THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB REGISTRY

AT MBEYA

LABOUR REVISION NO. 1 OF 2023

(Originating from Labour Dispute No CMA/MBY/109/2020)

JACOB PHILIP NDAGA .....APPLICANT

VERSUS

COCACOLA KWANZA LIMITED .....RESPONDENT

RULING

Date of hearing: 1/11/2023

Date of ruling: 12/12/2023

NONGWA, J.:

The applicant above named is aggrieved with the award of the Commission for mediation and arbitration of Mbeya (CMA) in Labour dispute No. CMA/MBY/109/2020 which upheld the termination of employment of the applicant by the respondent. He has filed the present application seeking the award to be revised and set aside. The grounds for the orders sought are set out in the affidavit.

The application is made under section 91(1) and 94(1)(b)(i) of the Employment and Labour Relation Act [Cap 366 R: E 2019] "the ELRA",

Rule 24(1)(2)(a)(b)(c)(d)(e)(f), 24(3)(a)(b)(c)(d) and rule 28(1)(c)(d)(e) of the Labour Court Rules G.N. No. 106 of 2007. It is supported by the affidavit dully sworn by the applicant. The application is resisted by the respondents through counter affidavit of Mika Thadayo Mbise, the respondent's counsel.

In a nutshell, the brief fact of the case albert is that the applicant was employed by the respondent since 2016 until his termination of employment had been promoted at the position of regional sales manager. It came to the attention of the respondent that the applicant misconducted himself by having sexual harassment to his subordinates. The complaint led to formation of investigation team which submitted his investigation report with recommendation that hearing be conducted on the proved allegation. The disciplinary hearing was conducted and found the applicant guilty of misconduct to wit sexual harassment, hence the applicant terminated from the employment.

Being aggrieved the applicant filed a labour dispute to CMA, both parties presented their evidence for and against the dispute. At the end the arbitrator found that the offence of sexual harassment was proved and there was procedural fairness on the conduct of the disciplinary

hearing. Finally, the applicant was only awarded the salary for the days he worked and annual leave making the total of Tsh. 7,800,000/=.

This decision angered the applicant and has filed the present application, seeking the award to be revised and set aside on the grounds set under paragraph 2 of the affidavit;

1. That there is an error material to the merits of the award involving injustices on the party of the respondent;
2. That the CMA erred in disregarding the strong evidence of the applicant that his termination was unjustified;
3. That the respondent failed to prove his case to the required standard;
4. That the award was improperly procured;
5. That the arbitrator was biased to the applicant; and any other relief this honourable court may deem fit and justice to grant.

On the hearing date, parties had legal representation Mr. Philip Mwakilima and Thadeo Mika Mbise, both learned counsels appeared for the applicant and respondent respectively. Hearing of the application took the form of written submission, dutifully parties complied to the scheduling order of the court.

In his submission Mr. Mwakilima prayed the court to be guided with the **one**, principle of the law on jurisdiction of this court, **two**, that parties are bound by their pleadings, and **three** that in civil proceedings, the burden of proof lies on the party who alleges anything in his favour in terms of section 94(1)(b)(i) of the ELRA, rule 24, 28(1) and 55 of the Labour Court Rules, G.N. No. 106 of 2007. He submitted that this court has power to re-appraisal evidence in record and draw its own inference of fact.

Arguing the application, it was stated that termination of employment must be for valid and fair reason in terms of section 37(2) of the ELRA and Article 4 of the C158 of the Termination of Employment Convention, 1982(No. 158). The argument was supported with the case of **Tanzania Revenue Authority vs Anderw Mapunda**, Labour Rev. No. 104 of 2014.

Mr. Mwakilima submitted that sexual harassment is one of unacceptable behaviour at a work place by referring to the ILO Declaration on Fundamental Principles and Rights at work adopted in 1998 which requires the government, employers and workers to uphold basic human value at work place. He stated that sexual harassment is the

existence of hostile working environment in which the conduct creates conditions that are intimidating or humiliating for the victim.

According to Mr. Mwakilima, the respondent did not discharge burden of proof and evidential burden that the applicant committed sexual harassment to his subordinates in accordance with section 110 and 111 of the Evidence Act [Cap 6 R: E 2022]. He fortified his argument with the case of **Sure Freight Tanzania Ltd vs XCMG Tanzania Ltd,** Civil Appeal No. 101 of 2020 [2023] TZCA 17286 (TANZLII).

It was further submitted that the respondents' exhibits that is EXD1, EXD2, EXD3, EXD4, EXD5, EXD6, EXD6, EXD7, EXD8, EXD9 and EXD10 were not read after being admitted. To bolster this preposition counsel cited the case of **Emmanuel Kondrad Yosipati vs Republic,** Criminal Appeal 296 of 2017 [2019] TZCA 25 (TANZLII).

Mr. Mwakilima contended that DW1 wrongly referred to the contents of EXD1 minutes of the disciplinary hearing while it was not read in court. He stated that failure to read exhibits after its admission in our jurisdiction renders it a worthless and it vitiates the fairness of trial. Counsel cited the case of **Robinson Mwanjisi vs R** [2003] TLR 384 and **Bulungu Nzungu vs Republic**, Criminal Appeal No. 39 of 2018 [2022] TZCA 454 (TANZLII) to convince the court.

Further submission was that exhibits were not read for the applicant to be able to appreciate and respond to them and in essence none of it proved the offence of sexual harassment. He prayed the court to disregard it as were not evidence at all.

Mr. Mwakilima went on to submit that testimony of DW2 denied to have tendered EXD10 and it was not prayed after being admitted instead it was prayed by PW1 who smuggled the proceedings. Counsel complained that EXD9 was objected to its admissibility but admitted with reasons to be disclosed in the award but that was not done by the arbitrator. With the above submission Mr. Mwakilima invited the court to expunge all exhibits tendered by the respondent.

Another argument from the applicant's counsel was that DW1, DW2 and DW3 mentioned several other persons who were aware of the alleged harassment but not called as witnesses. He referred to those who witnessed the DW3 being followed at Soweto by the applicant, Teddy where DW2 referred his complaint and plant manager. He stated that reason for their non-attendance was not stated by the respondent. He cited the case of **Anord Mtuluva vs Republic**, Criminal Appeal No. 511 of 2020 [2022] TZCA 696 (TANZLII) and **Hemed Said vs Mohamed Mbilu** [1984] TLR 113 to support the argument.

As to the procedural aspect, Mr. Mwakilima submitted contended that if exhibits are expunged in record including charge sheet and disciplinary hearing proceedings there will be no evidence to prove that there was hearing conducted on which the applicant was terminated.

Alternatively, it was submitted that the human resourced officer who received the complaint is the one who was the secretary of the disciplinary committee making it contrary to the ELRA and guideline 4(2) of G.N. 42 of 2007. He submitted that human resources department were the complainant and would not have formed part of the disciplinary committed. The case of **Standard Charted Bank vs Tredelis Mwambesa,** Labour Revision No. 239 of 2022 was cited in support of the argument.

It was contended that the human resource department being the secretary of the disciplinary hearing was against the principle of *Nemo iudex in causa sua,* referring to the case of **Rex vs Sussex**. Mr. Mwakilima submitted that termination was affected without recommendation from the disciplinary committee and cited the case of **Ally Farahani vs Geita Gold Mining Limited**, Civil Appeal 54 of 2020) [2023] TZCA 225 (TANZLII) in support the preposition.

In the end counsel was of view that the applicant was entitled to reliefs he claimed in CMA form 1 and prayed the application to be allowed.

Responding to the applicant's counsel submission, Mr. Mbise stated that the principles burden of proof and rules of pleadings referred in the applicant's submission was in applicable to the case at hand and was cited in the blank.

It was submitted that under section 91(2)(a)(b) of the ELRA and rule 28 of the Labour Court Rules, the award of the arbitrator is only revisable if it is shown that there was misconduct on part of the arbitrator, improperly procured and the award is unlawful, illogical or irrational. The argument was supported by the case of **Omary Kitwana vs Tanzania International Service Ltd,** Revision No. 190 of 2011.

Replying on issue of failure to read admitted documents, Mr. Mbise stated that the applicant's counsel participated in the hearing and did not object to its admissibility. He added that parties filed list of documents to be relied upon during hearing and the applicant did not object it because it was useful to his case, he was served with all document before hearing, knew its contents and used it in support of his case.

Mr. Mbise dismissed all cases relied by the applicant's counsel on effect of failure to read exhibits for being in applicable to the present

application. He contended that the labour laws have its own procedure not applicable to ordinary courts making reference that there are no pleadings at the CMA. He added that even the award is not appealable as it is not a judgment.

Mr. Mbise submitted that some of the case which came after the award was cited in support of applicant's case, hence not be accepted. On the other hand, it was submitted the exhibits on which the applicant complain was not the basis of the decision of the tribunal. That even in absence of all exhibits oral evidence of DW2 and DW3 proves sexual harassment beyond a shadow of doubt against the applicant.

Mr. Mbise submitted that evidence of DW3 on sexual harassment was not challenged by the applicant, he discounted the quotation from the bible on ground that the law is settled that it is not the number of witnesses that matter.

On complaint that the human resources officer was involved in the case, it was submitted that evidence in record established that the complainant sent their grievances directly to head quarter Dar es salaam. Mr. Mbise stated that the case of **Standard Chartered Bank** (supra) was not relevant to the case at hand.

On applicant being terminated without recommendation of the disciplinary committee, counsel for the applicant submitted that there is no law which enjoins that termination cannot be done without recommendation of the disciplinary committee.

In respect of use of WhatsApp chats and voice conversation, it was submitted that the same was not used in the award of the arbitrator. That the arbitrator was satisfied that DW3 was sexually harassed by the applicant. Mr. Mbise stated that per section 7(4)(h) and 7(5) of the ELRA together with rule 7(2)(3) of the code of good practice rule, G.N. 42 of 2007 that employee has to be protected against sexual harassment and is classified as gross misconduct.

Regarding fairness of procedure, it was argued that the applicant was involved in all stages as required by rule 13 code of good practice rule, G.N. 42 of 2007 including during investigation, charges and conducting hearing.

On reliefs claimed, Mr. Mbise stated that it is awarded to those who deserves and not by mere claiming it.

Dispassionately, I have considered the records and rival arguments of the parties, the only issue for my determination is *whether the application has merits*. Before embarking into the merits, I have to make

it clear that I will not indulge into discussing evidence touching DW2 because the tribunal was satisfied that she was not sexually harassed and there is no complaint about it.

Starting with some preliminaries which was raised in the submission, first is the law on burden of proof, it was submitted by the applicant's counsel that he who alleges must prove, in reply Mr. Mbise said it had no connection with the present application.

Indeed, under normal civil suit burden of proof is on person who asserts anything in his favour, the plaintiff. But this principle is not applicable in labour dispute because in terms of section 39 of the ERLA and Rule 9 (3) of the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007, the employer has a duty to prove that termination is fair. In **Ally Farahani vs Geita Gold Mining Limited**, Civil Appeal 54 of 2020 [2023] TZCA 225 (TANZLII) the court stated;

> '... *the employer is the one required to prove that the employee was terminated for a valid and fair reason and upon a fair procedure.'*

It is therefore incumbent that although under employee-employer relationship it is the employee who file the dispute, when it concerns unfair termination, burden of proof is upon the respondent employer. With

the above law just like the respondent's counsel I did not find how burden of proof under section 110 of the Evidence Act was relevant to the matter at hand.

The principle is rules of pleadings; it has to be noted that in CMA the only pleading is CMA form 1 which binds the employee. There is no exchange of pleadings upon which each party is bound with it. Therefore, the principle was cited in a blank.

Coming to merits of the application, the applicant complain that all exhibits was not read after its admission into evidence, Mr. Mbise replied that it was not objected to its admissibility.

It is elementary law that all documentary exhibits must be read in court after its admission, IN **Bulungu Nzungu vs Republic**, Criminal Appeal 39 of 2018 [2022] TZCA 454 (TANZLII) the court stated

> *'It is now a well-established principle in the Law of Evidence as applicable in trial of cases, both civil and criminal, that generally once a document is admitted in evidence after clearance by the person against whom it is tendered, it must be read over to that person.'*

However, there are circumstance in which the principle cannot be invoked, such circumstance is where the contents of the documents is not

disputed by the parties. In **Robert Mhando & Another vs The Registered Trustess of ST. Augustine University of Tanzania**. Civil Appeal No. 44 of 2020 [2023] TZCA 65 (TANZLII), the court stated;

> *'... DWI's evidence is remarkable of her discordant but conclusive statement that, there was no doubt that all the disputed receipts were issued by the respondents. Given this state of affairs, one thing becomes clear. That is, throughout the trial, the material contents of the disputed documentary exhibits were well known to the respondents as to render inconsequential the complaint by Mr. Nasimire that, they were not read out in court after being admitted in evidence. And what is more, the said documents were not disowned by the respondents particularly DW1 the only witness who testified on their behalf*

It is in record that in the CMA parties were allowed to file all documents to be relied and to be served to parties, the respondent filed that list on 8th February 2021 comprising the document which were admitted in evidence. During hearing DW1 tendered minutes of disciplinary hearing as (exhibit D1), hearing form (exhibit D2), statement of DW2 (exhibit D3), statement of DW3 (exhibit D4), suspension letter (exhibit D5), investigation report (exhibit D6), charge sheet and not to attend hearing (exhibit D7), termination letter (exhibit D8) and audio CD (exhibit D10). All these were not objected to its admissibility. Only

WhatsApp chats exhibits D9 was objected on ground that it did not meet the requirement of the Electronic Transaction Act.

The settled law is that a document admitted without objection its contents is taken to be effectively proved. In the case of **Eupharacie Mathew Rimisho t/a Emari Provision Store & Another vs Tema Enterprises Limited & Another**, Civil Appeal No. 270 of 2018 [2023] TZCA 102 (TANZLII) the court stated;

> *'In this regard, we agree with Mr. Chuwa that, admission of a document is not conclusive proof of its contents. However, it is settled law that the contents of an exhibit which was admitted without any objection from the appellant, were effectually proved on account of failure to raise an objection at the time of its admission in the evidence.'*

The same applies to the case at hand **one,** the applicant was served with a copy of those documents meaning that its contents as rights argued by Mr. Mbise was well known to the applicant even before being introduced in evidence; **second**, the applicant did not object when it was introduced in evidence.

Assuming the complaint of the Mr. Mwakilima is valid, the admitted exhibits was not relied upon by the arbitrator in the award, meaning even

if is expunged they will not affect merits oral evidence which was relied by the arbitrator.

Connected with the above is the complaint that the arbitrator did not give reason for admission of exhibit 9 in his award as promised. Mr. Mbise did not make any reply to this. I will not dwell on this issue because at the beginning of this judgment I intimidated that no reference will be made on evidence touching DW2 for the reason that it was found by the arbitrator that did not prove sexual harassment and parties are satisfied.

Adverting to whether termination was for valid reason, while Mr. Mwakilima forcefully submitted that the offence of sexual harassment was not proved, Mr. Mbise favoured the arbitrators award and reasoning.

This require appraisal of evidence, under section 39 of the ELRA it is upon the employer to prove that termination is for fair reason. In a bid to prove fairness of reason for termination evidence of DW1 and DW3 is relevant for the respondent.

According to DW1 the applicant being regional sales manage had to show good behaviour to his subordinates. That making sexual advances to his female subordinates amounted to sexual harassment and was using his position without their consent. He said, position held by the applicant was not expected of him to have such behaviour because it had impacts

on the business of the company and bad reputation to the customers and any other dealing with the company.

He went on to state that sexual harassment scandals specially to married women is not expected to be easily revealed unless it is persistent and it need courage to reveal it. In fact evidence of DW1 was mainly on procedural compliance in terminating the applicant from employment.

On his party the applicant generally denied the allegation and dwell on challenging disciplinary hearing proceedings.

It is undisputed fact that termination of employment of the applicant was sexual harassment to his female subordinates. The term "sexual harassment" is not defined under our labour laws though there are several references to it but it refers sexual harassment committed by employer to employee and not employee against fellow employee.

According the International Labour Organisation Guideline on Sexual Harassment Prevention at Workplace, sexual harassment is defined as any behaviour of a sexual nature that affects the dignity of women and men, which is considered as unwanted, unacceptable, inappropriate and offensive to the recipient, and that creates an intimidating, hostile, unstable or offensive work environment.

Sexual harassment can take two forms that is "*Quid pro quo*" can be in form of any physical, verbal or non-verbal, it is committed when an employer, supervisor, manager or co-worker, undertakes or attempts to influence the process of recruitment, promotion, training, discipline, dismissal, salary increment or other benefit of an existing staff member or job applicant, in exchange for sexual favours. And second is hostile work environment that is conduct that creates an intimidating, hostile or humiliating working environment for the recipient.

In this application sexual harassment took both forms that is it was *quid pro quo* and hostile working environment. For an act to constitute sexual harassment the recipient's perception and experience of the alleged conduct will largely determine whether the conduct was offensive and unwelcome.

The question to be asked is does making sexual advance to a co-worker amount to sexual harassment. Definitely there will be no single answer on the posed question but all it depends with the position held by the perpetrator and perception of the recipient. In the South African Case of **McGregor vs Public Health and Social Development Sectoral Bargaining Council and Others** [2021] ZACC 14 [AfricanLii] citing the case of **J v M Ltd** (1989) 10 ILJ 755, the court stated;

'Sexual harassment creates an intimidating, hostile and offensive work environment ... Inferiors who are subjected to sexual harassment by their superiors in the employment hierarchy are placed in an invidious position. How should they cope with the situation? It is difficult enough for a young girl to deal with advances from a man who is old enough to be her father. When she has to do so in an atmosphere where rejection of advances may lead to dismissal, lost promotions, inadequate pay rises . . . her position is unenviable. Fear of the consequences of complaining to higher authority . . . often compels the victim to suffer in silence.'

To be deduced in the above case is that sexual advance by superior in the position, supervisor and by older to young female may be considered as sexual harassment and creates hostile working environment compelling the victims to suffer in fear of losing the job.

In the present application it is settled in evidence that the applicant was a superior who held a regional sales manager position and DW3 was his subordinate. With that in mind any sexual in advance to DW3 would amount to sexual harassment depending on DW3's perception and resistance and is calculated to be discrimination based on sex.

At hand DW3 testified that in November 2019 while at work at Soweto the applicant followed her, when they met, he told her that she wanted her sexually in her words;

'... akaniambia wewe ni mtu mzima, kwanza ulitakiwa uwe umeshaelewa, mimi nakutaka, nakutaka kimapenzi. Nikamwambia haiwezekani kwa sababu mbili kwanza wewe ni mume wa mtu na mimi nina mme tayari...'

DW3 went on to state

Akaniambia nimekuelewa. Na mimi nikamwambia nakuomba usinisumbue kazini kwa vitu ambavyo havihusiani na kazi. Akaniambia sitakuwa nakusumbua kwa sababu tu umenikataa.

Going by the above evidence it is clear that the statement by the applicant was meant to making sexual advance to DW3 and DW3 did not buy the applicant's proposal, she refused and the applicant committed himself not to disturb at all. DW3 perceived it as embracement to her.

The applicant did not challenge going at Soweto, the working place of DW3 and that he made such words to DW3 be it in cross examination or evidence in chief when called to witness box. The impression I get is that the applicant made sexual advance to DW3. On the subject matter I find persuasion on the Kenyan case of **N M L v Peter Petrausch** [2015] eKLR in which Rika J. stated;

'Petrausch had adequate opportunity to challenge the other evidence on sexual harassment. The only piece of evidence he

made a forlorn attempt to challenge, was on the video recording of the Claimant as she bathed. He said nothing of the other complaints, which were stated by the Claimant in plain language. He did not deny any of the other accusations contained in paragraphs 6 and 22 above. Even assuming there was no truth in the Claimant's allegations about being video recorded, where is the challenge to her other accusations, which were just as much grave, if not graver" He does not deny calling her a Stupid Monkey and an overeating African; he does not deny touching her buttocks and breasts; he does not deny covering his penis with the coffee cup, and asking L to retrieve it from his penis; he does not deny demanding to have sex with the Claimant; and says nothing about inviting the Claimant to watch him have sex with his wife, so that she could learn to do it with him, while his wife was gone. This evidence of serious sexual harassment, gender and racial bigotry passed unchallenged.

Going by evidence of DW3 that after she refused to heed to sexual advance of the applicant in every meeting the applicant embarrassed her and at some point denied a promotion to SFA evidence of which was uncontroverted, is a manifestation that DW3 was placed in the invidious position of being compelled to balance her sexual dignity and integrity with her duty to respect her superior. It was impairment of the complainant's dignity, taking into account her circumstances and the respective positions of the parties in the workplace.

Mr. mwakilima mention a number of persons who were supposed to be called as witnesses but were not. Mr. Mbise refuted the argument on the ground that it is not the number of witnesses that count. I agree with Mr, Mbise that it is not number of witness that matter, but the credibility and quality of evidence of a witness. Being sexual offence credibility and reliability of her testimony with the core allegations of sexual harassment must come from victim.

Mr. Mwakilima submitted that words of the victim are not intended to be taken as a gospel truth but testimony has to pass the test of truthfulness. Indeed, that is the law, although is well known in sexual offences under criminal law, but it equally applied in labour disputes when sexual harassment is at issue. I find support in the south Africa case of **Motsamai v Everite Building Products (Pty) Ltd** (JA21/08) [2010] ZALAC 11 (AfricanLii) where the court stated;

> *'Sexual harassment is the most heinous misconduct that plagues a workplace, not only is it demeaning to the victim, it undermines the dignity, integrity and self-worth of the employee harassed. The harshness of the wrong is compounded when the victim suffers it at the hands of his/her supervisor. Sexual harassment goes to the root of ones being and must therefore be viewed from the point of view of a victim: how does he/she perceive it, and whether or not the perception is reasonable.'*

The respondent was only required to establish that there was sexual harassment against DW3 and the only evidence to establish it was to come from DW3. Looking at the nature of the offence, it is clear that witnesses Mr. Mwakilima wanted did not witness the applicant make sexual advance to DW3, their evidence could not have proved that there was sexual harassment because DW3 was resolute that it was done while alone. Those persons were not material witnesses as alleged in proving sexual harassment.

In her evidence DW3 broke down several times during her testimony evincing the traumatic effect of the harassment on her. For stance evidence of being joked by her subordinates that *naona leo boss wako amekuja kuomba kitumbua moja kwa moja* which made her to feel embarrassed. DW3 said that considering the difficulties she was going considered walking out of work but was advised by his family member not to do. This demonstrates the effect of sexual harassment women are Undergoing and the impacts it has on the employee and the organisation at large.

Although the applicant suggested that it was false accusation but failed to establish how that could have been done by DW3, what expectation did she have to have raised such serious and shameful

accusation which touches his dignity and personality. The applicant did not succeed in showing that the DW3 was motivated to raise false accusations against him. Accordingly, the dismissal based on findings of sexual harassment was indeed substantively fair.

Coming to procedural aspects, this will not detain me much as there is ample evidence on record, I am satisfied that the respondent adduced evidence that clearly showed the disciplinary process undertaken step by step as alluded to by the learned counsel for the respondent which features in evidence of DW2.

The appellant was duly charged, appeared before a disciplinary committee, and given the opportunity to cross-examine witnesses, and his explanations were considered as per spirit of rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules G.N. No. 42 of 2007.

The complaint that secretary of the disciplinary committed came from human resource department who was the complainant is misplaced because it was not raised in the disciplinary committee despite that the applicant knew all disciplinary procedures. Also, it was not raised in the CMA for the arbitrator to give her verdict on that, it is a new matter raised for the first time in this court while it is the factual issue.

Based on evidence records of the CMA I am satisfied that the respondent discharged his duty to prove that the appellant was fairly terminated from employment by proving that the reasons for termination are valid and fair.

From the foregoing, I find no merit in the application, I hereby dismiss it. Since it originates from a labour dispute, each party to bear its own costs.

V.M. NONGWA
JUDGE
12/12/2023

Dated and Delivered at Mbeya this 12th day of December 2023.

V.M. NONGWA
JUDGE