IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 371 OF 2021

(Arising from the award of Commission for Mediation & Arbitration of DSM at Ilala Dated 29th June 2020 in Labour Dispute No. CMA/DSM/KIN/188/19/122)

ALLY HADJI.....APPLICANT

VERSUS

MWANANCHI COMMUNICATION LIMITED.....RESPONDENT

JUDGEMENT

K. T. R. MTEULE, J.

8th September 2022 & 23rd September 2022

This Revision application arises from the award of the Commission for Mediation and Arbitration of Dar es Salaam, Kinondoni (CMA) delivered by **Hon. Mbena, S. Arbitrator**, dated 29th day of June 2020 in **Labour Dispute No. CMA/DSM/KIN/188/19/122**. The Application is instituted by the employee (the Applicant) against the employer (the Respondent). The Applicant is praying for this Court to call for the record of the proceedings and the award of the CMA in the aforesaid Labour Dispute, revise quash and set aside the award therein. The Applicant is further praying for costs of this application.

From what is gathered from the CMA record, as well as the affidavit and counter affidavit filed by the parties, the applicant was employed by the

respondent from 1st August 2006 under permanent terms. His contract was terminated on 21st Day of February 2021 while holding a position of Assistant Transport Supervisor to which he was promoted from the position of a driver. The termination was due to an allegation of misconduct (gross negligence) which faced the applicant. The allegation was due to loss of fuel card which went missing and the applicant was alleged to have been in knowledge of the incidence but neglected to report it. Disciplinary proceedings were held and the applicant was accordingly terminated from the employment.

Dissatisfied with the employer's termination decision, the applicant filed the Labour Dispute No. CMA/DSM/KIN/188/19/122 claiming to have been unfairly terminated and for payment of TZS 40,000,000.00. At the CMA arbitrator found that the reasons and procedures for the applicant's termination were fair and decided the matter against the Applicant. The arbitrator found that applicant's termination was both substantively and procedurally fair hence awarded nothing apart from certificate of service. This decision aggrieved the applicant and triggered this application for revision.

Along with the Chamber summons, the applicant filed an affidavit sworn by himself, in which after expounding the chronological events leading

to this application, alleged to have been unfairly terminated in both aspects substantively and procedurally. The applicant is of the view that the arbitrator failed to consider his evidence in making the findings.

Paragraph 4 of applicant's affidavit contains six legal issues as reproduced hereunder:-

i) The Honorable arbitrator erred in law and facts by holding that the applicant was not unfairly dismissed from employment.

ii) The Honorable arbitrator erred in law and facts by not taking into consideration the specific indicators of unfair termination even after witness DW2 openly admitted in the Course of cross examination that the applicant had been dismissed out of frustration to save the face of the organization as the things had not been going well and no one was getting punished.

iii) That the Honorable arbitrator forcibly admitted document tendered as D8 which was claimed by DW2 to be a letter of admission of guilty which upon inspection did not contain any words amounting to confession of admission but still admitted the document despite of objection by Counsel for the applicant and referred to the same at paragraph 2 of the award.

iv) The Honorable arbitrator was wrong to come to the conclusion of dismissal of the applicant while the hearing was still pending was wrong and that he had rightfully on a balance of probability.

v) The Honorable arbitrator was wrong to find that, the respondent had on balance of probability as is stated at paragraph 2 of page 8 of the award found the applicant liable for the gross negligence, as the greatest negligence was the loss of fuel card by another employee and not the applicant specifically and he had reported the matter as soon as it come to his attention and that he had not been charged or reported to the police as other employees had but still was punished by dismissal for the sake of saving face of the department in front of the management.

vi) The arbitrator failed to consider evidence submitted by the applicant, to the extent that the applicant had never been found liable for any gross misconduct, that he had taken all reasonable measure to report loss and was not the source of the loss in the first place and respected and adhered to the chain of command and did report matter to superior as was required.

The application was challenged through a counter affidavit sworn by Mr. Joseph Kesagero who is the Respondent's Legal and administrative manager. The deponent in the counter affidavit vehemently and strongly disputed applicant's allegation of unfair termination.

The application was disposed of by a way of written Submissions. The Applicant enjoyed legal services from Sama Attorneys whereas the Respondent was represented by Mr. Juventus Katikiro, Advocate, from a firm styled as Apex Attorneys Advocates. I appreciate their rival submissions which will be considered in drafting this Judgement.

Having gone through the parties' submissions and their sworn statements together with the record of the CMA, I am inclined to address two issues. The first issue is **whether the applicant has adduced sufficient grounds for this Court to revise the CMA award** issued in Labour Dispute No. CMA/DSM/KIN/188/19/122 and secondly, **to what reliefs are parties entitled**?

In addressing the issue as to **whether the applicant has adduced sufficient grounds for this Court to revise the CMA award**, I will consider the six grounds of revision listed in the affidavit all together

focusing on two aspects of fairness of termination namely fairness of reason and fairness of procedure.

A to whether there was unfairness in the termination of employment in terms of both reasons and procedures, there are standards an employer must observe internationally and nationally to ensure fairness in labour practices in terminating an employee. Termination of employment is said to be fair if it complies with **Section 37 of the Employment and Labour Relation Act , Cap 366 R.E 2019** which provides:-

> *"Section 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."*

Internationally, Article 4 of ILO Termination of Employment Convention, 1982 (No. 158) provides: -

> *"Article 4: 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 or services."

In the case of **Tanzania Revenue Authority V. Andrew Mapunda,** Labour Rev. No. 104 of 2014 it was held that: -

> *"(i) It is the established principle that for the termination of employment to be considered fair it should be based on valid reasons and fair procedure. In other words, there must be substantive fairness and procedural fairness of termination of employment, Section 37(2) of the Act.*
> *(ii) I have no doubt that the intention of the legislature is to require employers to terminate employees only basing on valid reasons and not their will or whims."*

The applicant herein was terminated from employment for allegedly having committed misconduct, that is failure to act in good faith and resulting to gross negligence as stated in Exhibit D-6 (termination letter).

In his submissions the applicant's counsel submitted that there are indicators of unfair termination. He referred to what he said DW2 admission that the applicant had been terminated out of frustration to save the face of the organization since things were not going well as someone needed to be punished. He challenged the arbitrator's finding

at page 8 paragraph 2 of the award that the offence was repetitive, as having been influenced by DW2 false statements that the applicant admitted negligence in Exhibit D8 which clearly spell out something else. He quoted the contents of exhibit D8 which contains information about stolen engine which has never been a subject of applicant's disciplinary prosecution.

He further faulted the arbitrator's finding of negligence for the missing fuel card while the applicant reported about the loss to his supervisor as required who neglected to take necessary steps. In his view, the arbitrator failed to define what were the boundaries of the responsibilities of the applicant.

According to the applicant's submission, the applicant's supervisor one Philip Ringo admitted in the disciplinary committee that he received the information of the missing fuel card. The applicant's counsel referred to page 5 of the disciplinary committee minutes which were admitted as Exhibit D5 where the supervisor admitted the receipt of the information of the missing fuel card from the applicant which in his view, tallies with the contents of Exhibit D2 which is the statements of the applicant where he stated the steps he took after noticing the missing fuel card including reporting to his supervisor.

Regarding procedural fairness, it is the submission of the applicant's counsel submitted that the principle of natural justice was not adhered to by the disciplinary committee because DW2 influenced the committee's decision by introducing extraneous matters by claiming that they have lost a lot of money due to lack of reporting and that he was not ready to continue working with the applicant but he wanted him to be dismissed. He cited page 2 of the disciplinary committee proceedings. He referred to the case of **Paul Mahindi and Athumani Dimwe versus Williamson Diamond Limited**, Revision No. 9 of 2014, High Court Labour Division page 33 last paragraph where the Hon Court faulted the decision arrived by influence of superior staff in the disciplinary meeting.

He faulted the arbitrator for having failed to take note of the new charge which was framed in the disciplinary committee meeting.

In response, Mr. Juventus Katikiro submitted that it is a settled principle of law that when the procedure for termination of employment was followed and the reason is proved by the employer, then termination is said to be fair. He cited the case of **National Microfinance Bank versus George Tioth Mwaikusa (Unreported)** Revision No. 510 of 2018, unreported.

According to Mr. Katikiro, the arbitrator was correct in finding fairness of the termination in terms of procedure and reasons.

From the CMA record, I have noted that it is undisputed that a fuel card was missing which resulted to a loss of TZS 7,746192.00. See Exhibit D-2. (Charge sheet) and D-3 (applicant's written statement). The CMA was tasked to consider as to whether the applicant was responsible with the loss.

It is on record that the applicant was working as an Assistant Transport Officer (See Exhibit D-7 (applicant's job description). Being a transport officer means the applicant had a duty of supervising all motor vehicles operations.

The arbitrator upheld the decision of the disciplinary committee which held the applicant liable with the loss of the fuel card by having been negligent in not reporting the incident to the relevant authorities. I have gone through the proceedings of the CMA as well as the proceedings of the disciplinary committee, and I agree with the applicant's submission that it is on record according to page 2 of paragraph 2 of Exhibit D5 which is the proceedings of disciplinary committee, that DW2 who was the supervisor of the applicant one Philip Ringo admitted having received the report of the loss of the fuel card. I take this information as

a confirmation of similar information given by the applicant in his statement which was admitted as exhibit D2. In my view, from the foregoing evidence records, the applicant took step to inform his supervisor about the loss of the fuel card. I could not see a reason why the disciplinary committee held him personally responsible with the loss. In my view, by reporting to his supervisor he performed his duty, and it was upon the authority to take necessary steps to prevent the loss.

I do not agree with the respondent's counsel that a mere holding of disciplinary committee confirms the fairness of reason and procedure for termination. I borrow leave from my brother Mipawa, J in the case of **Paul Mahidi** cited supra by the applicant that the arbitrator has a duty to consider the fairness of the substance of the disciplinary hearing. The arbitrator has a duty to assess what happened in the disciplinary committee. In my view, from the disciplinary committee, there was no prove of negligence on the part of the applicant. I therefore find that the arbitrator was wrong in finding fair reasons in the applicant's termination.

Having found that there was no fair reason for termination, the next question is whether the applicant's termination was procedurally fair.

It is the submission of the applicant that there was a new offence which was created during the disciplinary hearing which the applicant was not prepared with. I have compared the charge and the findings of the committee. There is no correlation between the charge and what was the findings of the committee. The charge alleged negligence due to failure to report the incidence of the loss of the fuel card to the management, but the outcome of the disciplinary committee confirmed an offence of failure to comply with the supervisor's instructions to report to Total. These are two distinct offences, since it was vivid in the proceedings that the offence of not reporting to the management was not confirmed as it was evidenced that the applicant did report to his supervisor. This means the applicant was not afforded right to be heard on the offence in which he was convicted with.

Right to be heard is a fundamental one as provided for under **Rule 13 of GN 42/2007**. In the case of **Abbas Sherally & Another Vs. Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 33 of 2002 (unreported) it was held;

> "***The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the Court in numerous decisions. That right***

> ***is so basic*** *that* ***a decision which is arrived at in violation of it will be nullified,*** *even if the same decision would have been reached had the party been heard,* ***because the violation is considered to be a breach of the principle of natural justice."***

Holding the applicant liable with an offence which was not in the charge sheet tainted the fairness of the procedure. The arbitrator ought to have noted this and find the procedure not fair.

Apart from the above irregularity, the arbitrator has a duty to ensure that termination procedures comply with the law. Since the termination was for misconduct, the relevant provision is **Rule 13 of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42** which provides: -

> *"Rule 13(1) - The* ***employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held."***

It does not feature anywhere in the record that there was any investigation which was held in respect of the alleged misconduct. This is another irregularity which renders the disciplinary procedure unfair.

From the above findings, I find the 1st issue answered affirmatively that there are sufficient grounds established by the applicant for this court to revised and set aside the CMA award.

Lastly what are the reliefs entitled to parties, unlike CMA I have found that the respondent had no fair reason terminate the applicant and he did not comply with fair procedure. However the applicant claimed for general damages to the tune of Tshs. 28,844,500.00. This was not proved hence it can't stand.

In the circumstances the CMA award is hereby set aside and replaced with the following:- I award the respondent twelve months remuneration as compensation for the unfair termination. The applicant is also entitled to other statutory terminal benefits if not yet paid as per the amounts stated in the breakdown in the sheet attached with CMA Form No. 1 except the damages. The applicant is therefore entitled to the following:-

1. Severance pay TZS 211,500/=
2. 12 months compensation for unfair termination in total of TZS 7,236,000/=.
3. Notice of TZS 603,000/=
4. Leave allowance TZS 1,206,000/=

All these give a total of TZS 9,256,500.00 which will be entitled to the Applicant.

The application is therefore partially allowed to that extent. I give no order as to the costs.

Dated at Dar es Salaam this 23th day of September, 2022.

KATARINA REVOCATI MTEULE

JUDGE

23/09/2022