**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION APPLICATION NO. 370 OF 2022**

*(Arising from the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Ilala dated 30th day of September 2022 in Labour Dispute No. CMA/DSM/ILA/R. 388/17 by (Chacha: Arbitrator)*

**NYAMOKO MIYASI NYAMOKO.....APPLICANT**

**VERSUS**

**DHL TANZANIA LTD.....RESPONDENT**

**JUDGEMENT**

**K. T. R. MTEULE, J.**

**11th May 2023 & 17th May 2023**

This application for revision emanates from the ruling of the Commission for Mediation and Arbitration of Dar es Salaam at Ilala (CMA) in Labour Dispute **No. CMA/DSM/ILA/286/2022/211/22**. The prayers contained in the Chamber summons are that: -

1. This Honorable Court be pleased to call for the records of the Labour **Dispute No. CMA/DSM/ILA/R.388/17** delivered by Hon. L,C. Chacha, Arbitrator, on **30th September 2022**, inspect and examine such records to satisfy as to correctness, rationality, propriety and legality of the award.

2. That the Honorable Court be pleased to revise and set aside the whole of the proceedings and subsequent award of the Labour **Dispute No. CMA/DSM/ILA/R.388/17 by Hon. L.C. Chacha,** arbitrator on the ground that the decision is illegal and factually wrong.
3. Any other orders or reliefs as the Honourable Court may deem fit and just to grant.

The background of the dispute as collected from the CMA record, affidavit and counter affidavit filed by the parties is stated hereunder. The applicant was employed by the Respondent as Export Agent from **1st October 2012**. On **29th March 2017** his employment was terminated for the reason of Misconduct (alleged Dishonesty and theft).

He was alleged to have failed to discharge his responsibilities to weigh a consignment for shipment which was underweighted to be 100kg instead of its original weight of 272.94 kg which brought the Respondent into disrepute. A disciplinary meeting was held and found the applicant to have participated in fraud, and found guilty of misconduct, dishonesty and theft.

Aggrieved by the termination decision, the applicant filed the matter in the CMA against the employer claiming to have been unfairly

termination. The Commission decided the matter not in his favor having found applicant's termination to be both substantively and procedurally fair.

The arbitrator was conviced by the evidence of PW1 who said that the Applicant trusted the staff who previously weighed the consignment and directly send it to the driver believing it to be ok. The arbitrator considered this as an admission to failure to implement the applicant's responsibilities of weighing the consignment.

The arbitrator was satisfied that since the applicant was called in a disciplinary meeting, suspended and heard in that meeting and given right to appeal then the procedure was fair.

Being resentful with the award, the Applicant preferred this application.

The application is supported by an affidavit in which the Applicant is challenging the fairness of his termination. It is deponed in the affidavit that there was no valid and fair reason for termination and that the procedures followed in ending the employment relationship amongst that parties were not in accordance with law.

In his affidavit, the Application has three grounds of revision which are: -

a. Whether the trial arbitrator's finding that the applicant's termination of employment was substantively and procedurally fair.

b. Whether the trial arbitrator erred in law and facts to find that the respondent had fair and valid reason to terminate applicant's employment.

c. Whether the applicant is entitled to be granted the prayers sought.

Opposing the application, the respondent filed a counter affidavit sworn by Nangena Mtango who is the Respondent's Human Resources Manager. Disputing the application, the deponent asserted that the termination of the employment was fair substantively and procedurally.

At the hearing, the applicant was represented by Mr. Deogratius Godfrey, Advocate, while Advocate David Chillo was representing the respondent.

In his submission, having adopted the affidavit in support of the application to form part of her submission, Advocate Deogratius Godfrey challenged the use of the words uttered by the police officer, telling the applicant that he was negligent to validate the reasons for termination. He stated that on the material date, the applicant was

on duty but his colleague in the same department verified the parcel/cargo before shipped to Canada. In his view, what was said by the police that the applicant was negligent amounts to hearsay evidence which is contrary to the law.

Regarding procedure, Mr. Godfrey submitted that the termination was improperly effected and without a valid reason regarding procedures. According to Mr. Godfrey, there was no investigation conducted to ascertain as to whether there were grounds of conducting disciplinary hearing which is contrary to **Rule 13 of G.N No. 42 of 2007**. He challenged the failure of conducting investigation, and instead relying on Police progress Report which was tendered in the CMA and admitted as **exhibit D-5**. In his view, the investigation was supposed to be conducted by the employer. He thus prayed for this Court to issue an order of reinstatement without loss of remuneration.

Opposing the application, Mr. Chillo submitted that the reason for termination was the act of not re-weighing the consignment as it is required by the respondent's procedure which resulted to the return of the said consignment after being found in Canada to be of a different weight which is not permitted and that the applicant admitted the offence of not re-weighing as indicated at page 11, paragraph 3 of the award. According to Advocate Chillo, this

damaged the Respondent's images leading to initiation of a criminal investigation at the respondent office for offence of illegal mineral transportation.

Recording the Applicant's duties which include to re-weigh the goods/cargo/consignment shipped from Tanzania, Advocate Chillo considered the Applicant's acts as admitted to amount to misconduct.

Regarding the police words to tell the applicant that he was negligent, Mr. Chillo questioned the Applicant's act of questioning his own statement at the stage of revision while he did not ask the arbitrator to impeach it from his own evidence. According to him, it was the Applicant who testified that the police officers told him that according to his statement, he was negligent in handling the consignment and in Mr. Chillo's view, this is Applicant's admission to the allegation. In Advocate Chillo's further views, questioning this evidence at this time amounts to an afterthought as held in **Browne v. Dunn** (1893) 6R, 67 and in the case of **Bomu Mohamed v. Hamis Amir,** Civil Appeal No. 99 of 2018.

Advocate Chillo further added that, the Applicant's admission to the offence of not re-weighing the consignment as one of his duties, is sufficient reason to terminate his employment. Bolstering his position, he cited the case of **Bank of Africa (T) limited v. Karim A.**

**Hassan,** Revision No. 123 of 2020, High Court of Tanzania, Labour Division, at Dar es salaam, (unreported).

On procedural fairness Mr. Chillo submitted that the respondent complied with all procedures in terminating the Applicant's employment. He stated that investigation was conducted, enough time was given to the applicant to attend disciplinary hearing, results were given within time and termination letter was issued after time to appeal had lapsed. He is of the view that there was a fair procedure in terminating applicant's employment.

According to Advocate Chillo, since the disciplinary offence against the Applicant was criminal in nature, then the respondent had no option, then to seek police assistance in the investigation, and investigation report was issued as per **Exhibit D-5,** which stated that the situation occurred resulted from negligence, as it indicated that he under-weighed shipment on DHL system. Thus, the Respondent prayed for the application to be dismissed.

In rejoinder, the applicant reiterated his submission in chief. He added that there was a big doubt as to whether it was true that the Applicant did misconduct leading to termination of his employment because there were divided views on the shipment. According to him,

one side of view commented that the shipment had valid permit while the other commented that it had no permit.

The Applicant in rejoinder challenged the Respondent's failure to produce in the CMA the shipment documents contained in his systems while commenting that airway bills are the most important cargo document; the Applicant indicated the importance of having the documents produced by the Respondent. He referred to some international cargo standards including the Warsaw System Convention and Montreal Convention 1999.

Having considered the submissions made by both parties, as well as the applicant's affidavit, the Respondent counter affidavit and CMA record, I draw up two issues for determination which are firstly, **whether the applicant have provided sufficient ground for this Court to revise the CMA award** and secondly, **what reliefs are parties entitled to.** In approaching the above issues, all grounds identified in the affidavit will be considered all together focusing on two aspects of fairness of termination, namely reason and procedure.

In addressing substantive fairness at national level, reference is made to **Section 37 of the Employment and Labour Relations Act, Cap 366 R.E 2019** which makes it unlawful for an employer to

terminate the employment of an employee unfairly. The section places the burden to prove the fairness of the reason to the employer. Section 37 (1) and (2) reads as follows: -

> *"37 (1) It shall be unlawful for an employee to terminate employment of an employee unfairly, (2) A termination of employment by an employer is unfair if the employer fails to prove-*
>
> *(a) That the reason for 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, and*
>
> *(c) That the employment was terminated in accordance with a fair procedure."*

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."*

From the above national and International legal position, unfair termination of employment is prohibited and there should be valid and fair reasons for termination. Misconduct is one of the fair reasons for termination. In this application the Court is tasked to scrutinize whether there was fairness of reason in the alleged misconduct.

Starting with the first aspect regarding the fairness of reasons for termination, the applicant contended that in the light of the evidence in the Court records, the respondent had no reason to terminate the applicant's employment. This argument is resisted by the Respondent who maintained that the applicant admitted to have committed an offence of underweighting of cargo resulting from his act of not re weighing the shipments which brought the company's name to disrupt contrary to the employer's policy and as a result the said consignment was returned from Canada leading to the initiated criminal investigation.

It is on record that the Applicant was charged with three offences, and he was found guilty of two offences. From the above legal provisions **(Section 27 of Cap 366 and Article 4 of the Convection No 158)** the offence the Applicant was charged with

fall under misconduct (fraud, theft and underweight). It is not disputed that the applicant was responsible for re weighing cargo or consignment, also not disputed by the applicant that the consignment was returned from Canada after being under-weight consignment varied from 272.9 Kg to 100kg. Since the applicant admits that on the material date he was on duty and he is responsible for such duty to receiving shipments as testified by the applicant himself at page 8 paragraph 4 of the CMA award, the applicant owed a duty to confirm the weight of the shipment. It is not in dispute that the consignment was shipped without its weight having confirmed hence found under-weighed. This means the applicant neglected his date. This confirms negligence on his part which is a fair reason.

Under such circumstances applicant's allegation that there was no evidence to prove validity and fairness of reason for termination while on other side admitting for the offence is not justified.

Having found that there was a valid and fair reason for the termination of the applicant's employment, the next question is on procedural aspect. At the CMA it was found that the applicant's termination was procedurally fair, but the applicant challenged its fairness. In the applicant's view, the procedure was not fair on the

reason that the investigation was not conducted on the reason that it was conducted by police and not employer.

Since the termination was based on misconduct the relevant provision is **Rule 13 of GN 42 of 2007.** To start with the lack of the investigation I find it worth to reproduce subrule (1) of this provision which provides; -

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

From the above provision which speaks loudly, it is mandatory to investigate prior to holding of the disciplinary hearing. Although the above provision did not restrict how employer could conduct investigation, I do not agree with the Respondent that the police investigation conducted after receiving criminal allegations do constitute the investigation envisaged by **Rule 13 supra**. The investigation should be conducted by the Applicant to inform whether disciplinary hearing should be done or not. It cannot be substituted by police investigation. Basing on the nature of this case which was criminal in nature, after being reported to the police, and investigation confirms that there was no theft but there was a negligence on re weighing cargo/consignment then, I am of the view that this could only contribute to the investigation report done by the

employer pursuant to **Rule 13 of G.N. No. 42 of 2007** and not becomes disciplinary investigation. It therefore remains that there was no investigation conducted by the employer as per the **Rule 13 supra.**

From the above legal findings, I have to say that although the termination was substantively fair, there was a minor error occasioned by failure to hold investigation. This taints the process to make it unfair. It is on this ground I see a reason to vary the CMA Award. The issue as to whether the Applicant managed to establish sufficient grounds for this court to vary the decision of the CMA is answered affirmatively to the extent of only lack of investigation.

Having found the first issue answered affirmatively, what follows is the relief. Since the error is minor, the extent of compensation should not be equal to the situation where the unfairness could be in both reason and procedure. Considering the position in **Felician Rutwaza versus World Vision Tanzania, Civil Appeal No. 213 of 2019,** Court of Appeal of Tanzania, at Bukoba, I vary the CMA award by awarding the Applicant only 3 months remuneration as compensation for the procedural unfairness. Other findings of the arbitrator will remain undisturbed. The application is therefore allowed to the extent discussed.

As to reliefs, the applicant is entitled to be paid a compensation of 3 months remuneration to the tune of **TZS 2,188,926.00** plus other statutory benefits if not paid. It is so ordered.

Dated at Dar es Salaam this 17th day of May 2023.

**KATARINA REVOCATI MTEULE**

**JUDGE**

**17/05/2023**