IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 125 OF 2021

Arising from the decision of the Commission for Mediation and Arbitration of DSM at Ilala) **(Uisso: Arbitrator)** dated 23rd February 2017 in Labour Dispute No. CMA/DSM/ILA/R.246/15/635

THE GOVERNING BODY OF THE COLLEGE
OF BUSSINESS EDUCATION..... APPLICANT

VERSUS

BITON CARSON MWENISONGOLE..... RESPONDENT

JUDGEMENT

K. T. R. MTEULE, J

01st September 2022 & 13th September 2022

Aggrieved with the award of the Commission for Mediation and Arbitration [herein after to be referred to as CMA] the applicant has filed this application for revision under Sections 91(l)(a)(b), (2)(a)(b)(c), (4)(a)(b) and 94(l)(b)(i) of the Employment and Labour Relations Act No. 6 [CAP 366 RE 2019]; Rules 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d) and 28(1)(c)(d) and (2) of the Labour Court Rules, GN No. 106 of 2017. The applicant is praying for this court to call for record, proceedings and subsequent award of the Commission for Mediation and Arbitration in Labour Dispute CMA/DSM/ILA/R.246/15/635 by Hon.

Alfred Massay, Arbitrator dated 19th February,2021 in order to satisfy itself on the appropriateness of the said award and give any other order.

At this point I find it worth, to offer a brief sequence of facts leading to this application as extracted from CMA record, and parties' sworn statements from the affidavit and counter affidavit. The Respondent was employed by the applicant as an Assistant Tutor. He was terminated on 08th May 2015 due to allegations of misconduct, said to have committed negligence which resulted into a loss to their employer to the tune of TZS 16,750,000.00. Following the termination, the respondent referred the dispute to the CMA vide the impugn labour dispute. In the CMA, the arbitrator found that the procedure for termination was not adhered to and consequently ordered the employer to pay the employee 12 months compensation. The total sum awarded was **TZS 34,680,000**.00. Being resentful with the CMA's Award the respondent filed this revision applications.

Along with the Chamber summons, in support of the application, an affidavit of the applicant was filed in which after elucidating the chronological events leading to this application, the applicant challenged the arbitrator for awarding compensation of 12 months on the reason of

procedural irregularities while in her view, the respondent was lawfully terminated.

In the affidavit, the applicant advanced seven legal issues for the revision as stated at paragraph 3 of the affidavit as follows; -

a) The Commission erred in law and in fact when it entertained this matter while it lacked jurisdiction.

b) The Commission erred in law and fact for holding that there was no evidence that the respondent was served with a notice to attend hearing, being the only alleged procedural error, which was an afterthought by the respondent, and total disregard of Exhibit D3 and Exhibit D12 being loss report and minutes of the hearing respectively.

c) The Commission erred in law and committed material irregularity for making a conclusion based on the oral testimony which contradicted documentary evidence namely Exhibit D3 and Exhibit 12 which were not dated 19th February 2021 based on the legal issues stated herein;

d) That this Honourable Court be pleased to give any other relief(s) it deems fit and just to grant.

The application was challenged by a counter affidavit of the respondent where all the material facts of the affidavit were disputed.

The application was heard by written submissions. Ms. Adelaida Ernest, State Attorney appeared and argued the application on behalf of the applicant (employer) while Mr. Stephan Mboje, Advocate appeared and on behalf of the respondent (employee). I thank both parties for complying with the Court's schedule and for their industrious work in the submissions.

Arguing in support of the first ground of revision that the CMA lacked jurisdiction, Ms. Adelaide Ernest submitted that applicant's principal duty is among other, to provide training on business related to professionals and in this regard, it is a public service institution. According to Ms. Adelaide, the respondent being employed by the applicant as a public institution, it means that he was a public servant and was bound by **Section 32A of the Public Service Act, G.N No.48 of 2016** which requires a public servant to exhaust all remedies under the Act, before seeking remedies provided under labour laws.

On the second ground regarding notice Ms. Adelaide Ernest faulted the arbitrator while citing pages 8 and 9 of the CMA award which in her view, disregarded Exhibit D3 and D12 being loss report and minutes of

the disciplinary hearing respectively. She stated that Exhibit D3 was admitted as evidence and that the said exhibit and the testimony of Izukanji Simwinga (PW1) indicated that several documents were lost including the notice of the respondent to appear before the Disciplinary hearing. In such circumstances she of the view that the allegation that the respondent was not served with the notice to appear is an afterthought. Citing the case of **Menrad Theobard Bijuka and Others v. Didas J. Tumain,** Civil Appeal No. 49 of 2019(unreported) Mr. Adelaida faulted the arbitrator for having not considered the evidence and exhibits and put them in an evidential perspective.

Regarding the **third** ground that the arbitrator erred in law in relying on oral testimony against documentary evidence, Ms. Adelaida submitted that it is an established principle that oral testimony cannot contradict documentary evidence. She cited **Section 101 of Tanzania Evidence Act, Cap 6 R.E 2019** and the case of **Agatha Mshote vs. Edson Emmanuel and 10 Others,** Court of Appeal of Tanzania, at Dar es salaam, (unreported). She averred that Exhibit D3 and D12 tendered by the applicant was never challenged, for that reason the CMA ought to have considered them in making its findings. To support her argument, she cited the case of **Anna Mosses Chicano v. Republic,** Criminal

Appeal No. 273 of 2091, Court of Appeal of Tanzania, (unreported). She added that **Rule 9 (3) of the Employment and Labour Relations (Code of Good Practices) G.N No 42 of 2007** requires an employer to prove on balance of probabilities and the same was done by the applicant by tendering Exhibit D3 and D12 but CMA failed to consider the same.

Submitting on the **fourth** ground, Ms. Adelaide submitted that the award and orders therein are unlawful, illogical, and improperly procured for failure to analyze the clear evidence of record. Ms. Adelaide identified what she thought to be the shortcomings as: - (a) holding that there was no evidence that the respondent was served with a notice to attend a hearing, (b) making a conclusion based on oral testimony against documentary evidence and (c) failure to consider Exhibit D3 and D12 and give it evidential perspective.

Regarding the fifth ground regarding reliefs, Ms. Adelaida challenged compensation of 12 months to the tune of TZS 34,680,000, for being baseless. In her view, even if there would have a procedural error, still 12 months award is baseless. To support her argument, she cited the case of **Felician Rutwaza v. World Vision Tanzania,** Civil Appeal No. 213 of 2019, Court of Appeal of Tanzania, at Dar es salaam,

(unreported). She added that the Commission erred in law for failure to consider that upon termination in May 2015, the respondent was paid one month salary instead of notice as per Exhibit D15. She thus prayed for the application to be allowed.

Opposing the application on **first** ground Mr. Mboje submitted that the issue of jurisdiction is already addressed by this Court after being raised by the applicant where it was found to lack legal stance. In his view, the Court is Functus officio on the issue.

Responding on the **second** ground, Mr. Mboje submitted that the arbitrator was right in his findings that the respondent was never served with the notice to appear, on the reason that no evidence was adduced to justify the service of the notice contrary to Rule 13 (2) of G.N No. 42 of 2007 which requires the employer to notify the employee about the allegation and disciplinary hearing date for preparation.

He added that Exhibit D3 (loss report) has no substances and the same was challenged by the respondent before the arbitrator. He is of the view that the alleged loss was supposed to be secondary evidence as per **Section 63 of the TEA, Cap 6 R.E 2019.**

Regarding Exhibit D12 (minutes of Disciplinary Hearing) Mr. Mboje alluded that nowhere the respondent signed to prove the attendance. He faulted the committee for not being impartial as its Chairman was involve in the saga which culminated into the respondent's termination. In his view, this is contrary to Rule 13 (4) of G.N No. 42 of 2007.

On third ground Mr. Mboje submitted that the case of Agatha and Anna Moses do not favor the applicant. He added that Exhibits can be challenged by the way of cross examination as it was done by the respondent during the hearing. He stated that the applicant failed even to tender a copy of the disputed notice.

On **fourth** ground Mr. Mboje submitted that by going through Exhibit D12 (minutes of Disciplinary Meeting), it shows that the decision of the Committee did not terminate the respondent from the employment rather recommended for a warning and refunding of the alleged loss something which contradicts the applicant's evidence.

On fifth ground Mr. Mboje averred that the decision to award 12 months compensation was reached after finding that the procedure for termination of employment was never followed by the applicant which led to unfair termination as per **Section 40 of the Employment and Labour Relations, Cap 366, R.E 2019**. He submitted further that the

applicant was against the agreed terms which required each party to the contract to issue the required notice before termination as justified by Clause 7 of Exhibit D1 (letter of Appointment).

The Applicant filed a rejoinder where she admitted that the issue of jurisdiction was already resolved by the court. She suggested that the court should disregard it.

Having gone through the submissions of the parties, what follows is the decision with regards to the merit of the application. I am of the view that the issue to be addressed is **whether the applicant adduced justifiable grounds for this Court to exercise its power to revise and set aside the CMA award.** To resolve this issue, the grounds of revision will be addressed one after another.

I start with the **first** ground concerning the issue of jurisdiction as raised in the applicant's submission. This should not take much time because in rejoinder, the applicant admitted that this court has already decided it hence it is ***functus officio***. This ground is therefore disregarded as prayed by the applicant in the rejoinder.

The **second** ground is **whether there was evidence that the respondent was served with notice to attend disciplinary**

hearing. I am aware that for termination to be fair the employer should comply with **Section 37 of the ELRA Act, Cap 366 R.E 2019 and Rule 13 of G.N No.42 of 2007;**

> *"13.- (1) The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held.*
>
> *(2) 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."*

Termination needs to be fair in both reason and procedure.

Having confirmed that the respondent failed to accomplish his PhD program sponsored by the applicant and register with another school without the approval of the applicant, the arbitrator found fairness in terms of reasons for the respondent's termination.

Regarding fairness of procedure, the arbitrator found the termination procedures to have been unfair for having not served a notice of disciplinary hearing upon the respondent. The procedure of terminating an employee under disciplinary ground is guided by **Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, GN 42 of 2004.** The relevant provision for the purposes of this matter is Rule 13 (2 and (3) as quoted hereunder:-

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

(2) 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.

(3) the employèe shall be entitled to a rensonable time to prepare for the hearing and to be assisted in the hearing by a trade union representative or fellow employee. What constitutes a reasonable time shall depend o of the circumstances and the complexity of the case, but it shall not normall be less than 48 hours,

(4)The hearing shall be held and finalized within a reasonable time strikes and chaired by a sufficiently senior management representative who shall no have been involved in the circumstances giving rise to the case."

In a bid to establish evidence of service of the notice to the respondent, the applicant's witness tendered a police loss report (exhibit D3) and stated that there are some documents relating to the matter which were lost including the notice of hearing. I have gone through the record and noted that Exhibit D3 (police loss report) clearly stated that there are some documents which were lost relating to case No. 246 of 2015. I am of the view that since the arbitrator admitted the loss report as exhibit,

he had a duty to consider it and make a finding in respect its evidential weight regarding of the service of the notice of hearing. Although he did not do so, I have gone to see whether the omission affected the outcome of the decision.

Service of notice is paramount to ascertain the fairness of the disciplinary proceedings. This is because, the notice was to inform the arbitrator as to when the notice was served so as to understand whether the employee had ample time to prepare for the hearing in accordance with Sub rule 3 of Rule 13 of GN 42 of 2004. The actual notice was crucial to ascertain as to whether the language used is appropriate and understandable as per sub rule 2. Lack of the actual notice left out so much important information which should have guided the arbitrator in finding the fairness of the procedure. It has to be noted that Section 39 of the ELRA imposes upon the employer the duty to prove the fairness of termination. It provides:-

> *"39. In any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair."*

From the above provision, it is upon the employer to ensure that all relevant evidential information is provided to the arbitrator to sufficiently inform him to the extent of being able to rule on the matter having

considered all the relevant circumstances provided in the law. Although the arbitrator did not sufficiently explained how he analyzed the evidence to arrive at the conclusion, I am of the view that he had a right conclusion that there was no sufficient prove that the applicant was properly served with notice to attend the disciplinary hearing. The Second issue is answered that the arbitrator did not error in finding that there was no evidence that the respondent was served with notice to attend disciplinary hearing.

Regarding the **third** ground that the arbitrator committed material irregularity for making a conclusion based on the oral testimony which contradicted documentary evidence namely Exhibit D3 and Exhibit 12 which were not dated 19th February 2021, basing on the legal issues stated herein, I have already held above that, Exhibit D3 which was the police loss report was not sufficient to prove that there was sufficient notice to the respondent to prepare and attend the disciplinary hearing. This is what guided the arbitrator to arrive to the conclusion that the procedure was unfair. Exhibit D12 which contains the minutes of the hearing of the disciplinary meeting was not an issue. The arbitrator's decision was based on lack of notice to attend the hearing. Since it is not disputed that the disciplinary hearing was heard, it means it was not necessary for exhibit D12 to be taken into consideration. I see no

relevance to discuss exhibit D12 which confirms undisputed fact. This issue is therefore redundant.

In the fourth issue the applicant is faulting the award asserting it to be unlawful, illogical and irrational and improperly procured for failure to properly analyze the evidence. From the findings in the first and the second issue, it is clear that the arbitrator was properly guided to arrive at the right conclusion that there was no sufficient service of notice to the respondent. This is what the basis of the award was. The allegation that the arbitrator failed to analyze evidence is unfounded.

On the fifth issue the applicant is disputing the award of TZS 34,680,000.00 as 12 months compensation and TSZ 5,780,000.00 as balance of notice. In applicant's view, this award does not have legal basis. There is no dispute that the termination was fair in terms of reason. As well the only procedure which was not complied with was issuance of notice to attend the disciplinary hearing. I agree with the applicant's counsel with regards to applicability of the case of **Felician Rutwaza versus Workd Vision Tanzania,** Civil Appeal No 213 of 2019 Court of Appeal of Tanzania at Dar es Salaam (unreported) in the circumstances of this case. Under this case, where the unfairness is only on the procedure, the award can be less than the minimum

compensation provided under **Section 40(1) (c) of the Employment and labour Relations Act.** Each case needs to be decided on its unique circumstances. Guided by authority in **Felician Rutwaza supra**, in this matter where the fairness is on procedure where the only defect is on the service of notice of hearing, I am of the view that awarding 12 months compensation may be on high side. I differ with the arbitrator on the number of months awarded.

In my view, 3 months compensation for that minor violation is sufficient.

I have gone through the proceedings to find the basis of the payment of TZS 5,780,000.00 as notice payment. I have noted that the letter of appointment informed the respondent that shall any part desire to terminate the contract, a three months' notice must be given or one month payment in lieu of notice. If the applicant was paid one month remuneration, I did not see a reason for further payment of 2 months. This payment of two months salaries instead of one month in lieu of notice has no legal basis.

The issue as to whether there are sufficient reason to revise and set aside the award of the CMA is answered affirmatively as the award sees to be excessive.

From the foregoing, it is my holding that the application is half successful to the extent that the amount awarded as compensation is excessive for the nature of the dispute. I therefore vary the number of months awarded as compensation to 3 months instead of 12 months. The payment of Tshs. 5,280,000/= was erroneously awarded, and therefore the CMA order thereof is hereby set aside.

It is so ordered.

Dated at Dar es salaam this 13th Day of September 2022.

KATARINA REVOCATI MTEULE

JUDGE

13 /09/2022