IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 89 OF 2023

(Arising from the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Ilala dated 04th day of November 2022 in Labour Dispute No. CMA/DSM/ILA/368/21/163/21 by (Mpulla, Arbitrator)

CABLE TELEVISION NETWORK(CTV) LIMITED.................... APPLICANT

VERSUS

POTENTINE PROTAS BYARUGABA....................................RESPONDENT

JUDGEMENT

Date of last Order: *13/07/2023*
Date of Judgement: *21/07/2023*

MLYAMBINA, J.

This decision concerns revision application arising from the Award issued in *Labour Dispute No. CMA/DSM/ILA/368/21/163/21* by the Commission for Mediation and Arbitration of Dar es Salaam, Ilala (herein CMA). The Applicant being aggrieved with the Award, filed this application under the provisions of *Section 91 (b), S. 91 (2)(a),(b), S. 94(1) (b),(i) of The Employment and Labour Relations Act [Cap 366 Revised Edition 2019] (herein ELRA); Rule 24 (1) (2) (a), (c), (d), Rule 24 (3) (b),(c), (d), (e) of the Labour Court Rules, G.N. No. 106 of 2007* praying for three reliefs: *One*, this Court be pleased to revise and set aside the arbitral Award of the Commission for Mediation and Arbitration in *Labour Dispute No. CMA/DSM/ILA/368/21* before Hon.

Mpulla U.N dated 13th March 2023. *Two,* having the Court be pleased to determine the dispute in the manner it considers appropriate. *Three,* any other relief (s) that the Court may deem just and fit to grant.

The brief history of this application is traced from the CMA record, the Applicant's affidavit, and the Respondent's counter affidavit. The Respondent was employed by the Applicant as Telephone Operator in Customer Services Department. On 7th August 2021, the Applicant was terminated for the reason of Misconduct (negligence). Being resentful with the termination, the Respondent referred the matter to the CMA. Having found the termination to be unfair in both aspects of procedure and reason, the CMA awarded the Respondent 12 months as compensation for unfair termination, plus 19 months remuneration from the date of unfair termination to the date of Award at the tune of TZS 19,809,000/=.

The Award aggrieved the Applicant who decided to lodge this application by way of Chamber summons accompanied with the affidavit of the Applicant. After expounding the chronological events leading to this application, the Applicant claimed that the Respondent's employment was fairly terminated after being found guilty of the alleged offence. The Applicant further challenged the Arbitrator's

decision for awarding compensation of 31 months by claiming that it was contrary to the law. Hence four (iv) legal issues, namely:

i. Whether the Arbitrator was right for holding that the Respondent's termination was substantively unfair irrespective of the fact that the Respondent admitted having been found playing card in the office.

ii. Whether the Arbitrator was right for holding that the Respondent termination was procedurally unfair on the solely reason that the chairperson of the Disciplinary hearing was from the same department.

iii. Alternatively, whether a person from the same department where the Complainant is working is barred from being a Chairperson of the Disciplinary Hearing.

iv. Whether the compensations awarded by the trial Arbitrator are justifiable in law.

The application was challenged vide the Respondent's counter affidavit which repudiated existence of fair termination in both aspects substantively and procedurally. It was further disputed by the Respondent on the existence of any irregularities or errors on the award of the CMA.

The application was disposed of by way of written submissions. The Applicant was represented by Mr. Shepo Magirari John, Advocate from a firm stylized as Arbogast Mseke Advocates, whereas the Respondent enjoyed a legal service rendered by Ms. Stella Modest Rweikiza, Advocate from a firm known as Mordern Law Chamber.

In his submissions the Applicant consolidated ground (ii) and (iii) to start with the first issue; whether the Arbitrator was right for holding that the Respondent's termination was substantively unfair notwithstanding of the fact that the Respondent admitted having been found playing card in the office, Mr. John submitted that; as per exhibit D2, the Respondent was charged and terminated with the offence of gross negligence after being found playing card in the office while the channels were off. He added that for the Court to appreciate the seriousness of the offence which led to his termination, it is important to look on the position and Job description of the Respondent.

Mr. John submitted that; the Respondent during working hours was supposed to perform his duties and make sure customers are getting better services. But instead of performing his duties, the Respondent was found playing card during working hours while channels were off. As a reasonable employee, they expected him to report the problem to the technician, but he did not do so. In justifying

Respondent's negligence, Mr. John prayed for the Court to consider page 9, 1st paragraph of the typed Award.

Upon been cross examined, the Respondent testified that he did not report the problem to the technician. Basing on the circumstances of this case, he was of the view that the Respondent being Customer Support/Telephone Operator/control room Assistant had a duty to report the problem to the technician but failed to exercise such duty that could be expected to an employee in his position, as result, it caused complaints from customer and threaten to terminate their contract for poor services. As such, the Applicant believes that they had a valid reason to terminate the Respondent on gross negligence.

Regarding the allegation of tendering any policy to have been violated, Mr. John argued that; in gross negligence there is no requirement to tender the policy alleged to have been breached, such condition is applicable in determining the issue of gross misconduct under *rule 12 of the Code of Good Practice (G.N 42 of 2007).*

Mr. John insisted that; even though there is no policy alleged to have been breached, the Respondent breached or contravened the common law duty which suggest that an employee must act in good faith toward the employer. According to him, the Respondent's act of not reporting the problem that the channels are not working and

continued playing card in the office, breached common law duty of acting in good faith. Supporting their stand, the Applicant cited the case of **Detrick Rweyemamu v. IST Medical Clinic,** Revision No. 403 of 2016 (unreported).

On the second issue; *whether the Arbitrator was right for holding that the Respondent termination was procedurally unfair on the reason that the Chairperson of the Disciplinary hearing was from the same department,* Mr. John submitted that; the Arbitrator misdirected himself by holding that there was a likely hood of bias on two reason. *First,* there is no evidence which was adduced to show that the Chairperson was involved in the circumstances giving rise to the case. *Second,* there is no law which restrict a person from the same department to chair the disciplinary hearing.

It should be well noted that, being in the same department, is not necessarily been involved in the circumstances of the case. He added that; the Arbitrator ought to consider; whether the Chairperson was involved in the circumstances of giving rise to the case as per *Rule 13(4) of G.N No.42 of 2007.*

On ground four relating to compensation, Mr. John submitted that the law which provide for compensation for unfair termination is *Section 40 of the ELRA (supra),* which directs that in case of unfair

termination then remedy should be awarded separately and not collectively. Backing up their position, the Applicant cited the case of **National Microfinance Bank v. Leila Mringo and Others,** Civil Appeal No.30 of 2018, Court of Appeal of Tanzania at Dar es Salaam (unreported).

It was further submitted that since the Arbitrator opted to award compensation of 12 months, after having found that the termination was unfair, then it was wrong for him to award another 19 months as a compensation from the date of termination to the date of the Award, while this fall under category of reinstatement.

Disputing the application, the Respondent's Counsel argued that the admission in playing cards was exculpatory as clearly seen in exhibit P6 (show cause latter by the Respondent dated 08/07/2021) and in exhibit D3 (hearing form) at paragraph 3 page 2). The Respondent did not admit the offence, but he used to pray card while waiting for various notification, which enable him to improve the services to the customers.

Ms. Rweikaza submitted that since DW1 supported the testimony that there was no rule which prohibit the use of programs installed in the computer, cards being one of them, the same does not amount to offence.

On violation of common law principle, Ms. Rwekiza submitted that the Applicant cannot take a shield in common law rule because playing cards is not an offense. He further added; as there was no any employer's policy violated, then nothing was wrong for the Applicant in playing card. Challenging the case cited by the Applicant, the Respondent submitted that the ***Ditrick's Case*** *(supra)* are distinguishable from the present one because in that case the Applicant was Assistant Accountant and was charged of gross misconduct for occasioning loss of money and theft, while in this matter, that was not the case.

Regarding allegation on failure to report a channel problem (if any) to the technician, Ms. Rweikiza submitted that that issue was not raised in the charge sheet, therefore it is an afterthought. He stated that what was exercised by the Applicant is to establish fair termination under a shield of common law rule, contrary to *Section 37(2)(a) of ELRA (supra).*

On allegation regarding complaints from customers and threats to terminate contract for poor services, Ms. Rweikiza submitted that this ground should be dismissed as the Applicant completely failed to prove the charged gross negligence. In emphasizing her position, she stated that gross negligence was correctly founded by the Trial

Arbitrator by referring the case of **Twiga Bancorp (T) Limited v. David Kanvika,** Labour Revision No. 346/2013 which defined as follows:

> A serious carelessness, a person is grossly negligent if he falls far below the ordinary standard of case that one can expect. It differs from ordinary negligence in terms of degree.

The second issue is; *whether the Arbitrator was right in holding that the Respondent termination was procedurally unfair on the solely reason that the Chairperson of the Disciplinary hearing was from the same department.* Ms. Rweikiza submitted that the Arbitrator findings based on three reasons.

First, the Applicant failed to comply with *Rule 13(4) of the Code (GN No. 42/2007)* which requires the Committee Chairperson to be senior. *Second*, who has not been involved in the circumstances giving rise to the case as was discussed in **National Microfinance Bank Plc v. Christian Nicholas Gideon,** Civil Revision No. 336 of 2020, (unreported). *Thirdly*, bias that the terminating authority (Director) was a Complainant during disciplinary hearing, as per testimony of PW1 and DW1 that the Director was the one who saw the Respondent playing the cards.

On the above reasons, the Respondent's Counsel was of the view that the Director was a Judge of his own cause and the Disciplinary hearing was a just rubber stamp, contrary to the principle of natural justice of observing the right to be heard before taking any action as was addressed in the case of **I.S. Msangi v. Jumuiya ya Wafanyakazi and Workers Development Corporation** [1992] TLR 259.

On whether the trial Arbitrator erred in awarding the Respondent, payment of salaries for the period from the date of unfair termination to the date of Award plus twelve months' compensation. Ms. Rweikiza submitted that in CMA Form No. 1, the Respondent prayed for reinstatement without loss of remuneration which the Arbitrator noted that it is grantable under *Section 40(1)(a) of the ELRA* but refrained to grant reinstatement on the reasons detailed from page 21 to 22 of the Award.

Ms. Rweikiza stated that instead of reinstatement, the Arbitrator ordered payment of 12 months' compensation which is grantable under *Section 40(1)(c) of ELRA.* Therefore, it is not true that the Arbitrator granted the relief(s) under *Section 40(1)(a) and (c) of ELRA* as argued by the Applicant. She was of the view that the decision of the Court of Appeal cited by the Applicant in the case of **National Microfinance**

Bank v. Leila Mringo and Others is distinguishable because in the present case the Arbitrator did not order reinstatement and compensation conjunctively and the order of payment of 19 months' salaries is not reinstatement.

Guided by parties' submissions and their affidavits together with the record of the CMA, I am concerned to address two issues. *First, as to whether the Applicant has adduced sufficient grounds for this Court to exercise its discretional power of revising the CMA Award issued in Labour Dispute with Reference No. CMA/DSM/ILA/368/21/163/21. Second, to what reliefs are the parties entitled?*

In addressing the first issue, all four grounds of revision which fall under the ambit of four legal issues contained in the Applicant's affidavit will be considered, centring on two aspects of reason and fairness of procedure.

Both international and national labour law standards require in establishing fairness of termination, there some criteria established under both laws to be met in evaluating two aspects of termination to enhance fairness in terminating employment contract.

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

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.

Nationally, for the termination to be termed fair, it must be exercised in accordance with *Section 37 of the ELRA (supra)* which provides:

(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."

(c) that the employment was terminated in accordance with a fair procedure.

From the above authority, for the termination to be fair both aspects of termination should be considered. [See **Tanzania Revenue Authority v. Andrew Mapunda**, Labour Rev. No. 104 of 2014].

Starting with the reason for termination, the Applicant herein was terminated for the allegedly misconduct (gross negligence), in summary the Applicant's Counsel contended that the act of the

Applicant of playing card during working hours amount to gross negligence.

The Applicant's Counsel further averred that even though no policy for the offence committed by the Respondent, but still he failed to act in good faith under common law by playing card during working hours and he admitted for the same.

On opposing the application, the Respondent's Counsel maintained that the Respondent did not admit the offence, but he was playing card in harmonising his work performance of receiving notification from customers. According to her, the Applicant should not use the shield of common law in punishing the Respondent. She added that the act of playing card does not amount to gross negligence.

Before I embark to the disputed question, I find worth to consider the case cited by the Respondent which defined the meaning of gross negligence. In ***TWIGA's Case****(supra)*, it was defined thus:

> *A serious carelessness, a person is grossly negligent if he falls far below the ordinary standard of case that one can expect. It differs from ordinary negligence in terms of degree.*

The above meaning alerts this Court for the offence to be termed as gross negligence, the same must be serious and not first offence as per *Section 12(2) of G.N No. 42 of 2007.* Having such legal stand

regarding gross negligence, I find wise to connect the same with the questions placed by the parties before this Court. *First, whether the Respondent admitted for the offence or not. Second, does the same warrantee termination?*

From the CMA record, especially Exhibit D-3(Hearing Form) at page 2 paragraph 5, the Respondent admitted that he used to play card but he did not know as to whether it was offence or not. In establishing as to whether it was offence or not, as challenged by the Respondent, the relevant provision is *Rule 12(1) (a) of G.N No. 42 of 2007* which directs the decision maker that for the employee's act to be misconduct must contravene a rule or standard regulating conduct relating to employment.

I take note of the Respondent's working condition but basing on nature of his employment as Telephone Operator in Customer Services Department, an employee could reasonably be expected to have been aware of it as per *Rule 12(1) (b) (iii) of G.N No. 42 of 2007.* I therefore find that the act of Respondent of playing card during working hours amount to an offence falling under misconduct by contravening employment standards, in which the employee could reasonably be expected to have been aware. Therefore, the Respondent's allegation regarding employer's policy lacks merits.

Having founding that the Respondent committed misconduct, now the next question is; did the said misconduct warrantee termination? *Rule 12(2) and (3) of G.N No. 42 of 2007* directs that the first offence of an employee does not warrantee termination unless is so serious. The record available in this application reveals nothing as to; whether the Applicant had previous offence or he damaged any property or failed to perform his duties.

In such circumstances, I am of the view that the misconduct done by the Respondent did not amount to *gross negligence,* hence the termination imposed by the Applicant was not a *proper sanction*, as the Respondent was supposed to be given warning. Therefore, there was a reason for termination but was not fair as it did not warrantee termination.

Regarding the procedure, since the termination was for misconduct, the Applicant had a duty to adhere to *Rule 13 of G.N No. 42 of 2007*. The Applicant never disputed that the Chairman namely Arshad Dosa Chairman of the committee worked with the Respondent from the same department. That means, she was not senior to her.

Further, it was never disputed that the Director saw the Respondent playing card as testified by DW2 and PW1 who have been involved in the circumstances giving rise to the case. According to

Exhibit P-5(Termination Letter), it was signed by the Director namely Bahasker S. Rughani the same person, who initiating legal action, contrary to *Rule 13 (4) of G.N No. 42 of 2007.* In such circumstances, I am of the view that the principle of fair hearing was not observed. In the case of **Justa Kyaruzi v. NBC Ltd,** Revision No. 79 of 2009, Labour Division at Mwanza (unreported), it was held:

> *What is important is not application of the code in the checklist fashion, rather to ensure the process used adhere to the basics of fair hearing in the labour context depending on the circumstances of the parties, so as to ensure the act to terminate is not reached arbitrarily. Admittedly, the procedure may be dispensed with as per Rule 13(12) of the Code.*

From the above authority, the principles of natural justice were not adhered by the Applicant on account of the following reasons. *One,* the Disciplinary Committee was chaired by unqualified Chairman and right to appeal was jeopardized. *Two,* the letter of termination was signed by the same person who initiated legal action. I therefore find no need to fault the Arbitrators finding on that aspect regarding procedure.

As regards Reliefs entitled to the parties; it was challenged by the Applicant that what was awarded by the Arbitrator was conjunctive

by awarding 12 months compensation for unfair termination plus 19 months salaries from the date of termination till the date of Award.

On other side, the Respondent insisted that the Arbitrator was right in awarding 12 months, plus 19 months because the Arbitrator refrained to grant reinstatement on the reasons detailed in the Award.

From the above disputed facts, the question to be addressed by this Court is; *whether the Award was properly procured to the CMA by awarding salaries from date of termination to the date of Award, after awarding compensation of twelve months for unfair termination.* In resolving this issue, labour laws are not silent on what to be awarded in case the Arbitrator or Labour Court finds a termination is unfair. I find worth to reproduce the relevant provision, *Section 40 of the ELRA (supra)* provides that:

> *40.-(1) Where an Arbitrator or Labour Court finds a termination is unfair, the Arbitrator or Court may order the employer –*
>
> *(a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or*
>
> *(b) to re-engage the employee on any terms that the Arbitrator or Court may decide; or*

(c) to pay compensation to the employee of not less than twelve months remuneration.

(2) An order for compensation made under this section shall be in addition to, and not a substitute for, any other amount to which the employee may be entitled in terms of any law or agreement.

(3) Where an order of reinstatement or reengagement is made by an Arbitrator or Court and the employer decides not to reinstate or re-engage the employee, the employer shall pay compensation of twelve months wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment.

The plain meaning of the above provision is that any order of compensation without loss of remuneration is applicable when the order of compensation issued under *Section 40(1)(a)(b)(3) (supra)* and not order issued under *Section 40(1)(c) of the ELRA (supra).*

The above authority directs the court to vary with the Arbitrator in his findings regarding reliefs, as he awarded compensation of 12 months compensation in accordance to the provision of *Section 40(1)(c) of ELRA (supra).* At the same time, the Arbitrator combined the reliefs provided under *Section 40(1)(a) (remuneration without loss)* while they are supposed to be ordered separately. This is reflected at page 21 paragraph 2 of the impugned award.

With the above reasoning, I agree with the Applicant's Counsel by citing the case of **National Microfinance Bank v. Leila Mringo and Others** *(supra)* which directs that compensation to be ordered separately as categorized by *Section 40 of the ELRA (supra).* Therefore, I differ with the Arbitrator by awarding 19 months compensation as remuneration without loss.

Having found that the termination was substantively and procedurally unfair, as the termination of Respondent's employment was not a proper sanction, then I borrow wisdom from the case of **Tanzania Cigarette Company Ltd v. Hassan Marua,** Revision No. 154/2014 in which the Court of Appeal of Tanzania stated:

> *It stems out clearly that; first; an order for payment of compensation is discretionary and, secondly; is awardable to an employee only when the Arbitrator or the Labour Court finds that his or her termination was unfair. The two conditions apply conjunctively or must cumulatively exist. To say it in other words, an order of payment of compensation is discretionary and is consequential to unfair termination.*

The above authority directs that Award of compensation must be done judiciously. Therefore, I award the Respondent 20 months compensation, basing on her monthly salary of TZS 639,000/=.

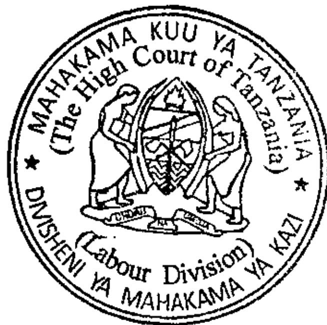
In the afore circumstances, the application is partly allowed to the extent discussed herein above. Each party to take care of its own cost. It is so ordered.

Y. J MLYAMBINA

JUDGE

21/07/2023

Judgement pronounced and dated 21st July, 2023 in the presence of Counsel Shepo Magirari for the Applicant and the Respondent in person. Right of Appeal fully explained.



Y. J MLYAMBINA

JUDGE

21/07/2023