

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 249 OF 2023

*(Arising from the award of the Commission for Mediation & Arbitration of DSM at
Kinondoni*

*Issued by Hon. M, Abdallah: Arbitrator in Labour Dispute
No. CMA/DSM/ILA/483/21/2/22)*

HASSAN KONDO KUGA.....APPLICANT

VERSUS

TANZANIA SOCIAL SERVICES

INDUSTRY WORKERS UNION.....RESPONDENT

JUDGEMENT

OPIYO, J.

Date of last order: 11th March 2024

Date of Judgement: 5th April 2024

OPIYO, J.

HASSAN KONDO KUGA, the Applicant herein is seeking for this Court to call for the record of Labour Dispute No. CMA/DSM/ILA/483/21/2/22 from the Commission for Mediation and Arbitration of Dar es salaam (herein CMA). The object is to revise and set aside the CMA award. He further prayed for this Court to make any other orders as it may deem just and convenient in the circumstances of the case.



Historically, the applicant was employed by the respondent as Assistant Accountant since 1st February 2017 till 31st December 2021 when he was terminated for misconduct (withdrawing money not authorized by the Secretary, honoring payment without authorization from responsible authority, hence causing a loss of TZS 65,093565/=). Aggrieved by the decision applicant filed the matter at CMA on claiming for unfair termination and praying for reinstatement without loss of income. At CMA the matter was determined on respondent's favor on the reason that the termination was both substantively and procedurally fair. This triggered the present application.

The application was commenced by the Chamber summons, supported with an affidavit sworn by the applicant himself, in which after expounding the chronological events leading to this application, the applicant challenging the decision of the arbitrator on the ground that he erred in law and fact by finding that his termination was both substantively and procedurally fair. He further challenged the decision of the arbitrator by not considering the impropriety of the disciplinary committee, as it was held not in accordance with the law.



The application was challenged through a counter affidavit affirmed by Mr. Zuberi Madunda, respondent's Principal Officer (Secretary General). The deponent in the counter affidavit vehemently and strongly disputed applicant's allegations.

Orally the application was disposed of. In this matter, the applicant was represented by Mr. Paul Elias, Advocate, whereas the respondent was represented by Ms. Isabela Alex, Respondent's legal Secretary. All the submissions are valued, and they will be taken on board as they fall relevant in relation to legal issues raised in this application.

Starting with the first ground as to whether the arbitrator was right in his findings that there was a valid reason of terminating applicant's employment, while the same was not proved by the respondent. The applicant's Counsel contended that the money was released with permission of the Former Acting Secretary General before the current secretary was elected. He stated that, PW2 testified at the Commission that he was the one who approved the payment as he was the Acting Secretary. He said he approved postdated cheques, meaning the money was withdrawn with his permission before the new General Secretary was



elected. So, to him this proves that the approval was there contrary to what the respondent claims that he withdrew the amount without approval.

Mr. Elias argued that, PW2 testimony as reflected at Pg 13 supported by the testimony of PW3 that the funds were released with approval of executive committee for election facilitation purposes. Regarding Pg 15 of the award, Mr. Elias averred that, the arbitrator in answering the issue as to whether there was a valid reason for termination used exhibit D7 and other exhibits of payments but did not consider applicant's evidence.

On the last charge of causing loss to the respondent he submitted that, at Page 17 line 4-7 it is stated how this claim was not proved. According to him, failure to show that there was no loss, even the previous three allegations were not proved. He further contended that the arbitrator's conclusion that there was reason for termination by loss of faith in applicant for dishonest is a new issue that was not testified on by the parties during trial.

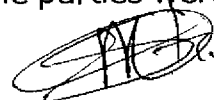
On the issue as whether procedure was followed, he stated that, in disciplinary proceedings, the form required the member to indicate their



designations, but this requirement was not adhered to as non-indicated his or her designations.

He also stated that, there was no valid coram for the meeting. That, in respondent's constitution, members of such committee should come from each department, but in this case same departments did not bring any member. According to Article 5:1:3.4 there are several departments, but participation of members from each department was not adhered to.

On 3rd ground on whether applicant was entitled to salary arrears, he argued that, arbitrator did not consider testimony of the applicant. He stated that, he was first suspended for investigation purposes, so he expected to be receiving salary in full, but the respondent stopped salary instantly during suspension. And worse still, the arbitrator only ordered for payment of 2 months salaries instead of 7. That, the respondent claimed the money was used to settle applicant's personal debt. He admitted that, it is true applicant had borrowed refrigerator, but had an agreement to pay in instalments not in lumpsum as the respondent did with his entitlements. He argued that, it was wrong for respondent to change the terms of this agreement and pay in lump sum. That, in accordance to exhibit D15, in dispute resolution, the parties were to settle



dispute amicably, but respondent ignored that as there was no consent of applicant in settling the debt. Therefore, it was wrong for arbitrator to support such deeds by stating that the debts were proved to have been paid.

On the last ground as to reliefs parties are entitled to, he submitted that the arbitrator wrongly decided that the applicant was not entitled to compensation. He argued, citing the case of **Fredy Ngodoki v. Swissport Tanzania PLC**, that since procedure was not followed, the applicant was entitled to compensation. He continued that, under section 110 and 111 of the evidence Act, one who alleges must prove, so it lies on the employer to prove compliance with procedures in terminating an employee. That, under paragraph 14 of the counter affidavit the respondent insinuates criminality in applicant actions, but he did not take criminal actions against him and prove the same beyond reasonable doubt.


Challenging the application Ms. Isabela maintained that on 25/05/2021 there was a change of institution administration, including a change of chairperson, Secretary General, Deputy Secretary etc. (exhibit D2 minutes of meeting that elected new leaders and D3 showed the names of those



new leaders). The change was communicated to the Registrar as required per exhibit D5. She stated that by that time the applicant was an accountant, and there was a letter that informed the banks on the change of signatories, exhibits D6a, D6b and D6c. However, on 22/07/2021 the new Secretary General went to the bank and realized that the withdrawals were still going on through the old signatories (exhibit D7). Also that, the applicant made payments using payment vouchers that were not approved by the Secretary General (see exhibits D8a D8b, D8c, D8d, D8e and D8F).

Ms. Isabela further submitted that, it was proved that the applicant did gross misconduct as he used former signatories for withdrawals. He did not inform the bank about the change of signatories. According to her, all these were done with ill intent. Therefore, there was a valid reason for applicant's termination.

She continued to submit that, in her view, all the procedures were followed, as the applicant was called before disciplinary committee and given right to be heard. He had representation and his terminal benefits were used in paying for his loan, on the reason that the respondent being a guarantor entered an agreement with the lender company as per Exhibit

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15. She stated that, applicant admitted his loan at Page 11 para 3 of the award to the tune of TZS 720,000/=. This shows that he had admitted that settlement of the same was done by the respondent using part of his terminal benefits.

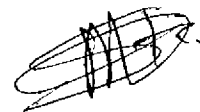
Yet again, Ms. Isabela argued that, the employer managed to prove his case that there was fair termination and the applicant failed to prove unfair termination as stated at page 13 of the award. PW2 admitted knowing there was a change of management, but still he made a grip to the fact that, whatever was done was in accordance to order as there was no handover. The witness however also admitted that accountant cannot withdraw money without Secretary General's approval as per page 15 of award.

She continued that in their counter affidavit, the charge against the applicant was both disciplinary and of criminal nature as he forged some documents. The respondent opted for disciplinary actions, but this does not mean the actions could not be criminally proved against the applicant. She therefore prayed for the application to be dismissed for lack of merits.

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In rejoinder the applicant reiterated what he submitted in chief, insisting that his termination was unfair both substantively and procedurally. His prayer for reinstatement was also reiterated.

Given the facts of this case, the first issue for consideration in determination of this application is fairness of the applicant's termination both substantively and procedurally. Starting with fairness of the reasons, from the records, both charge sheet and termination letter show that the offences that the applicant was charged with were four including withdrawal of funds without permission of the Secretary General, making payments without proper approval of the Secretary General, using improper signatories (former Signatories) in approving withdrawals, occasioning loss to the Institution to the tune of 65,093,565/=. The fairness of the reasons for his dismissal depended on the proof of the above allegations. The CMA found that there were fair reasons for applicant's termination since there was proof that there was withdrawal of the total amount of 8,986,615/= in terms of exhibits D8A, D8B, D8C, D8D, D8E and D8F. That, the amount of 3,891,000/= was spent without approval and balance of 3,501,000/= expenditure is unknown. The arbitrator concluded that, this amounted to gross dishonest in terms of rule 12(3) (a) of GN 42/2007.



It is undisputed that, the withdrawals were through cheques which were signed before the applicant was able to make withdrawals. PW2 and PW3 who were former executive leaders responsible for signing the said cheques admitted authorising the withdrawals for the purpose of facilitating the General election meeting that was held on 25/5/2021 (exhibit D2, minutes of the meeting) in which the current General Secretary, Zuberi Said Madunda (the complainant and the only respondents witness at trial) was elected.

The issue that emanates here is whether the arbitrator was right in his findings that there was a valid reason of terminating applicant's employment. The applicant's Counsel contended that the money was released with permission of the Former Acting Secretary General before the current secretary was elected. PW2, one Said Kassim Kiluke, the outgoing chairperson who was also re-elected to the position at the same time the current Secretary General was elected on 25/5/2021 (see exhibits D3 and D4) testified at the Commission that he was the one who approved the payment as he was the Chairman. He expressed his discontentment with applicant's termination on these reasons, stating that they as leaders are the ones who approved postdated cheques for meeting facilitation



expenses as approved by executive committee. This testimony was well corroborated with the testimony of PW3 who was the acting Secretary General at a time who also elaborated very well that he continued to authorize the withdrawals and payments even after the election at the time the handover was yet to be made to the new management for the purpose of clearing the election meeting expenses. He added that, he is the one who was in charge then and he made sure all the debts relating to the meeting expenses were cleared. What that means is that the money was withdrawn with their permission before the new General Secretary was made a signatory. In my view, this proves that the approval was there contrary to what the respondent claims that the withdrawals were without approval. All the withdrawals claimed to have been without approval envisaged in exhibits D8A, D8B, D8C, D8D, D8E and D8F and payments claimed to have been made without approval were made in June 2021, before the change of signatories that was made through the letter dated 28th July 2021 as per exhibit D6B not on 28th May 2021 through exhibit D6A as claimed by respondent.

I have noted that exhibit D6A purported to be a notice to the bank for change of signatories apparently never reached the Bank, as no proof to that effect was advanced by the respondent. The respondent puts blame



on the applicant that he had ill intentions by not serving the letter to the bank, but no proof that it was the applicant who was obliged to do so. As a General Secretary, DW1 was the one obliged to make such follow ups to ensure service. From its wording, even if it could indeed reach the bank, exhibit D6A was just a notice that there were to be changes in signatories with the names of those who will be involved in the process. It did not have the effect of actually changing the signatories at the time as the executive committee meeting appointing the signatories was yet to sit. Therefore, it is the letter dated 28/7/2021 that was received by the bank on 3/8/2021, exhibit D6B, that requested for change of signatories as approved by the executive on 8/7/2021 (exhibit D6B collectively) that had the effect of doing so. That means the signatories were changed after 3/8/2021. Therefore, whatever was done before that date with authorisation of former signatories were not without approval as claimed by the respondent and for that matter leaves no blame on the applicant. If at all, all blames should be directed to PW2 and PW3 who were the authorising officers. Although, even to them, the blames can hardly stand as the withdrawals were limited to settling debts relating to election facilitation purposes that were incurred during the former regime. This answers the first three charges of withdrawal and payment without approval of the secretary general and of using former signatories.



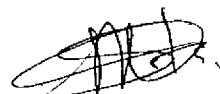
On the last charge of causing loss to the respondent, as submitted by Mr. Elias this claim was not proved as per the CMA award page 17. This indeed shows that there was no loss that was occasioned by the applicant to the tune of 65, 093,565/= to the respondent. The CMA finding was also that this charge was not proved. The respondent did not challenge this finding of the CMA. I therefore not going to dwell much on it. It suffices to reach a conclusion that as these allegations were not proved, the arbitrator's conclusion that there was reason for termination was indeed unfounded. The arbitrator found a reason in loss of faith in applicant for dishonest. This was not among the charges the applicant was charged with. Therefore, it remains a new issue that was not testified on by the parties during trial and not consonant with the charge, as correctly argued by Mr. Elias.

The next issue for determination was whether the procedure was followed. Normally, after finding that there was no reason for termination, consideration of propriety of procedure becomes immaterial. The rationale is that, there is no need of setting any procedure, no matter how proper, in motion for no fair reason at all. However, for the procedural's flaws relating to justifying reasons found in this matter I wish to say a word



before pen off. Regarding this aspect, the respondent alleged that there was no impartiality on the ground that the coram was not proper as the designations of members of Disciplinary Committee was not mentioned. In answering the same this Court directed itself to the CMA records including the minutes of disciplinary meeting, it is found that indeed members designations were not indicated. The proceedings only reflected the membership position of every member of the committee (whether chairperson, secretary or just a member). I am alive to the fact that the procedure are not to be adhered to in checklist as was held in the case of **Justa Kyaruzi V NBC Ltd** Rev. No 79 of 2009 Lab Division at Mwanza. However, not showing members' designation makes it impossible to determine the composition of the committee with precision. In this case the applicant claims that the committee was to be composed by members from all departments in the Institution, which was not adhered to. Without designation of members, one can not know if the coram was proper in terms of drawing members from all the departments as required by their constitution.

What is again so noticeable in the committee proceedings was their findings which differed massively with the charge against the applicant. Seemingly, some principles of natural justice were adhered to by the

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respondent since the applicant was notified of the charge on 2nd July 2021 and he was given time to prepare for the hearing and consequently the hearing was conducted on 10th November 2021. That means, he was afforded with more than 48 hrs for hearing as directed by Rule 13(3) of G.N No. 42 of 2007. However, the major lapse came out of the finding of the disciplinary committee which was not in line with what the applicant was charged with. At page six of the proceedings, the committee found the applicant guilty of insubordination and misuse of employer's funds which were not the offences he was charged with. What this means is that, the committee did not deal with what they were set to do. The offences the applicant was charged with were left unattended by the committee, making the committee's finding redundant as the same is not related to the charge.

Regarding relief of the parties are entitled to, this court has this to say; upon finding that the applicant's termination was unfair in both aspects, then the remedies he is entitled to need to be propounded in terms of section 40(1) and (2) of the Cap 366 RE 2019. From CMA F1, the applicant prayed for reinstatement without loss of remuneration during the period he was absent from work due to unfair termination. However, given the circumstances of this case, that is, given how the two parted ways in

unpleasant manner, and the age of appellant which is over retirement age, I find that awarding reinstatement is not a favorable remedy. I therefore look for other remedies grantable under the above section, which is compensation. In the case of **Tanzania Cigarette Company Ltd vs Hassan Marua**, Revision No. 154/2014 the Court of Appeal stated that

"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 principle, directs that awarding compensation must be done judiciously. Considering the age of the applicant, its undisputed that he cannot secure other employment. On that basis and being a Court of equity, I award him a total Tshs. **5,255,000/=** (including 12 months salaries as compensation amounting to (3,600,000/), calculated from the salary of Tshs. 300,000/= per month, severance allowance to the tune of 375,000/=, one month salary in lieu of notice (300,000/=), two month's

salary arrears (600,000/=), leave allowance 300,000/- amount undisputedly deducted from employees' salaries for the purpose of meeting facilitation as per the CMA proceedings (80,000/=).

For those reasons, the CMA award is revised to the extent explained above. Each party to the application to take care of his/her own costs.

It is so ordered.




M. P. OPIYO,

JUDGE

5/4/2024