IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 422 OF 2022

(Arising from an Award issued on 3/11/2022 by Hon. Wilbard G.M, Arbitrator, in Labour dispute No. CMA/DSM/KIN/449/21/6/22 at Kinondoni)

RAJAB ISMAIL ..... APPLICANT

VERSUS

SINCROSITE WATCH LIMITED ..... RESPONDENT

JUDGMENT

Date of Last Order:16/02/2023
Date of Judgment: 10/03/2023

B.E.K. Mganga, J.

Background of this application is that the parties herein were in employment relationship whereas the applicant was employed by the respondent as NOC Attendant for a one-year fixed term contract renewable. The parties renewed the said fixed term contract several times. The two maintained their employment relations until on 07th October 2021 when respondent terminated employment of the applicant allegedly due to insubordination and absenteeism. Dissatisfied with the respondent's decision, on 05th November 2021, applicant referred the matter to the Commission for Mediation and Arbitration

(CMA) where he filed a dispute complaining that he was unfair termination.

On 3rd November 2022, Hon. Wilbard G.M, Arbitrator, having heard evidence of the parties, decided the matter in favour of the respondent that termination was fair both substantively and procedurally.

Aggrieved with the award, applicant filed this application for revision. In his affidavit in support of the Notice of Application, applicant raised fourteen(13) grounds. But during hearing, counsel for the applicant dropped 5 grounds and argued 8 grounds mentioned hereunder:-

1. *That the Commission erred in law and fact in holding that the charge was served in accordance with the law and in compliance of 48 hours before disciplinary hearing contrary to the documents and witness testimony.*
2. *That the arbitrator failed to understand that Joachim Maftah(DW3) was not applicant's witness rather as he was internal observer according to the attendance register and his testimony under oath.*
3. *That the arbitrator erred in law and fact by relying on fabricated minutes which was not signed by the applicant.*
4. *That the arbitrator erred in law by failure to consider the applicant's evidence that he was sick.*
5. *That the arbitrator erred in law and fact in holding that failure to afford applicant right to mitigate is not fatal.*

6. *That the arbitrator erred in law and fact and misdirected himself and established her own fact that respondent directed applicant to appeal to the CMA.*

7. *That the arbitrator erred in law and fact by relying to the employer's standing order(exhibit S2) which was not binding the parties as it was neither signed by the employer nor the employee.*

8. *That the arbitrator erred in law and fact by holding that failure to conduct investigation is not fatal while that is amongst the preliminary mandatory procedure for conducting disciplinary hearing.*

In opposing the application respondent filed the counter affidavit of Adelica Bocko, her Principal officer.

When the matter was called for hearing, both parties enjoyed the services of learned Advocates. Mr. Meshack Dede, learned counsel appeared and argued for and on behalf of the applicant while Mr. Brave Saronga, learned counsel appeared and argued for and on behalf of the respondent.

Arguing the 1st ground, Mr. Dede submitted that, applicant was not afforded with a reasonable time to prepare for his defense contrary to Rule 13(3) Relations(Code of Good Practice) Rules, GN. No. 42 of 2007 which requires the employee to be given not less than 48 hours. He added that applicant was served with the notice of hearing on 29th September 2021 at 18:30 hrs and required to appear on 01st October

2021 at 11:00 hrs. He went on that the disciplinary hearing was conducted on 01st October 2021 at 11:00 hrs. To bolster his submission that it is mandatory to give an employee reasonable time to prepare for his defense, counsel for the applicant cited the case of ***TBP Bank PLC V. Poster Mahaba***, Consolidated Revision No. 324 and 326 of 2021, HC (unreported).

Arguing the 2nd ground, counsel for the applicant submitted that, Joackim Mafutah (DW3) testified that he appeared at the disciplinary committee as internal observer and not applicant's representative. He went on that applicant was not assisted by his fellow employee as required by Rule 13(3) of GN. No. 42 of 2007(supra) as a result, for reasons only best known to the respondent, chose DW3 to be representative of the applicant.

In regard to the 3rd ground, Mr. Dede contended that the disciplinary minutes were not signed by the applicant. He argued that applicant was given two minutes namely, Swahili version (exhibit S9) wherein DW3 appears as witness for the applicant and the English version (exhibit S10). He submitted further that applicant signed exhibit S10 and not exhibit S9. He added that both exhibits S9 and S10 were tendered by the respondent. He concluded that termination was unfair

because minutes of the disciplinary hearing were forged and cited the case of ***Dew Drop Co. Ltd vs. Ibrahim Simwanza***, Civil Appeal No. 244 of 2020 CAT (unreported).

Arguing the 4th ground, counsel for the applicant submitted that there was no valid reason for termination because applicant was sick and communicated to his immediate boss. He argued that as a proof thereof applicant tendered medical report (exhibit R2) after serving respondent a notice to produce. In regard to insubordination, counsel submitted that applicant was transferred from the position Technician Operator and duty station namely from Mikocheni area to field Engineer position to a new duty station at Salasala area both within the Region of Dar es Salaam. Counsel submitted that applicant accepted transfer and prayed to be issued with a new contract because his contract had expired. He clarified that; the said transfer was in August 2021 but the contract was expiring on 01st January 2022. During submissions, counsel conceded the said transfer did not affect condition of employment of the applicant including but not limited to salary.

In relation to the 5th ground, Mr. Dede submitted that, the disciplinary hearing Committee did not afforded applicant right to mitigate after finding him guilty contrary to Rule 13 (7) of GN. No. 42 of

2007(supra). To support his argument, counsel referred the Court to the case of ***Kimambo*** (supra).

On the 6th ground, Counsel for the applicant contended that the arbitrator established her own facts that applicant was notified to appeal to CMA and referred to termination letter (exhibit S10). He argued that termination letter said nothing in relation to appeal or referring the matter to CMA. He insisted that, that violated Rule 13(10) of GN. No. 42 of 2007(supra).

Arguing the 7th ground, counsel for the applicant submitted that, arbitrator relied on the respondent's standing order (exhibit S2) that was not signed by the applicant and the respondent. However, upon reflection, counsel conceded that there is no law requiring employees to sign the standing order. Counsel was quick to submit that applicant was unaware of the said standing order.

In arguing the 8th ground, Mr. Dede submitted that no investigation report was submitted before the disciplinary hearing committee contrary to Rule 13(1) of the Employment and Labour Relations(Code of Good Practice) Rules, GN. No. 42 of 2007. He referred the court to the case of ***Huruma H. Kimambo vs. Security Group (T) Ltd***, Revision No. 412 of 2016, HC (unreported) that it is

mandatory to conduct investigation and that failure to conduct investigation renders termination unfair. He further submitted that; applicant was absent from work for five days because he was sick as Exhibit R2. He notified the respondent that he was sick. In winding his submissions, counsel for the applicant submitted that termination was procedurally unfair and prayed the application be allowed.

On the other side, Mr. Saronga, learned counsel for the respondent responding to submissions made in respect of the 1st ground submitted that respondent complied with the 48 hours rule. He argued that applicant was granted 48 hours to appear before the disciplinary hearing. He went on that applicant was served with the notice on 29th September 2021 at 11:00 hrs and that hearing was on 01st October 2021 at 11:00 hrs as evidenced by both the notice and the disciplinary hearing form (exhibits S8 and 10) respectively. He argued further that paragraphs 4 and 5 of exhibit S10 that was signed by the applicant shows time the notice was served and time when hearing commenced that is to say at 13:00 hrs.

In regard to the 2nd ground, counsel for the respondent submitted that DW3 testified under oath that during the disciplinary hearing, he

was representing the applicant. He argued further that, that evidence corroborated exhibit S10 and exhibit S9.

Arguing the 3rd ground, counsel submitted that applicant did not sign the minutes because he promised to come back to sign as evidenced by (exhibit S14). Counsel submitted that there is nothing held to confirm what was submitted by Counsel for the applicant in relation to ***Dew Drop case*** (supra). He submitted that there was no objection at the time of tendering both exhibit S9 and 10. He concluded that claims that S9 was fabricated is an afterthought.

Regarding the 4th ground, counsel for the respondent submitted that applicant committed the misconduct of insubordination. He submitted further that applicant was transferred to new duty station but he did not report despite of several reminders as evidenced by exhibit S5, S7 and S15. He insisted that there was valid reason for termination as evidenced by exhibit S1 and S2. Counsel submitted further that Clause 10 of the contract of employment (exhibit S1) and Section 16.2 of the Standing Order (exhibit S2) gave room respondent to transfer applicant to another station. He strongly submitted that applicant demanded more salary as evidenced by his letters (exhibit S4 and S6.

On the issue of medical report (exhibit R2), Counsel submitted that, the same was challenged by the respondent as there was no original. He submitted further that applicant served respondent with the notice to produce on the hearing date and respondent informed the arbitrator that the original medical report was in possession of the applicant himself. On the other limb, counsel for the respondent submitted that there was no sick leave that was issued by the respondent. He added that applicant knows where he got the said medical report (Exhibit R2). He insisted that, chart messages (exhibit S14) between applicant and the Human Resource Manager of the respondent (DW1) shows that he was directed to follow procedures of seeking permission.

Arguing the 5th ground, counsel for the respondent submitted that exhibit S9 shows that applicant was afforded right to mitigate but did not use that opportunity.

In respect of the 6th ground, counsel for the respondent submitted that DW1 testified that applicant was advised to go to CMA because there was no one to hear his appeal as evidenced by exhibit S12. He submitted that, that evidence was not challenged.

Arguing the 7th ground, counsel for the respondent submitted that there was no objection at the time exhibit S2 was tendered. He was quick to submit that the arbitrator did not rely on Exhibit S2.

In regard to the 8th ground, counsel for the respondent submitted that, given the nature of the charge and the fact that during disciplinary hearing applicant pleaded guilty to the charges, there was no need of tendering investigation report. He further submitted that a reminder letter can serve the purpose of investigation report. He went on that applicant was reminded by exhibit S5, S7 and S15. To support his submissions that reminder can serve the purpose of investigation report, counsel referred the court to the case of ***Ramadhan Masud vs. Bank of Africa***, Revision No. 391 of 2020, HC (unreported) and ***Kilimanjaro Plantation Ltd V. Nicolaus Ngowi***, Revision No. 40 of 2020, HC (unreported). Counsel for the respondent prayed the application be dismissed.

In rejoinder, Mr. Dede, counsel for the applicant simply reiterated his submission in Chief.

I have examined evidence in the CMA record and considered submissions of the parties in this application and find that the main

issues between parties are availability of valid reason for termination and compliance with procedures for termination.

Section 37 of the Employment and Labour Relations Act [Cap. 366 R.E 2019] provides in an ambiguous term that, in any termination of contract of employment, the employer must establish that she had valid reason and adhered to fair procedure of termination. Requirement of presence of valid reason for termination is also provided for under Article 4 of the 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 operation requirements of the undertaking, establishment of services. (Emphasis is mine).*

I will begin with presence or absence of valid reason for termination. It is apparent on CMA record that, respondent terminated employment of the applicant due to insubordination and absenteeism. It was argued by counsel for the applicant that applicant was sick and relied on the medical report to argued that the misconduct of absenteeism was not proved. The said exhibit was challenged by the respondent on the reason that he did not issue the applicant with the sick leave. In terms of Guideline 9(1) of the schedule to the

(Employment and Labour Relations (Code of Good Practice) Rules GN. No. 42 of 2007, absent from work without permission or without acceptable reason for more than five working days, if proved, constitutes serious misconduct leading to termination of employment. it is undisputed that applicant was charged with absenteeism. The charge relating to absenteeism read as follows:-

> *"That on multiple occasions during the months of August and September 2021, amounting to more than five working days, without official permission you have failed to appear in the office and for your official duties as directed by your superior."*

The above quoted charge was not clear as to the specific dates applicant absconded from work. I have examined evidence adduced on behalf of the respondent and find that none of them specifically stated the dates applicant was absent. That notwithstanding, evidence in the CMA record shows that in the alleged months', applicant was absent from work. It was testified by applicant that his absence was on reasonable causes. He tried to substantiate his absence by tendering medical report and emails (exhibit R2 collectively). In the emails applicant notified respondent reason for his absence. I should point out that there is no medical report and R2 cannot be a medical report so to speak.

Applicant was also charged for insubordination. It is clear from the CMA record that on 18th August 2021 applicant was issued with a transfer letter (exhibit S3). From that date he was served with the transfer letter, applicant absconded from work as it is reflected in correspondences he made through emails with the respondent. In exchange letters (exhibits R2, S5, S7 and S15), respondent was urging applicant to attend at work while working on his demands. Even if we accept that he was sick and take exhibit R2 collectively as valid, yet the days which applicant alleged to be sick were only three days (3) from 30th August 2021 to 1st September 2021. Still the charge of absenteeism was proved by applicant himself as evidenced by the disciplinary minutes (exhibit S9). I should point out that contents of the said exhibit were never disputed by the applicant at CMA. I therefore find that respondent proved the charge of absenteeism on the balance of probability.

As pointed hereinabove, applicant was also charged for insubordination. In terms of Rule 12(3) of GN. No. 42 of 2007(supra) insubordination if proved, justifies termination of employment. The said Rule provides:-

The acts that may justify termination are: -

(a) Gross dishonest
(b) Willful damage to properly
(c) Willful endangering the safety of others
(d) Gross negligence
(e) Assault on a co-employee, supplier, customer, or member of the family of and any person associated with, the employer and
(f) Gross insubordination.

The term insubordination as a misconduct was well explained in the case of ***Sylvania Metals (Pty) Ltd v Mello N.O. and Others*** (JA83/2015) [2016] ZALAC 52 where it was held that:-

> *"Insubordination in the workplace context, generally refers to the disregard of an employer's authority or lawful and reasonable instructions. It occurs when an employee refuses to accept the authority of a person in a position of authority over him or her and, as such, is misconduct because it assumes a calculated breach by the employee of the obligation to adhere to and comply with the employer's lawful authority. It includes a willful and serious refusal by an employee to* ***adhere to a lawful and reasonable instructions*** *of the employer, as well as conduct which poses a deliberate and serious challenge to the employer's authority even where an instruction has not been given."(*Emphasis is mine)

In the application at hand, applicant refused to be transferred from Mikocheni area to Salasala site both within Dar es Salaam Region. According to transfer letter (exhibit S3) dated 18th August 2021 the applicant was transferred from the position of NOC Operator where his former duty station was at Mikocheni area to a new position namely Field Engineer at a new duty station at Salasala site. He was required to report to his new duty station immediately. It is crystal clear from the record that, applicant did not report to his new duty station, instead, he gave a condition that he will only accept transfer after signing a new contract that will increase his monthly salary to 3,000,000/= as evidenced by exhibits S4, S5, S6 and S7 all authored by the applicant.

I have keenly examined the record and find that the subsisting contract was renewed by default after expiry of the former (exhibit S1). Renewal of contract by default means that, the parties were still bound by terms and conditions agreed in the former contract. In clause 10 of exhibit S1, the parties agreed that:-

> *"The employee may be transferred from one station to another station operated /managed by the Employer".*

As pointed hereinabove, applicant was transferred to another station in a new position of Field Engineer. The duty station he was

transferred to was also managed by the respondent. The fact that he signed the contract with the above quoted clause, means he consented in advance to be transferred to another duty station. It is my firm view that, despite his demands, applicant ought to have reported first to the new duty station while working on his demand to be issued with a new contract especially before expiry of the contract that was in force. Having said so, I find that applicant had valid reason for terminating the applicant.

On procedural aspect, applicant is faulting the arbitrator's finding that termination was procedural fair arguing that there was no investigation conducted by the respondent prior holding the disciplinary hearing. The requirement to conduct investigation is provided for under Rule 13 (1) of GN.No.42 of 2007(supra). The essence of conducting investigation is to establish whether there are grounds for a disciplinary hearing to be held against the employee. It is my considered view that, not in every circumstance the employer is compelled to conduct investigation. Investigation can only be conducted depending on circumstances of each case. It is my opinion that in the circumstances of the matter at hand, considering the nature of the charges namely absenteeism and insubordination,

there was no need of conducting investigation. It is undisputed that applicant was not attending at work despite reminders though he alleged that he was sick. That, in my view, did not require investigation to be conducted. Against, there was no need to conduct investigation relating to the charge of insubordination while applicant supplied several letters to the respondent as to why he was not ready to accept transfer.

I have examined the CMA record and find that the issue of investigation was not raised by the applicant at the hearing before CMA. Therefore, raising the same at this stage was an afterthought. It is a settled principle that an appellate court cannot allow parties to raise matters that were not raised or pleaded in the courts below as it was held in the case of ***Hotel Travertine Limited & Others vs National Bank of Commerce Limited*** (Civil Appeal 82 of 2002) [2006] TZCA 16.

It was submitted on behalf of the applicant that applicant was not afforded adequate time i.e.,48 hours within which to prepare for his defence. That submission was countered by counsel for the respondent. In terms of Rule 13 (3) of GN. No. 42 of 2007(supra), an employee is entitled to be given not less than 48 hours to

prepare for the hearing. I had a glance on the disciplinary form (exhibit S10) and find that the disciplinary hearing was conducted at 13:00. I have examined the CMA record and find that there is no proof from either of party as to exact time the charge was served to the applicant.

Cit was submitted on behalf of the applicant that applicant was not afforded chance to mitigate. I should point out that an employee is entitled to be afforded a chance to mitigate as it is provided for under Rule 13(7) of GN.No.42 of 2007(supra). In the matter at hand, there is no doubt that applicant was not afforded that right. This is clearly reflected in the exhibit S8. Right to mitigation cannot automatically be taken away simply an employee admitted to have committed the alleged misconduct. Therefore, failure of the respondent to allow applicant to raise his mitigation amounted to procedural unfair. I, therefore, find no need to labour on other alleged procedural aspects.

Having found that applicant's termination was fair substantively and procedurally unfair, considering the extent of unfairness and being guided by the decision of the Court of Appeal in the case of ***Felician Rutwaza vs World Vision Tanzania*** (Civil

Appeal No. 213 of 2019) [2021] TZCA 2, I order applicant be paid TZS 750,000/= being one month salary compensation for procedural unfair termination. I therefore allow the application to that extent only.

Dated in Dar es Salaam on this 10th March 2023.

B. E. K. Mganga
JUDGE

Judgment delivered on this 10th March 2023 in chambers in the presence of Brave Saronga, Advocate, for the Respondent but in the absence of the Applicant.

B. E. K. Mganga
JUDGE