IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 920 OF 2024

(Arising from an Award issued on 27/11/2023 by Hon. G.M. Wilbard, Arbitrator, in Labour Dispute No. CMA/DSM/ILA/497/389/2022 at Ilala)

GODSON PAUL KATAMBI ..... APPLICANT

VERSUS

MINI BAKERIES (T) LTD ..... RESPONDENT

JUDGEMENT

Date of Last Order: 18/03/2024
Date of Judgement: 03/04/2024

B. E. K. Mganga, J.

It is undispute that Mr. Godson Paul Katambi, the herein applicant, and Mini Bakeries (T) Ltd, the herein respondent, started their employment relationship on 01st July 2018 when respondent employed the applicant as a salesman. It is further undisputed that the said employment contract was for unspecified period. It is said that, on 18th July 2022, respondent terminated employment of the applicant due to absenteeism from work for more than five days consecutively. Being served with termination letter, applicant was aggrieved with the said termination as a result, on 22nd July 2022, he filed Labour dispute No.

CMA/DSM/ ILA/497/389/2022 before the Commission for Mediation and Arbitrartion (CMA) complaining that respondent had no reason to terminate his employment and further that, procedures for termination were not adhered to.

On 27th November 2023, Hon. Wilbald G.M, arbitrator, having heard evidence of the parties, issued an award that termination was substantively and procedurally fair. In the said award, the arbitrator stated *inter-alia* that, applicant did not prove that he was at work during the period respondent alleged that he was absent. Dissatisfied with the award, applicant filed this Revision Application seeking the court to revise the said award. In the afidavit in support of the Notice of Application, applicant raised four (4) issues namely:-

1. *Whether it is legal and proper for the arbitrator to shift burden of proof from respondent to applicant.*
2. *Whether it is legal and proper for the arbitrator to make an error in stating that the respondent proved the case procedural and substantive while employer's documentary evidence suggest respondent did not prove.*
3. *Whether it is legal and proper for arbitrator to make an error in evaluating evidence tendered before the Commission and that led to bad decision.*
4. *Whether it is legal and proper that, the arbitrator to make an error by stating that respondent proved that applicant terminated with good reasons without regarding evidence provided by respondent to prove had good reasons to terminate applicant.*

In opposing the application, respondent filled for counter affidavit sworn by Tom Mwanalisi, her Principal Officer.

By consent of the parties the application was argued by way of written submissions. Applicant drafted and filed the written submission on his own while respondent enjoyed the service of Pascal Temba, personal representative.

Arguing the 1st ground of the application, applicant submitted that section 37(2)(a) and (b) and section 39 both of the Employment and Labour Relations Act, Cap. 366 R.E. 2019 requires the employer to prove fairness of termination of employment contrary to what was held by the arbitrator who shifted the burdern to the employee namely the applicant.

Arguing in support of the 2nd and 4th grounds, applicant submitted that respondent had no reason for termination. He submitted further that, respondent was supposed to adduce evidence proving reason for termination but she failed. On the requirement of prove of reason for termination, including the alleged misconduct comitted, applicant referred the court to the case of ***National Microfinance Bank vs George Athanasio Makange***, Revision No.7 of 2013, HC(Unreported). He submitted further that, in the bid to prove reason for termination,

respondent called Ally Hussein who testified that applicant left office on 28th June 2022 to 8th July 2022 and tendered a book to prove absenteeism. He added that, he objected admission of the said book because it was not in the list of documents to be relied upon by the respondent and that the same was not served to him. He went on that, the said book does not qualify to be called attendance register because it lacked signatures of the employees and it was written by the same person. He also submitted that, authenticity of the said document was questionable.

On procedural fairness, applicant submitted that respondent did not follow procedures for termination provided for under the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 that requires *inter-alia*, the employee be served with the notice to attend the disciplinary hearing, disciplinary hearing be conducted, evidence adduced, disciplinary hearing committee to be fair and the employee be afforded right to appeal. He submitted further that, he was not served with the notice to attend the disciplinary hearing. He added that, respondent stated that applicant was untraceable but did not tender any notice showing that she prapared the notice to be served to him. He went on that he had sureties but

respondent did not prove that applicant's sureties were traced. He added that, not only that respondent failed to serve him with the notice but also failed to comply with the provisions of Rule 13(3) of GN. No. 42 of 2007 (supra) that requires an employee be afforded the period of at least 48 hours. He went on that exhibit D18 shows that the date of notice was 08th July 2022 and the hearing date was 09th July 2022.

Applicant submitted further that, exhibit D18 shows that, Tom Wanalisi(DW1), who was the chairperson in the disciplinary hearing committee, is the one who testified at CMA as a witness on behalf of respondent. He argued that, DW1 was a judge on his own case contrary to what was held by this court in the case of ***National Microfinance Bank PLC vs Christian Nicholous Gideon***, Revision No. 336 of 2020, HC(Unreported).

Arguing in support of the 3rd ground, applicant submitted that, the arbitrator failed to evaluate evidence tendered before CMA and relied on evidence which is not allowed by the laws to prove that he was an absenteeism and was never served to him. Applicant cited the case of ***National Microfinance Bank vs George Athanasio Makange*** (supra) to support his submissions.

With those submissions, applicant prayed the application be allowed and awarded 52 months salaries compensation as prayed in the CMA F1.

Arguing on behalf of the respondent, Mr. Temba submitted that, respondent had a valid reason and proved the reason for termination of applicant's employment based on absenteeism.

On procedural fairness, Mr. Temba submitted that, according to exhibit D18, the notice was issued on 08th July 2022 and hearing was conducted on 09th July 2022 because applicant was untraceable hence respondent properly proceeded with the disciplinary hearing in terms of Rule 13(6) of GN. No. 42 of 2007. He added that the denial to right to prepare for hearing does not arise in the circumstances of the application at hand.

On the complaint that DW1 was the chairperson during the disciplinary hearing and testified at CMA, hence violation of the principle that no one should be a judge on his own case, is a misconception and cannot apply in the application at hand. With those submissions, Mr. Temba prayed the application be dismissed for want of merit.

I should point out that applicant did not file rejoinder submissions though he had that chance. I will therefore only consider written submission in chief by the applicant and reply submissions by the respondent.

I have examined evidence of the parties in the CMA record and considered their rival submissions in this application. The main issue to be answered in this application is whether termination was fair and to what reliefs are the parties entitled to.

It was evidence of Thom Wanalisi(DW1) that, applicant was terminated due to absenteeism for five consecutive dates. In his evidence, DW1 did not specifically state the dates applicant was absent. While under cross examination, DW1 stated that, it was Ally Hussein(DW2) who reported absenteeism of the applicant. He further testified while under cross examination that, applicant did not attend the disciplinary hearing because he was not served as he was untraceable.

It was evidence of Ally Hussein Hassan(DW2) that, applicant was absent on 28th, 29th and 30th June 2022 and other dates of July 2022. In his own words, DW2 is recorded stating:-

"… Since tar 28/June hakufika kazini. Na nilimtafuta hakupatikana. Nilifikisha taarifa operation ambao nao walimtafuta bila mafanikio. Ndipo tulimjazia absent.

As per log book ➡ hakuripoti tangu tar; 28, 29, 30 na pia mwezi July kuendelea hakuriporti.

Naomba kitabu kiwe sehemu ya ushahidi."

I should point out that, in his evidence, DW2 prayed to tender the "MUSTER ROLL BOOK FOR the July(sic) 2022" as exhibit but respondent objected that it was not listed in the list of documents to be relied upon by the respondent. The objection was overruled and it was admitted as part of exhibit D18.

During cross examination, DW2 admitted that the said master roll is only for July and that he(DW2) was the author of the said document. He further admitted that, he doesn't know whether there is a person who testified in the disciplinary hearing and that he doesn't know that the said document was tendered as exhibit during the disciplinary hearing. He further admitted that the said document was written by a single person namely himself and that, he doesn't know a person who clarified the meaning of P/A/L. DW2 also stated that, applicant did not attend at work starting from 29th June but the document tendered is for July only. In his own words, DW2 was recorded while under cross examination stating *inter-alia* that:-

"…

- *Sikuwepo katika kikao cha nidhamu.*
- *See "master roll for the" (sic) hiyo ni Julai tu.*
- *Mm ndio mwandishi wa master roll.* ***Cjui*** *nani alikwenda kutoa ushahidi* ***ktk*** *hg.*
- ***Mm*** *sijui km kuna mtu aliongelea km ushahidi as sikuwepo.*
- ***Mm*** *sijui km ilitolewa* ***km*** *ushahidi* ***ktk DH***
- *Master roll ni mwandiko wa mtu mmoja. Aliandika majina na kujaza mwenyewe.*
- ***Mm*** *ndiye huwa najaz master roll, ndo mhusika*
- *Nani alifafanua P/A/L maana zake?* ***Cjui****.*
- *Karatasi moja si daftari zima*
- ***Mm cjui*** *if DW1 alizungumzia kitabu cha mahudhurio.*
- *Ni zaidi ya siku 5 hakuwa kazini kuanzia tar 29/6 -*
- *Hiyo nyaraka ya mahudhurio ni ya julai*
- *Sijui* ***km*** *waliwasilisha mahudhurio ya june.*
- ***Ktk*** *D18 hakuna ushahid wa june uliowasilishwa.*
- *Sijui ameachichwa kazi kwa tuhuma za utoro kuanzia wapi (****tar – mpk tar*** *ngapi)*
- *Upo uwezekano wa m/kaji kuingia kazini na kujaza ameingia saa ngapi na kutoka saa ngapi.*
- *Why Tume isiamini umepika data? As unaandika mwenyewe*
- ***Kwsbb*** *hiki kitabu ni kwa ajili yangu mm kuangalia mahudhurio, so huwa najaza mwenyewe*
- *…"*(Emphasis is mine)

In his evidence, Jackson Filbert Kagaruki(DW3) testified inter-alia that applicant was employed by the respodent on 1st July 2018 for unspecified period. He further testfied that applicant went on leave but he did not return at work as a result he was terminated. He also

testified that applicant did not attend the disciplinary hearing because he was untraceable.

On the other hand, Godson Paul Katambi(PW1) applicant testified *inter-alia* that his monthly salary was TZS 360,000/=. He Also stated that the procedure at work was that, employees were signing at the time of entering at work and departure from work. That, book in which employees were signing is at the reception where the watchman seats. That, he went on leave and when he came back, he continued to attend at work. He further testified that on 11th July 2022 he was directed to go at the respondent's headquartes and that he obeyed. That, upon his arrival to the respondent's headquarters, DW3 served him with termination letter. He stated that, at all times, he was at work hence termination is unfair for want of reason and procedure. He also testified that, he does not know the master roll (part of exhibit D18) because it is not an attendance register and there is no his signature and that, none of the employees signed it. He added that, employees including himself used to write their names and sign in the attendance register. In his own words, PW1 is recorded stating:-

> "...
> *Hii karatasi haina saini yangu.*
> *Haina saini ya mtu aliyeandika.*

Sikubali, hii sio attendance register

Ina jumla ya majina 20.

Hakuna mtu aliyesaini.

Daftari tuliokuwa (sic) tunasaini tulikuwa tunaandika jina wenyewe, na kusaini na ukitoka unasaini mwenyewe.

…"

While under cross examination, PW1 stated that he commenced his leave on 1st June 2022 to 28th June 2022. That, on 29th he was in office. In his own words, PW1 stated *inter-alia* that:-

"…

Likizo yangu ilianza tarehe 1/6/2022 ***mpk*** *28/6/2022. Tarehe 29 niliingia kazini…*

Shughuli gani ulifanya wakati umetoka likizo?

Kuuza mikate.

…"

It was correctly submitted by the parties that respondent being the employer, had a duty of proving fairness of termination of employment of the applicant. Section 39 of Cap. 366 R.E. 2019(supra) is clear to that position. It was also correctly submitted by the parties that fairness of termination includes both presence of valid reason and adherence to procedures as it is provided by section 37(2)(a),(b) and (c) and (4) of Cap. 366 R.E. 2019 (supra). See also the case cited by the applicant and the case of ***National Microfinance Bank vs Victor Modest Banda*** (Civil Appeal 29 of 2018) [2020] TZCA 35 (26 February 2020), ***Elia Kasalile & Others vs The Institute of Social Work*** (Civil

Appeal 145 of 2016) [2018] TZCA 364 (4 April 2018), ***National Microfinance Bank vs Leila Mringo & Others*** (Civil Appeal 30 of 2018) [2020] TZCA 240 (20 May 2020) to mention but a few. In Mringo's case (supra) the Court of Appeal held inter-alia that:-

> *"…We agree with the respondents' counsel that section 39 reproduced above, has the effect of shifting the burden of proof of fair termination to the employer in any proceedings concerning unfair termination. In such cases, the employee's duty is simply to allege termination and that it was unfair…"*

It is my view therefore that, it was an error on part of the arbitrator in holding that applicant did not prove that he was at work during the period respondent alleged that he was absent. In so holding, the arbitrator shifted the burdern of proof of fairness of termination from the respondent to the applicant contrary to the provisions of section 39 of Cap. 366 R.E. 2019 (supra). As pointed herein above, applicant stated that his leave ended on 28th June 2022 and that from 29th June 2022 to the date of termination of his employment he was at work. It was the duty of the respondent to prove that applicant was not attending at work on the alleged dates.

I have carefully examined evidence adduced on behalf of the respondent and find that, respondent did not prove that applicant did not attend at work for the alleged period. I am of that conclusion

because, in his evidence, DW1 stated that it is DW2 who reported absenteeism of the applicant. In other words, respondent was banking on evidence of DW2 to prove the alleged absenteeism. In his evidence, DW2 stated that, applicant did not attend at work from 28th, 29th and 30th June 2022 other dates of July 2022. To prove the said absenteeism, DW2 tendered the so called Muster roll for July 2022" part of exhibit D18 despite an objection that was raised by the applicant that the said document was not in the list of documents to be relied on by the respondent. I have examined the said "Muster Roll for july 2022" and find that, it was not signed by the author namely DW2 who alleges is the one who prepared it. Again, authenticity of the said document is questionable because, it purports to show that it is muster Roll for the month of July 2022 but, in my view, it is not. The said document reads " MUSTER ROLL for the July (sic) 2022. The words " MUSTER ROLL for the" is typed while July 2022 is handwritten and there was no explanation from DW2. The said document was attached to the Disciplinary Hearing Form (exhibit D18) to show that it was part of evidence that was considered during the disciplinary hearing. I have examined evidence of the respondent and find that, the said document was not tendered during the disciplinary hearing. I am of that conclusive opinion because, DW2 stated in his evidence that, he did not attend at

the dicsiplinary hearing, as such, he doesn't know whether the same was tendered in the dicsiplinary hearing. Again, evidence of DW1 who was the chairperson of the disciplinary hearing has nothing to do with the said Muster Roll for July 2022. It is my further view that, the said Muster Roll for July 2022 cannot be said is an attendance register. I am of that view because, evidence by the applicant that at the time of attending at work, employees including himself, were writing their names and signing in the attendance register and at the time of exit they were also signing, was not shaken. It was the duty of the respondent, to tender the attendance register in which employees were signing and not the so called Muster Roll for July 2022 that was authored by DW2. I am of that view because, in absence of the attendance register that was signed by the employees, there is possibility, DW2 for his interior motive, to have reported that so and so did not attend at work and finaly be unfairly terminated. In addition to the foregoing, I have examined the said Muster Roll for July 2022 part of exhibit D18 and find that there are alphabets such as "L", "A", "P" and "O" but there is no explaination as to what they stand for. In fact, even DW2 failed to explaining in his evidence both the meaning of these alphabets in the said Muster Roll for July 2022 (part of exhibit D18). In the upshot, I hold that the said Muster Roll for July 2022 and the whole

evidence of the respondent did not prove the alleged misconduct of absenteeism against the applicant.

I have pointed out that, at the time of tendering the said Muster Roll for July 2022, applicant objected *inter-alia* that, it was not listed by the respondent as one of the documents to be relied to prove her case. The arbitrator relied on the provisions of section 88 of Cap. 366 R.E. 2022 and Rule 19(2)(b) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. No. 67 of 2007. I have read the list of documents that were filed at CMA on 05th October 2022 by the respondent as documents to be relied on to prove her case in terms of Rule 24(6) of GN. No. 67 of 2007 (supra) and find that the said Muster Roll for July 2022 was not amongst. In the said list, respondent mentioned the Disciplinary hearing Form as one of the documents to be relied to prove her case. Though the said Muster Roll for July 2022 was attached to the Disciplinary hearing form, it cannot be said that it is a disciplinary hearing form because their content and purposes are different. Had respondent intended to rely on that document to prove her case, she should have complied with the provisions of Rule 24(6) of GN. No. 67 of 2007 (supra that provides:-

> *24(6) Parties shall provide copies of each document intended to be used as evidence, for the Arbitrator and for each party in dispute."*

In my view, the said Rule was drafted to ensure fair hearing and avoid ambushing the arbitrator and the other party so that, from the beginning, each knows the case he or she is likely to face. Relience by the arbitrator to the provisions of Rule 19(2)(b) of GN. No. 67 of 2007 (supra) to overrule the preliminary objection that was raised by the applicant was a great misdirection because, the said Rule cannot be read in isolation of other Rules of the said GN. No. 67 of 2007(supra). In my view, the provisions of Rule 19(2)(b) of GN. No. 67 of 2007 was inaplicable in the circumstances of this application. The said Rule reads

> *"19(2) the Powers of the Arbitrator include to-*
>
> *(b)* ***summon a person*** *for questioning attending a hearing, and* ***order the person to produce*** *a book, document or object relevant to the dispute, if that person's attendance may assist in resolving the dispute."* (Emphasis is mine)

In my view, the above quoted Rule is a discretion of the arbitrator. That discretion must be used judiciously and not arbitrarly. It is my view that, the powers of the arbitrator under the quoted rule is to summon the person and order him to produce the book, document or object relevant to the determination of the dispute. In other words, for the said Rule to be applicable, the arbitrator must be the initiator of summoning the person especially after considering that the person was not called by either party to produce the book, document or the object that the

arbitrator finds relevant in determination of the disputes. This normaly is after closure of evidence of each side and the parties are aforded right to cross examine the witness. In other words, once that person is summoned, the said person becomes CMA's witness and not either party's witness. In the application at hand, DW2 was called by the respondent as her witness. DW2 was not summoned by CMA to tender the said Muster Roll for July 2022 rather he was called by the respondent.

As pointed out hereinabove, the Arbitrator relied on the provisions of section 88 of Cap. 366 (supra) that gives powers to the Arbitrators to regulate the manner on how to conduct proceedings. I should point out that, sub-section (4) of section 88 of Cap. 366 R.E. 2019(supra), puts a condition that, that should be for fair and quick determination of the dispute. The said section 88 is not an open check for the arbitrators to do whatever they think they can do without considering fairness to the parties.

For the foregoing, I find that the 2nd and 4th issues raised by the applicant is merited and do hereby expunge the said Muster Roll for July 2022 as it was illegally admitted. As held hereinabove, respondent did not prove reason for termination.

It seems the arbitrator is relying on the provision of section 88 of Cap. 366 R.E 2019 (supra), Rule 19(1) of GN. No. 67 of 2007 (supra) to determine how to conduct arbitration proceedings, which is why, she has used acronomies best known to her as quoted hereinabove. In my view, those provisions are not tickets for the arbitrator to use languages that can be used while enjoying nocturnal drinking sessions or languages that are only used in private life and not in public offices. I once again, advise the arbitrator that, official language should always be used when discharging public duties including determination of someone's right. We should always remember that we are in public office, discharging public duties, therefore, let us respect the offices we are working in and the public we are serving. We should always also remember that, the public is the consumers of our decisions and they expect us to use the official language for that matter. Twe should always further remember that, the awards and judgments were are issuing or delivering to the parties, does not end into the hands of the parties but becomes a public documents for public consumption. Bearing those I our minds, let us use the language that is easly understandable by the parties and the public. In other words, let unofficial and jargon languages be reserved for use in social media only, if necessary anyaway, but should not be used in ofiicial duties in public

offices. See the case of ***Imran Murtaza Dinani vs Bollore Transport & Logistics Tanzania Ltd*** (Revs Appl No. 253 of 2022) [2023] TZHCLD 1170 (27 February 2023) and ***Issa Barnabas Pakata vs Victoria Finance Plc*** (Consolidated Labour Revision No. 329 of 2022) [2022] TZHCLD 1048 (28 November 2022).

It was submitted by the applicant that, termination was also unfair procedurally because he was not served with the notice to attend the disciplinary hearing and that, the period available from the alleged notice of disciplinary hearing and hearing is less than 48 hours. I have examined the disciplinary hearing form (exhibit D18) and find that, the notice to attend the said disciplinary hearing was prepared on 8th July 2022 requiring applicant to attend the disciplinary hearing on 9th July 2022. It is clear that, time that was availbale is less than the minimum 48 hours provided for under Rule 13(3) of GN.No. 42 of 2007 (supra).

It was testified by DW1 and DW2 that, applicant was untraceable which is why, he was not served with the notice to attend the disciplinary hearing hence he did not attend the disciplinary hearing. It is my view that, respondent did not trace applicant and serve him with the notice to attend the disciplinary hearing. I am of that view because, I see no logic as to why, respondent was in hurry and took just 24 hours

to trace applicant, if we assume that the said notice was prepared. If at all applicant was untraceable, still, had respondent intended to serve the applicant with the notice to attend the disciplinary hearing, she could have done so through applicant's sureties. I am of that view because, respondent had address and phone numbers of applicant's sureties as per exhibit D21 that was tendered by the respondent. More so, in exhibit D21, applicant provided his residential address but no evidence was adduced by the respondent proving that respondent went to serve applicant the notice to attend the disciplinary hearing at his residential house. It is my view that, what was done by the respondent was a clear deprivation of right to be heard. For all what I have pointed hereinabove, I hold that termination was also unfair procedurally.

It was submitted by the applicant that DW1 was the chairperson in the disciplinary hearing and appeared at CMA to testify on behalf of the respondent and that he was a judge on his own case. With due respect to the applicant, in appearing as witness for the respondent at CMA, DW1 had nothing to do with making decisions. His role ended after making recommendations of terminating applicant during the disciplinary hearing. There is no evidence showing that, during the disciplinary hearing, DW1 prayed the role as a judge and investigator or accusor for

this court to accept submissions that DW1 was a judge on his own case. I find that complaint with no merit.

Having held that termination was unfair both substantively and procedurally, the next issue is to what relief(s) the applicant is entitled to. In the Referral Form(CMA F1) applicant indicated that he was claiming to be paid 12 months salary compensation for unfair termination, notice pay, leave pay and severance pay. In terms of section 40(1)(c) of Cap. 366 R.E. 2019(supra), applicant is entitled to be paid 12 months salary compensation. In his evidence, applicant(PW1) testified that his monthly salary was TZs 360,000/=. That evidence was not challenged by the respondent. I therefore order respondent to pay applicant TZS 4, 320,000/= being twelve months salary compensation for unfair termination. I further order respondent, in terms of section 41 of Cap. 366 R.E. 2019(supra) to pay applicant TZS 360, 000/= being one month salary in lieu of notice. I also order respondent, in terms of section of section 44(1)(b) of Cap. 366 R.E. 2019 (supra) to pay applicant TZS 360,000/= one month salary as leave pay. I finally, in terms of section 42 of Cap. 366 R.E. 2019(supra) order respondent to pay applicant TZS 387,692.31 as severance pay. In total applicant shall be paid TZS 5,427,692.31

For the foregoing, I find that this application is merited and allow it. I hereby revise, quash and set aside the CMA award.

Dated in Dar es Salaam on this 3rd April 2024.

B. E. K. Mganga
JUDGE

Judgment delivered on this 3rd April 2024 in chambers in the presence of Godson Paul Katambi, the Applicant and Pascal Temba, the Personal Representative of the Respondent.

B. E. K. Mganga
JUDGE