

"a serious carelessness, a person is gross negligent if he falls far below the ordinary standard of care that one can expect. It differs from ordinary negligence in terms of degree".

There are three principles set in a test for a tort of negligence **which were established in the case of Donoghue vs. Stevenson [1992] UHKL, 100** as follows:-

"i. That there was a duty of care,

ii. That there was a breach of that duty,

iii. That the breach of the duty caused loss."

The above elements were also adopted in the Tanzanian case of **Tanzania Revenue Authority Vs. Thabit Milimo and Another, Lab. Div. DSM Rev. No. 246 of 2014 [2015] LCCD 1 (191)** where Nyerere J. (Rtd) held that:-

"In the law of negligence liability arises where:-

(i) There is a duty of care and a person breaches that duty as a result of which, the other person suffers loss or injury/damage.

(ii) 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.

(iii) Negligence is the opposite of diligence or being careful."

In the matter at hand, the particulars of the gross negligence were that the respondent released the customer's shipment under AWB: 4457519791 from a DHL facility without relevant paperwork. The conduct was interpreted as part of an effort to foster tax evasion. It was further alleged that the respondent changed shipment status from 'H Hold' to 'R Condition' and moved it from bonded store the same day without following due process to ensure that customs duties and taxes were fully paid with the correct paperwork. During disciplinary hearing, the respondent strongly denied the allegation tabled against him. However, after the applicant presented evidence from Air Cargo Automation System (ACA) which showed that the respondent's username and password were used to scan out the shipment and after the evidence was presented and shown from the system, the respondent admitted that his user ID was used to scan out the shipment in question. This is reflected at page 4 of the disciplinary minutes (exhibit D3) where it was recorded as follows:-

"The alleged agreed that his user ID was used to scan out the shipment as proven by the evidence from the system, but he claim that he was not responsible with the said shipment, but he is willing to be punished for sharing his password but not to release shipment from bond".

Even in his appeal form (exhibit D5) the respondent admitted that his username and password were used but he went on to claim that it was a normal practice of the employees, hence the misconduct was not so serious to warrant termination. It is also pertinent to note that the applicant's witnesses during arbitration testified that the respondent attended trainings of information security awareness, the fact which was not disputed by the respondent.

On the basis of the above analysis and findings, it is my view that the respondent was rightly found guilty of gross negligence as he had a duty to keep his username and password to himself, failure of which he is responsible for any action that will be done with his credential.

As rightly submitted by Mr. Irungu, the respondent did not reveal who he shared his username and password with so as to facilitate smooth investigation process, therefore it was proper to hold him responsible for the misconduct. I am not in disregard of the evidence

tendered by the respondent to prove that the contested consignment was dully paid tax. After examining the release order (exhibit C2) tendered by the respondent, it shows that taxes for the contested consignment was paid on 26/05/2020 which was after the date when the shipment was released on 30/04/2020. At this point, even the exhibit in question also proves that there was violation of procedures.

As to the second and third misconducts, it is my view that the same were also proved based on the findings above. The applicant witnesses testified at the CMA that any tax relevant to any consignment has to be paid first before release of the relevant consignment. Such procedure was not contested by the respondent and in this application it is crystal clear that the required procedures were not followed.

It should be noted that under Section 39 of the ELRA, the burden of proof on the fairness of termination is on the employer, but the proof is on balance of probabilities pursuant to Rule 9(3) of GN. 42/2007 (See also the cited case of **Amina Ramadhani Vs. Staywell Apartment Ltd)**. In this case, I find the applicant to have discharged his burden and proved on balance of probabilities that the respondent committed the charged misconducts. In the event I find the applicant had valid

reason to terminate the respondent. Thus, the Arbitrator's findings that the respondent was unfairly terminated is revised and set aside.

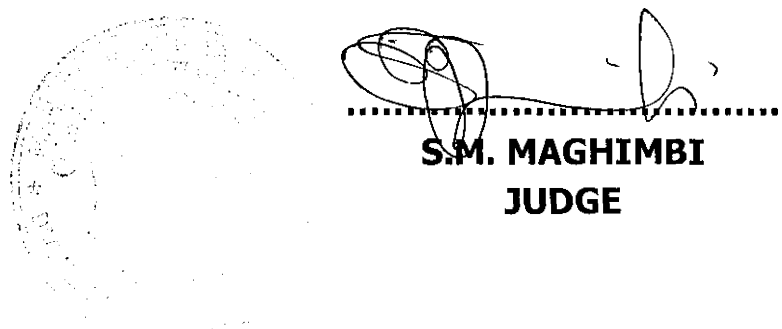
Turning to the second issue as to whether the applicant followed procedures in terminating the respondent. The procedures for termination were followed as the records reveal. As submitted by Mr. Irungu and reflected on the records, an investigation was conducted, the applicant was served with the notice to attend disciplinary hearing and proof of minutes of the disciplinary hearing (exhibit D3). As per the cited Rule 13 of the Code, procedures in handling termination on misconduct include investigation, notification of disciplinary hearing, hearing and the decision of the committee. The records show further that the respondent was given 5 days to prepare for the disciplinary hearing and at the hearing he was given an opportunity to defend himself and he was afforded an opportunity to mitigate. He even lodged an appeal which was not successful. Up until this point, all the procedures were followed. However, the respondent has alleged a violated pprocedure as indicated in the respondent's referral form (CMA F1), that there was a change of charge sheet. The respondent alleges that he was firstly served with a chargesheet which had different misconducts from the ones served on the second time.

On my part having perused the records, the record shows that the first charge sheet was served to the respondent on 29/05/2020 which had three misconducts namely; dishonest and fraud, failure to follow company procedure and bringing the DHL Brand into disrepute. The second charge sheet was served to the respondent on 04/06/2020 which had the following misconducts gross negligence, failure to follow company procedures and bringing the DHL Brand into disrepute. On this aspect it is my finding that so long as the disciplinary hearing was not convened yet the applicant was at liberty to change the charges levelled against the respondent basing on the investigation findings. The important thing is to ensure that the applicant was properly served with the amended charge sheet within sufficient time required by the law. Since no disciplinary hearing was held in respect of the first charge sheet, and in the second charge sheet as pointed above the respondent was served on 04/06/2020 and the disciplinary meeting was held on 10/06/2020 it suffices to conclude that the respondent had reasonable time to prepare for his defense pursuant to Rule 13(3) of the Code. In the premises, in this application all the termination procedures were followed hence the termination procedurally fair.

Coming to the last issue, since it is found that the respondent was fairly terminated both substantively and procedurally, I find the present application to have merits and it is hereby allowed. The award of the CMA is consequently revised and set aside.

It is so ordered.

Dated at Dar es Salaam this 17th day of August, 2022.



S.M. MAGHIMBI
JUDGE