IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT DAR ES SALAAM

LABOUR REVISION NO. 244 OF 2023

JOHN BATISTA ..... APPLICANT

VERSUS

SOS CHILDREN'S VILLAGE TANZANIA ..... RESPONDENT

(Revision from the Award of the Commission for Mediation and Arbitration in Labour Dispute No. CMA/DSM/KIN/236/2021/67/21 Hon. William R. dated 25th August 2023.)

JUDGEMENT

Date of last Order: *05/02/2024*
Date of Judgement: *08/02/2024*

MLYAMBINA, J.

The Applicant herein through the affidavit in support of the application urged the Court to revise and set aside the decision of the Commission for Mediation and Arbitration (herein CMA) on the following grounds:

i. That, the Arbitrator's award was improperly procured as it was tainted with material irregularity and illegality. The Arbitrator relied on extraneous matter in composing and delivering the said award.

ii. That, the Arbitrator failed to evaluate and analyse the evidence adduced by the Complainant, now the Applicant in reaching and or composing the said award.

iii. That, the Arbitrator's conduct on the matter as stated in the foregoing paragraph amounts to gross violation of the law which

makes it necessary to remedy it through revision, hence this application.

iv. The Arbitrator did not consider the witness evidence testified during the hearing, while the evidence were considered genuinely by the management to breach the contract. Onesmo Itozya testified that the Applicant did not attribute to anything because he had duty of reporting the incident to the external authorities such as police, local government or social welfare. Also, it was crystal clear that the Arbitrator did not exercise justice because the proceedings at management level stated that there was the report which was discussed on May 13th 2021 per Onesmo Itozya but the Arbitrator did not urge the witness/HR to submit the report, thus all decisions made were influenced by bad motive.

Being guided by the principle that parties are bound by their own pleadings, the Applicant ought to have submitted on the above grounds as they are stated at paragraph 4 of the affidavit in support of the application. The principle is stated in numerous Court decisions including the case of **Makori Masoga v. Joshua Mwaikambo & Another**, (1987) TLR 88 where it was held that:

> In general, I think it is elementary a party is bound by his pleadings and can only succeed according to what has averred in evidence. He is not allowed to set up a new case.

To the contrary, in his submission in support of the application, the Applicant abandoned the above grounds and centered his submissions on unknown grounds. The submission was vague as rightly submitted by Mr. Msosa, Respondent's Advocate. On such basis, this Court finds no relevance to reproduce the irrelevant part of the Applicant's submission.

From the Applicant's submission, the only ground which stands is the last one as quoted above. Thus, the Court will proceed to determine the same. However, before the determination, I find it relevant to briefly narrate the background of this dispute. The Applicant was employed by the Respondent since 2017 as a National Child Protection Manager. His contract was renewable after every 2 years. The last contract which is the subject matter of the present application commenced on 01/01/2021 and it was agreed to end on 31/12/2022. The Applicant's contract was terminated on the ground of gross negligence on 16/06/2021. That, an incident of child abuse occurred at the Respondent's office on 12/02/2021 whereby 18 years young man abused a 10 years child.

The Applicant was informed of the incident on 23/02/2021 but formally reported to the National Director on 29/04/2021. On such basis, the Applicant was charged for gross negligence for failure to immediately report the incident to the National Director and for gross

dishonesty. He was summoned before the disciplinary hearing where he was found guilt of the misconduct of gross negligence while discharged with the misconduct of gross dishonesty. The disciplinary committee proposed the sanction of termination, and the employer upheld the same. As pointed out above, the Applicant was terminated on 16/06/2021.

Aggrieved by the termination, the Applicant referred the matter to the CMA where he claimed for breach of contract. After thorough consideration of the evidence of the parties, the CMA concluded that the Applicant was fairly terminated from employment both substantively and procedurally. Consequently, the Applicant's claim at the CMA was dismissed.

Ms. Mumburi persuaded the Court to fault the Arbitrator's decision on the following reasons: *First*; that the disciplinary charges summarised against the employee do not allege material breach of contract. She was of the strong submission that the Respondent did not point out any clause in the employment contract that was breached. She added that the only reference made is to labour laws and SOS policies, but no employee should be dismissed for acting contrary to such general principles.

Second, even if SOS policy was incorporated in the employment contract, which is not the case, the said policy does not state that failure to report amounts to dismissal. She added that the policy only stated that failure to report may result in action against the respective ci-worker or associate. Thus, there was no basis for dismissal.

Third, in reliance to the book titled **Employment and Labour Relations in Tanzania**, by Cornel K. Mtaki [Edited by Bonaventura Rutinwa, Evance Katula and Tulia Ackson], the Applicant should not have been punished by dismissal after apologizing.

Fourth, the Arbitrator misapplied the principle and reasoning of the cases of **Warrior Security Ltd v. Athumani Mwangi**, Revision No. 83 of 2018, High Court Labour Division at Arusha and **NBC Bank Plc v. Lameck Matemba**, Revision Application No. 950 of 2018, High Court Labour Division at Dar es Salaam. She added that; the referred decisions were neither binding nor relevance to the material breach of contract. It was further submitted that the circumstances in the cases in question are quite different form the case at hand.

Fifth, that the Applicant who was acquitted for gross dishonesty should not have been convicted of material breach of contract.

Sixthly, had the Arbitrator applied the principle of consistency, he could not had upheld the decision to terminate the Applicant's employment contract whilst other officers who did not report the incident were not terminated from their employment. On the basis of the stated reasons, the Applicant urged the Court to revise and set aside the CMA's award as the same was improperly procured.

In response to the first reason, on the Applicant's contention that termination of the contract did not point out any clause in the contract is totally wrong, Mr. Msosa stated that failure to report the incident of child abuse was termed as negligence as it was among the responsibility of the Applicant (Refer exhibit D2 and D3). He added that; Exhibit D15 which is Termination Letter, mentioned the offence and regulation which has been violated.

As to the second reason, the Counsel reiterated his submission in chief on the first reason and added that failure to report the incident was contrary to the contract, job description and several policies, hence the Applicant deserved termination.

On the allegation that termination was not the proper sanction, Mr. Msosa submitted in reply that the record and proceeding reveals the Applicant was aware with the incident of the Child abuse from 23rd

February 2021 as it can be reflected in Exhibit D4. The Applicant failed to report the incident to the National Director who became aware sometimes on April 2021 through a report which was tendered as exhibit D5 on other findings. After the said report, the Applicant through email exhibit D6 started to explain to the National Director what happened. the National Director and entire management decided to write a Demand letter which was tendered as exhibit D7, and the Applicant through exhibit D8 apologised. Counsel Msosa was of the view that the apology was an afterthought.

Regarding the fourth reason it was submitted that the same is misconceived as the Arbitrator on the said two cases was addressing a scenario where an employee had apologized for the misconduct. It was relevant to this case because the Applicant apologized through exhibit D8.

On fifth reason, it was shortly submitted that the Applicant was terminated for gross negligence in the performance of his duties.

Turning to the last reason on the allegation of the principle of consistency, the same was not raised at the CMA. In the upshot Counsel Msosa urged the Court to dismiss the application for lack of merit.

In rejoinder Ms. Mumburi reiterated her submissions in chief.

I have cautiously considered the rival submissions of the parties, CMA and Court records as well as relevant laws. I find the Court is called upon to determine only one issue; *whether the Arbitrator properly considered the evidence on record to conclude that the Applicant was fairly terminated from employment.*

At international level, *Article 4 of C158 - Termination of Employment Convention, 1982 (No. 158)* requires termination of workers employment be based on valid reason associated with the capacity or conduct of the worker grounded on the operative requirements of the work. For clarity, *Article 4 (supra)* provides:

> 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 operational requirements of the undertaking, establishment or service.

The records are loud that the Applicant was terminated from employment on the ground of gross negligence. The Applicant's submissions in this case impliedly confirms that he violated the policy of reporting the incident as required. What the Applicant is challenging before the Court is the punishment imposed to him in respect of the

misconduct charged. The law under *Rule 12(1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 (herein GN. No. 42 of 2007)* provides the circumstances to be considered in determining whether the termination for misconduct in question was fair. *Rule 12 (1) (supra)* provides as follows:

> Any employer, arbitrator or judge who is required to decide as to termination for misconduct is unfair shall consider-
> (a) whether or not the employee contravened a rule or standard regulating conduct relating to employment;
> (b) if the rule or standard was contravened, whether or not
> (i) it is reasonable;
> (ii) it is clear and unambiguous;
> (iii) the employee was aware of it, or could reasonably be expected to have been aware of it;
> (iv) it has been consistently applied by the employer; and
> (v) termination is an appropriate sanction for contravening it.

In the present case, the Applicant was aware of the policy relating to immediately reporting any issue related to child abuse/violence/neglect/mistreatment. The policy is also embodied in the

Applicant's job description which was tendered as exhibit D2. It is my view that the policy in question is unambiguous and reasonable as it enhances the safety and protection of children who were under the Respondent's supervision. It is my further view that based on the circumstances of this case, termination was the appropriate sanction imposed to the Applicant on the following reasons:

First, the Applicant impliedly admitted having breached the policy in question where he also sought for forgiveness as evidenced by a letter titled sincere sorry dated 05/05/2021 (exhibit D8). That fact was also considered by the Arbitrator as it is reflected at page 23 paragraph 1 of the impugned award.

Second, based on the nature of the misconduct committed, termination was the appropriate sanction. The records are loud that the Applicant was terminated for negligence on failure to immediately report a child's sexual abuse incident. Going through the record there are no justifiable reasons adduced by the Applicant for failure to report the incident immediately as required. Taking into account that child's sexual abuse is a world-wide pandemic, it is my view that any person entrusted to safeguard and protect children under any abuse must act promptly regardless of the fact that the information received is true or not. The

same must be done to protect not only the children under his/her control but the society at large. The same was also emphasized by the Arbitrator in the impugned award at page 26 where he stated as follows:

> In my view, in terms of *Rule 8(2)(a) of the Rules*, the Respondent had a valid reason to terminate the contract of employment with the complainant as the said breach by the employee was material. The reason for holding so is the nature of the activities that the Respondent is dealing with. It is my view that, dealing with children and youth with no parents is a serious job that needs to be handled cautiously. These children may be exposed to a lot of risks including abuses amongst themselves. As such, an extra care is needed. Similarly, the complainant who was employed by the Respondent for the purposes of supporting the Respondent in ensuring safety and protection of children, was supposed to discharge his duties in an efficient manner so that any incidents that would have likely jeopardized such safety and protection do not happen.

Third, Rule 12 (4) of GN No. 42 (supra) provides for the circumstances to be considered in determining whether or not termination is the appropriate sanction. It states as follows:

(a) The seriousness of the misconduct in the light of the nature on the job and the circumstances in which it

occurred, health and safety, in the likelihood of repetitions; or

(b) The circumstances of the employee such as the employees employment record, length of service, previous disciplinary record and personal circumstances.

In the light of the afore *Rule 12 (4) (a) (supra),* the seriousness of the misconduct committed by the Applicant implicates safety of the children under the supervision of the Applicant.

Again, under the provisions of *Rule 12 (4) (b) (supra),* the Applicant was the employee of the Respondent since 2017. He is deemed to be aware of the child protection policy and reporting procedures.

I have noted the Applicant's submission that the Arbitrator did not state which provision in the employment contract was breached. Having gone through the records, I noted *Clause 4 of the employment contract (exhibit D1)* stipulates clearly that duties of the Applicant's position are attached to the job description. Thus, the Applicant's contention on lack of any term of the contract breached is absurdity. Any violation of the

duties attached to the job description amounts to breach of contract. Therefore, the Arbitrator arrived to a just decision in holding that failure to immediately report the matter the Applicant breached the employment contract.

In the result, I find the present application has no merit. The Applicant was fairly terminated from employment both substantively and procedurally. Consequently, the application is hereby dismissed for lack of merit. Each party to bear his own costs.

It is so ordered.

Y.J. MLYAMBINA

JUDGE

08/02/2024

Judgement pronounced and dated 8th February, 2024 in the presence of learned Counsel Juliana Mumburi for the Applicant and Ritha Mahoo for the Respondent.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) DIVISHENI YA MAHAKAMA YA KAZI (Labour Division)

Y.J. MLYAMBINA

JUDGE

08/02/2024