

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM**

REVISION NO. 240 OF 2021

*(Arising from the decision of the Commission for Mediation and Arbitration at Kinondoni
Wilbard G.M; Arbitrator Dated 22nd April, 2021 in Ref. CMA/DSM/KIN/908/19/36/2020)*

BETWEEN

MICHAEL KAKIZIBA APPLICANT

VERSUS

PANGEA MINERALS LIMITED RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

The application beforehand was lodged under the provisions of Section 91(1)(a) 91(2)(a), (b), (c) 91(4)(a); 94 (1)(b)(i) of the Employment and Labour Relations Act Cap. 366 R.E. 2019 ("the ELRA") and Rule 24(1), 24(2)(a), (b), (c), (d), (e), (f) and 24(3)(a), (b), (c) (d), 24(11) Rule 28(1)(a), (b), (c), (d) and (e) of The Labour Court Rules G.N. No. 106 of 2007 ("the Rules"). In both his Notice of Application and the Chamber Summons, the Applicant is applying for orders in the following terms:-

- i. That this Honourable Court be pleased to revise and set aside the partial findings of the award that termination was fair substantively in respect of the dispute No. CMA/DSM/KIN/908/19/36/2020 issued to the parties by Hon. Wilbard G.M.

- ii. That this Honourable court may be pleased to grant any other relief(s) which in its wisdom considers just to grant.

The dispute emanates from the following background; the applicant was firstly employed by the respondent as Pangea Minerals Limited. He was subsequently promoted to the position of Commercial Manager on 01/03/2017, the position he held until his termination on 02/12/2019. Aggrieved by the termination, he referred the matter to the CMA where the dispute was partly decided on his favour by holding that the respondent had valid reason to terminate the applicant but she violated some of the procedures for termination. Following such findings, the Arbitrator awarded the applicant a total of USD 47,250/= being six month's salaries compensation for the alleged unfair termination. Dissatisfied by the award, the applicant filed the present application raising the following legal issues:-

- i. Whether it was proper for Arbitrator to rule that the termination was fair substantively while no disciplinary hearing was conducted to prove the applicant's alleged offences.
- ii. Whether it was proper for the Arbitrator to rule that the termination of the applicant was substantively fair while the burden of proof was shifted to the applicant during the hearing before the CMA.

- iii. Whether it was proper for the Arbitrator to rule that the termination was substantively fair without giving reasons to his decision.
- iv. Whether it was proper for the Arbitrator to rule out that the termination was substantively fair while no job description or any other evidence was tendered during the disciplinary hearing to prove the alleged offence.
- v. Whether it was proper for the Arbitrator to draw the conclusion without analysing the evidence adduced before him.
- vi. Whether it was proper for the Arbitrator to rule that the termination was substantively fair while it is on record that the applicant was terminated on the offence he was never tried before.
- vii. Whether it was proper for the Arbitrator to rule out that the termination was fair substantively while the applicant was never availed the right to be heard during investigation.

The application was disposed by way of written submissions. Before this court, the applicant was represented by Mr. Alhaji A. Majogoro, Learned Advocate while Ms. Caroline Kivuyo, learned Advocate.

I will start with an issue raised by Ms. Kivuyo at the onset of her submissions. She pointed out in the notice of application; the applicant only challenged the partial findings of the award that the termination was substantively fair. He argued that on such aspect the applicant admits that the procedural aspect of the award is correct and fair and that the counsel had no leave of the court to amend the application to include the challenged procedural irregularities. She argued that the said allegation cannot be raised during submission because parties are bound by their pleadings. To support her submissions, the counsel cited the Court of appeal case of **NBC Limited & another Vs. Bruno Vitus Swalo, Civil Appeal No. 331 of 2019.**

Having gone through the records of this application, I find that indeed some of the issues framed by the applicant were irrelevant to this revision. To be specific, in the first issue, the applicant is challenging the Arbitrator's finding that the termination was fair substantively while no disciplinary hearing was conducted to prove the applicant's alleged offences. He however contradicts himself when he raised an issue as to whether the Arbitrator's finding that the termination was substantively fair was right while no job description or any other evidence was tendered during the disciplinary hearing to prove the alleged offence.

This answers his first issue that there was a disciplinary hearing conducted.

In addition to that, it was the finding of the arbitrator that the termination of the applicant was procedurally unfair and that is why the applicant was awarded compensation equivalent to six month's salaries. Therefore Mr. Majogoro is trying to turn the court to determine an issue which he is substantively not opposing because the findings of the arbitrator are contrary to what he is trying to impress the court with. On that note, I find that there is only one issue for me to determine in this case, whether the termination of the applicant was substantively fair. Tailoring this to the issues raised by the applicant, the issues are covered on the third issue whether it was proper for the Arbitrator to rule that the termination was substantively fair without giving reasons to his decision. And the fifth and sixth issue whether it was proper for the Arbitrator to draw the conclusion without analysing the evidence adduced before him and whether it was proper for the Arbitrator to rule that the termination was substantively fair while it is on record that the applicant was terminated on the offence he was never tried with.

At the onset of his submissions, Mr. Majogoro abandoned the fourth issue and remained with only five issued. As I have determined

above, my focus will be on the submissions which address the substantive fairness of the termination. It was Mr. Majogoro's submission that no allegation could be levelled against the employee if the same does not reflect the disciplinary policy and procedure of the employer as it is the requirement of Rule 11(1) of the Code. To support his submission, he referred the court to numerous decisions including the decision of the Court of Appeal case of **Peter Maghali vs Super Meals Limited (Civil Appeal 279 of 2019) [2022] TZCA 217 (22 April 2022)**. He then submitted that exhibit P5 does not serve purpose of the charge sheet, it is rather a show cause letter inviting the applicant to appear before investigation team. He insisted that no formal charge was served to the applicant.

He also submitted that during the disciplinary hearing the burden of proof was shifted to the applicant contrary to Sections 37(2)(a) and (b) of the ELRA which imposes the burden of proof to the employer. He submitted that the employer was duty bound to adduce evidence on the whole tendering process and prove that Gastech did not win the tender but the same was awarded to him unfairly by the applicant contrary to the company rules and procedures. That in disputes of unfair termination it is the employer's duty to prove that the termination was fair. To support his preposition, he cited the case of **Bernard Mtaki**

**and Abdallah Rasuli Vs. Williamson Diamonds Limited, Revision
No. 14 of 2013, High Court Labour Division, Shinyanga 2014
LCCD 1.**

Mr. Majogoro submitted further that in the impugned award, the Arbitrator did not indicate the type of proof he was referring to. He stated that the Arbitrator never mentioned the proof which made him arrive to his decision arguing that the judgement must be in conformity with the evidence adduced during hearing and must have the reason for the decision as in accordance with Rule 27(3) of GN. 67 of 2007. As to what should be included in the judgement the counsel referred the court to the case of **Stafood S/O Kabogo Vs. Athuman S/O Mauruti Mrisho, Land Appeal No. 06 of 2021** High Court Kigoma. The counsel strongly submitted that in this case, the Arbitrator failed to give reasons for his decision. He added that if the Arbitrator could have analysed the evidence properly, he wouldn't have reached to the conclusion he did. That the employment contract (exhibit P2) did not contain the applicant's job description to prove that the applicant was required to do what was held by the Arbitrator as among his duties. Regarding the relevance to tender job description Mr. Majogoro referred the court to the case of **Chemi Cotex Industries Ltd. Vs. Edia W.**

Mwakyoma, Revision No. 829 of 2019 High Court Labour Division at Dar es Salaam where it was held that:-

"... Worse still, no policy or regulation was tendered to show what was contravened by the respondent, as pointed out, even job description of the respondent was not tendered to enable both the Arbitrator and this court to assess as to whether, the respondent was aware that she was not aware that she was not supposed to take reject white dent from production to store..."

Mr. Majogoro submitted that likewise in the case at hand, the respondent had a duty to tender the job description to prove the duty of the applicant in relation to the misconduct committed. That looking at the letter written on 30th October, 2019 the offence titled as breach of trust was not listed however, the termination letter indicated that the applicant was terminated for breach of trust. He then argued that the reason for termination must be in conformity with the charges laid against the employee and that since there is no any charge of major breach of trust, then terminating the applicant on such ground is completely wrong.

Mr. Majogoro further submitted that since the CMA found that the termination in this case was unfair, they ought to have awarded the applicant the reliefs claimed in the CMA F1. To support his submission, he cited the case of **Lucy Mandara vs Tanzania Cigarette Company Limited (Labour Revision 185 of 2020) [2021] TZHCLD 62 (01 April 2021)**. In the upshot, it was submitted that the Arbitrator erred to award the applicant six months salaries as compensation for unfair termination since the termination in this case was unfair both substantively and procedurally. He thus, prayed for the prayers sought in CMA F1 to be granted.

In considering the reply submissions, I will also focus on the submissions addressing the substantive fairness of the termination. It was Ms. Kivuyo's submission that during the disciplinary hearing, the respondent as a complainant brought his witness and submitted documentary evidence to prove his case. She pointed to the evidence of John Bathrens (DW2) and the disciplinary hearing minutes (exhibit P7). She submitted that it is not true that the burden of proof was shifted to the applicant arguing that breach of trust may be caused by the employer or employee and the Arbitrator just stated that he will discuss the breach caused by the employee which is the gist of this case. She

argued that there is nowhere that the Arbitrator stated the applicant was bound to prove the case against him.

It was further submitted that the charges against the applicant was proved and at pages 18 and 19 the Arbitrator explained how the charges were proved by referring to various documents tendered by the respondent's witnesses. Ms. Kivuyo submitted that notwithstanding the fact that the burden of proof lies to the employer the law does not prohibit the Arbitrator to discuss the evidence adduced by the employee otherwise such evidence would be meaningless. She submitted further that the issue of substantive fairness is discussed from page 15 to 21 of the award. That at page 18 the Arbitrator explained how exhibit P22 proved the offence and at pages 18 to 19 the Arbitrator referred to Gastech registration of VAT and exhibit P28 which allowed Gastech to change quotation while other companies were not allowed. The counsel strongly submitted that the award was justifiable.

On whether the arbitrator properly analysed the evidence, Ms. Kivuyo submitted that the Arbitrator properly analysed the evidence and reached to the conclusion that the offence of major breach was proved. The counsel argued that they do not see the relevance of job description in relation to the fifth issue adding that the job description is contained

in exhibit P1. She submitted that the case of **Chemical Cotex Industries Limited** (supra) is inapplicable to this case.

As to the reliefs claimed, it was submitted that the termination was only partially unfair on procedural aspect hence the award of six months' salary was justified. That both the Arbitrator and the court can award less than 12 months considering the circumstances of the case. To support his position, he referred the court to the case of **Felician Rutwaza Vs World Vision Tanzania (Civil Appeal 213 of 2019) [2021] TZCA 2 (02 February 2021)**. Regarding the award of repatriation expenses, it was submitted that the applicant did not prove the alleged claim as he was employed at Dar es salaam and his employment was terminated in Dar es salaam hence, he had no reason to go back to Buzwagi where he was working. She added that exhibit P15 proves that the applicant's personal belongings were transported by the respondent from Kahama to Dar es salaam by Precision Air. She concluded by urging the court to dismiss the application. In rejoinder Mr. Majogoro reiterated his submissions in chief.

That being said, after considering the rival submissions of the parties, CMA and court's record as well as relevant laws I find the court is called upon to determine the following issues; whether the applicant

was fairly terminated substantively and the justification of the awarded reliefs.

Starting with the first issue as to whether the respondent had valid reason(s) to terminate the applicant; it is a trite law that employers are required to terminate employees only on fair and valid reason in terms of Section 37 of the ELRA. In the matter at hand, the applicant was terminated for major breach of trust on the way Gastech Enterprises (Vendor) has been handled as it is indicated in the termination letter (exhibit P13). At the CMA, the Arbitrator found that the respondent proved the misconduct in question. On his part, the applicant wants this court to fault the Arbitrator's findings on the reason that the respondent did not tender sufficient evidence to prove the alleged misconduct.

On this application I will not dwell much on the definition of breach of trust because the Arbitrator rightly explained such meaning and referred to numerous decisions which are confirmed by this court. The respondent strongly alleges that the applicant breached trust because he committed the misconducts listed in the investigation report (exhibit P22). The said report was the findings of the investigation conducted in respect of the vendor and invoice controls for Gastech, a contractor at Barrick Buzwagi Mine. The said report noted the following

deficiencies, that the vendor on boarding process was not sufficient, no contract for Gastech in place, 67.5% of Gastech invoices are done through sole source motivations, RFQ procedure not adhered to, quotations differ from invoices, quotes from Gastech obtained before RFQ process is started, management overrides specific requests from end users, change in quotation occurred, no evidence of approval of invoices from the end user and Gastech outbids competitors 95% of the time.

When confronted at the disciplinary hearing, the applicant denied the charges levelled against him. He defended himself that the deficiencies noted were not his responsibilities indicated in the job description. The respondent tendered the job advert for Commercial Manager at North Mara which was the same as core responsibility of Buzwagi Job advert. The respondent further tendered evidence to prove that in the past, the sole source was going through General Manager and later changed to go through Commercial Manager and the communication as such went to all employees (exhibit P18) the said notice was issued on 20/01/2017. The respondent was transferred to the position of Commercial Manager on 13/02/2017 therefore, even before he was placed to the relevant position there were changes of sole

source operations which he ought to know because he was employed since 2014.

Again, the respondent tendered Gastech quotation and invoices (exhibit P20) where on 26/02/2019 Gastech submitted the quotation with the grant total of 64,760 USD and the second day on 27/02/2019 Gastech submitted another quotation of similar work with RFQ: SR-BUZ 010710 (RFQ) 01 dated 25th February, 2019 of a grand total of 61,790 USD. Such circumstance shows that the vendor, Gastech was favoured other than other bidders who were not afforded opportunity to change their quotations. In the premises, all the above stated circumstances which directly involved the applicant as a Commercial Manager raises the question of trust against him. Thus, the respondent had valid reason to terminate him as rightly found by the Arbitrator.

I am not in disregard of the applicant's allegation that the Arbitrator shifted the burden of proof to him contrary to section 39 of the ELRA. On this aspect I join hands with Ms. Kivuyo that there is nowhere the burden of proof was shifted to the applicant. In the impugned award, the Arbitrator only discussed how the respondent lost the applicant's trust. As stated earlier on the basis of the evidence on record it is proved on the balance of probabilities that the applicant

breached the trust. The termination of the applicant was therefore substantively unfair.

Turning to the last issue as to parties reliefs, at The CMA the applicant prayed for the following reliefs; 60 month's salaries compensation for unfair termination, 9 months salaries as severance pay in the total of USD 62,833.50, one month salary in lieu of notice, 12 month's salaries as general damages in the total of USD 87,778.00, repatriation costs and subsistence allowance, clean certificate of service and salaries from the date of termination to the date of judgement.

Starting with the first relief of 60 months salaries compensation, The Arbitrator only awarded the applicant six months salaries as compensation for procedural unfair termination. Since it is found that only one minor procedure was violated by the respondent in termination the applicant, I find the award of 6 months salaries to be proper. This award is in light with the Court of appeal decision in the case of **Felician Rutwaza Vs. World Vision Tanzania (Civil Appeal 213 of 2019) [2021] TZCA 2 (02 February 2021).**

As to the claim of severance pay, the applicant is not entitled to the same because he was terminated with the proved ground of misconduct as in terms of section 42(3)(a) of ELRA. Regarding of notice

of termination, the applicant is entitled the same pursuant to section 44(1)(d) of the ELRA because the same is not indicated to be paid in the final payment of terminal benefits as indicated in exhibit P14. As to general damages the applicant did not prove how he was affected to be awarded the same.

Turning to the payment of repatriation and subsistence allowance, since it is proved that the applicant's belongings were transferred to the place of recruitment, Dar es salaam, he is not entitled to the allowances as he claimed. As for the certificate of service, it is a right to every employee and is awarded pursuant to Section 44(2) of ELRA thus, the applicant is entitled to the same. The award of salaries from the date of termination is normally awarded to an employee who has been reinstated to his employment which is not the order in the case at hand, such relief lacks merit.

In the result, based on the above findings, I find the present application to have no merits as I see no justification to interfere with the findings of the CMA. Consequently, this application is hereby dismissed.

Dated at Dar es Salaam this 03rd day of October, 2022.


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S.M. MAGHIMBI
JUDGE