IN THE HIGH COURT OF TANZANIA

HIGH COURT LABOUR DIVISION
AT SHINYANGA

LABOUR REVISION NO. 12 OF 2013

NICODEMU G. MWITA ..... APPLICANT

VERSUS

BULYANHULU GOLD MINE LTD.....RESPONDENT

(Original CMA/SHY/113/2011)

JUDGMENT

19/8/2013 & 15/1/2013

Mipawa, J.

The applicant in this revision namely Nicodemus G. Mwita herein will be referred to as the applicant instituted a trade dispute before the Commission for Mediation and Arbitration of Shinyanga commonly known as CMA vide Mgogoro wa kikazi na CMA/SHY/113/2011 against his erstwhile employer Bulyanhulu Gold Mine Ltd who will be referred in this judgment as the respondent. The Learned Arbitrator dismissed the dispute of the applicant who was complaining of unfair termination hence the present application for revision in which the applicant ask this court to revise the Arbitration award of the CMA commission for mediation and arbitration award procured on 30/04/2012 and this court to order the employer respondent to reinstate the applicant to his employment.

In order to comprehend what transpired in the commission for mediation and arbitration a brief account of the case is required. The applicant was employed by the respondent as a security guard from 01/11/1999 to 30/09/2011 when his employment was terminated after disciplinary hearing was had on 29/09/2011. The applicant was charged with three offences before the disciplinary committee; they were-

1. ***Failure to immediately report knowledge of sexual harassment***
2. ***possessions of fraudulent material removal permit***
3. ***Possession of company property unauthorized.***

The applicant was found by the disciplinary committee which heard both parties that the applicant was responsible and that the respondent proved the allegations leveled against him.[applicant]. The respondent had told the CMA that the applicant who was as of January 2005 elevated to the level of Chief security officer "mkuu wa kitengo cha ulinzi" until when he was terminated on 29/09/2011,had received on 04/01/2011 and 05/11/2011 as a chief security officer,at Bulyanhulu Mine,complaints and reports concerning sexual harassment "unyanyasaji wa kijinsia" which was committed by his deputy or assistant one Ndazi which was contrary to the company's rules and the public in general. The respondent alleged that the applicant being a chief security officer neglected and refused to take any actions against the person who committed the sexual harassment who was his assistant. On 16/08/2011 investigation was conducted in the room of the applicant where

he was found with **"BGML vehicle material removal permit"** contray to the rules [cardinal rules] of the company. The applicant was also found in possession of properties of African Barrick Gold Contractors in his room to wit underground vehicle solenoids one safety harnes, three electrical switches, one multimeter and one merger respectively. The applicant was suspended to give way to further investigations and was later summoned to appear at the disciplinary hearing where he was heard and given chance to ask question. However the disciplinary committee found the applicant responsible and hence his termination.

The respondent through his witness had revealed that the victims of sexual harassment who were "polisi jamii" girls or sungusungu, that is, fellow security guards commonly known as "polisi jamii or sungusungu" had wrote their statement on sexual harassment committed against them by Ndazi the assistant of the applicant at work place. However when the complaints were sent to the applicant who received the same did not take any action. The assistant of the applicant who was being complained of sexual harassment by women guards "polisi jamii", and according to the employer's witness one Grace, Mr Ndazi was notorious sexual monger who was even terminating employment of those who refused to commit sex with him, Ndazi was the assistant of the Chief Security officer Mr. Mwita the applicant. Grace was one of the victims of sexual harassment who refused to have sexual intercourse with Ndazi and reported him to the applicant who did not take any action against Ndazi his assistant:

.....Ndazi alienda na kumwita Grace na kisha kumlaumu kwa nini alitoa taarifa kwa Mwita (applicant) Ndazi akasema kuwa yeye [Ndazi na Nicodemus Mwita ni pete na kidole hatamfanya lolote...

Baada ya hapo alisimamishwa kazi (aliachishwa) kazi mwezi Mei 2011 ambapo Ndazi alienda off na kuacha majina kuwa aachishwe kazi. Nicodemus Mwita ni bosi wa Ndazi na ana uhakika aliongea na Nicodemus katika radio call. Nicodemus Mwita hakuchua hatua yoyote hata kumwita...[1]

The evidence on sexual harassment to women employees was also confirmed by the respondent witness one James Kitakuzi that several girls employees guards who refused to have sexual intercourse with Ndazi were terminated by Ndazi on consultation with the applicant.

The applicant on the other hand refuted the allegations and told the CMA that he reported the sexual harassment to the police especially one Inspector Hatari kisumo who was also his witness. The applicant also refuted the allegations that he was found with company's property and his witness on Gerald Msangi told the CMA that the property(ies) were not of the applicant and that they were found in the room of the applicant because he, Gerald Msangi had kept them there for safe custody and he was using them in practical under the training office.

[1] Record of CMA arbitration award at pg 4

The learned Arbitrator in his award found that the applicant was a person chained in the sexual harassment at place of work because he corroborated and consented the harassment to continue at place of work.

> ***...ukitafakari ushahidi uliotolewa na mashahidi wote wa mlalamikiwa utaridhika kuwa mlalamikaji amekuwa akiridhia matendo ya aliyekuwa msaidizi wake Ndazi na kwa maana hiyo utaridhika kwamba mlalamikaji amekuwa akisaidia na pia yeye mwenyewe kushiriki kwenye vitendo vya unyanyasaji wa kijinsia...***[2]

The Learned Arbitrator found as a fact that the applicant was responsible in the first offence of failure to immediately report knowledge of sexual harassment which the applicant did not controvert **the evidence** of the victims Grace and Asma. The Learned Arbitrator reasoned that:-

> ***....kutokana na mlalamikaji kutochukuwa hatua mapema juu ya taarifa ya unyanyasaji alizopewa na James tangu Machi, 2011 ndiyo iliyopelekea Grace na Asma kuachishwa kazi tena Mei, 2011 na hivyo kufanya nione alilinda uovu wa Ndazi kunyanyasa wanawake kijinsia jambo ambalo ni kosa mahali pa kazi hasa ukizingatika alikuwa Chief Security...***[3]

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[2] Record of CMA arbitration award at pg 7-8

[3] Record of CMA arbitration award at pg 11

The Arbitrator found that the applicant had committed offences which could have caused the employer respondent to be seen as embracing sexual harassment without taking any stringent measures as per Section 7(5)(7) of Employment and Labour Relations Act [ELRA] no.6 of 2004. As regard to other offences leveled against the applicant to wit, possession of fraudulent material removal permit and possession of company property unauthorized. The learned arbitrator was of the view that the applicant could have been warned rather than being terminated because the properties were put in the applicant's room not for any evil purpose. The arbitrator found that the offence which the applicant had committed cannot warrant him to be reinstated back to his employment. Therefore the reason for termination was valid and fair. On what relief the applicant could have upon termination be paid the learned arbitrator decided that the applicant had agreed to be paid his dues. He quoted the decision of this court Wambura , in **Bulyanhulu Gold Mine Ltd vs Chama stanslus Ngeleja revison no. 12 of 2011 [unreported]** in which the court held that:

> ***....However, I have noted that in the letter for termination the respondent acknowledged that the payments made were his final terminal payment and he will make no further claims against the applicant. If he was not satisfied he should not have accepted the payment and proceeded to file his complaint at CMA... if the respondent has received the said [money] payments then the***

matter should end at this juncture as one cannot be reinstated after having been paid his terminal benefits...[4]

When arguing the application **viva voce** before this court the representative of the applicant one Nyanjugu Maulidi submitted that there was no fair hearing at the disciplinary hearing because the committee issued a judgment to terminate the applicant rather than making recommendations that the witnesses of the respondent failed to prove the allegations against the applicant and therefore it was wrong for the Arbitrator to terminate the applicant. He insisted that the applicant should be reinstated because an employee who is terminated on misconduct cannot be given severance allowance **"kinua mgongo"** That the applicant was unfairly dealt will contrary to the Grand norm of the land to wit, the constitution of the United Republic of Tanzania.

On the other hand the respondent who was represented by Learned counsel M/s Theresia Clemence submitted that the applicant was fairly terminated and that there was a fair procedure and valid reason to terminate. She adduced that the applicant before the commission for mediation and arbitration did not complain of unfair procedure but he complained in form No. 1 of the [substantive] substance that is why he ticked at the word no. 1 substance and did not tick at no.2 the procedure in form number one. On the reason that the arbitrator did not consider the

[4] Bulyanhulu Gold Mine Ltd vs Chama stanslus Ngeleja revison no. 12 of 2011 [unreported]

evidence, the learned counsel submitted that the revision level is guided by section 91(2)(a)(b) of the ELRA. The applicant has not submitted on grounds mentioned by the ELRA on revisions. She further submitted that:-

> ***... the arbitrator was satisfied with the evidence of the respondent as per section 37(2)(b)(i) that the termination was fair as it was related to the conduct of the applicant and that procedure was followed as per section 37(2)(c) of the ELRA....***[5]

The applicant in rejoinder insisted that the procedure was not followed as per Rule 4 of Code of Good Practice GN 42 of 2007. That the applicant had first reported the issue of sexual harassment to the police and therefore it was not true that he did not report. He told the court that he had reported the sexual harassment to inspector Kisumo. He lastly told the court that their citation in the application [notice of] to wit section 91(2)(c) of the ELRA is correct because the Act was amended to accommodate rule 91(2)(c)[6].

I have duly considered the submissions of both parties in this revision and read the record of this court and the commission for mediation and arbitration **in ex-abandunt cautela** [with eyes of caution or extreme caution]. The issues to be determined in this revision is whether or not the arbitrator was correct to hold that there was a fair and valid reason for

[5] Record: Proceeding in revision no. 12 of 2013 Nicodemus Mwita vs Bulyanhulu Gold Mine
[6] Record: proceeding in revision no 12 of 2013 HCD

termination of the applicant's employment and whether there was procedural fairness. On dealing with the issue of substantive fairness ie valid reason the learned arbitrator found that the applicant had indeed failed to immediately report sexual harassment done by his assistant to women though he was aware of the sexual harassment done by his assistant to women employees like Grace and Asma. The complaints on sexual harassment were reported to him but he did not take any action to stop the evil practice of sexual harassment at place of work. The reasoning of the learned Arbitrator is found in the award.

> *.... Katika suala la uhalali wa sababu ni kuwa kulikuwa na makosa matatu yaliyosababisha mlalamikaji aachiswe kazi kuhusiana na kosa la "failure to immediately report knowledge of sexual harassment".... Nimeridhika kuwa kweli mlalamikaji alitenda kosa hili kutokana na ushahidi uliotolewa.... Shahidi wa mlalamikiwa James Kitakuzi allieleza kumpa taarifa Nicodemus Mwita (Mlalamikaji) juu ya unyanyasaji wa kijinsia uliofanywa na Ndazi kwa Grace na Asma kati ya mwezi Februari na Machi 2011 (halikupingwa na mlalamikaji) na haifahamiki mwajiri wa malalamikaji kujua suala hilo kama lipo polisi kwani halikuwa suala binafsi la mlalamikaji ....*[7]

[7] Record: CMA arbitration award in dispute "Mgogoro wa kikazi" No. CMA/SHY/113/2011 Page 9

Sexual harassment talked of in this Court and which was also revealed in CMA by witnesses was that of repeated sexual intercourse demands to women employees by Ndazi who was the assistant chief security officer of the applicant, while the applicant was the chief security guard and the women who were sexually harassed were employed as guards and worked under the instructions of the applicant who was the chief security and his assistant one Ndazi. I entirely and respectfully agree with the learned Arbitrator that there were sexual harassment at place of work done by the assistant of the applicant to women employees. The complaints were reported to the applicant who was supposed to prevent the sexual harassment and immediately report to the authorities lest the company could be accused of protecting and encouraging sexual harassment at place of work. And this could have effected the employer in terms of section 7(4) (5) and (7) of the employment and Labour Relations Act no. 6 of 2004, which reads;

> *7(1) Every employer shall ensure that he promotes an equal opportunity in employment and strives to eliminate discrimination in any employment policy or practice.*
> *(2) ....*
> *(3) ....*
> *(4) No employer shall discriminate, directly or indirectly, against an employee, in any employment policy or practice, on any of the following....*
> *(h) Sex ....*

(5) Harassment of an employee shall be a form of discrimination.... [8]

The applicant for not immediately reporting the sexual harassment of women employees would have dumped his employer the Respondent in committing an office as a company could be accused of embracing sexual harassment at place of work on women employees and discrimination which is an offence under section 7 of the ELRA No. 6 of 2007

(7) Any person who contravenes the provisions of subsections (4) and (5) commits an offence.....[9]

There is no any employer who is ready to tarnish the image of his company for embracing sexual harassment and falling himself into the quagmire of discriminating and violence against women employees. The term sexual harassment is not well defined in our laws of Tanzania But in 1988 General survey on discrimination in Employment, examining the application of convention 111, ***Discrimination (Employment and Occupation) Convention 1958 No. 111,*** the ILO (International Labour Organization) Committee of Experts on the application of conventions and recommendations, listed a number of examples of ***Sexual harassment in employment*** *applying* to both men and women that:-

[8] See ELRA No. 6 of 2004 section 7(1) 41 a – o (5)
[9] ELRA No. 6 of 2004 section 7.

.... These included insults, remarks, jokes insinuations and inappropriate comments on a person's dress physique, age or family situation and a condescending or paternalistic attitude undermining dignity, unwelcome invitations or requests that are implicit whether or not accompanied by threats, lascivious looks or other gestures associated with sexuality, unnecessary physical contact such as touching, caresses, pinching or assault... [10]

The laws of this country and the law enforcing instruments have to support the 1993 Vienna Declaration and Programme of Action adopted at the world conference on Human rights and the Beijing Platform for action support the necessity of implementing legal measures to protect women from sexual harassment. Sexual harassment has been also recognized as violence against women in CEDAW General Recommendation No. 12 of 1989. It is defined in General Recommendation No. 19 of 1992 as including

.... Such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem....[11]

[10] ILO 1988 General survey on Discrimination in employment. Quoted from "An outline of recent developments concerning equality issues in employment for Labour Court Judges and assessors by Jane Hodges".
[11] An outline of recent developments concerning equality issues in employment for Labour Court Judges and assessors – ibid – page 19

The sexual harassment reported to the applicant by complainants and victims of sexual harassment done by his assistant at place of work and which the applicant could not take any measures to thwart the evil practice at place of work and even not or failing to immediately report the knowledge of sexual harassment on women employees to the employer so that disciplinary actions could be taken was a valid reason for the employer to terminate the applicant. The learned Arbitrator had noted in his arbitration award that women employees lost their employments as the result of sexual harassment. The United Nations special Rapporteur on violence against women, stated in her 1997 report to the commission on Human Rights that:-

> *.... Sexual harassment strikes at the heart of women's economic self-suffiency, disrupting women's earning capacity by forcing, them out of the work place and school....* [12]

The record shows that several women employees were forced out of work and lost their jobs as the result of sexual demands from their superiors. It was therefore correct for the learned Arbitrator to hold that the applicant was embracing sexual harassment on women employees at place of work and thus argued that reason to terminate the applicant on that basis was fair and valid reason. The employer was also correct not to welcome such discrimination based on sexual harassment as defined in ELRA section 7 (1)

[12] Report of the United Nations Rapporteur on violence against women, 1997.

(4) (5) and (7) Cap 366 R. E. 2002 because it was a serious misconduct and the employer was right to impose the sanction. It must be stressed that the Arbitrator or judge will not automatically order a lesser penalty if termination is not considered the appropriate sanction after considering all the factors. The penalty of termination will stand if the arbitrator or judge is satisfied that a reasonable employer could also have decided to terminate under the circumstances.

The labour Appeal Court of South Africa where the labour laws are in pari material with Tanzania Labour Laws and heavily borrowed form South Africa held n the case of **Nampak Corrugated Wadeville vs Khoza** [1999] 20 ILJ 578 (LAC) at [age 584 A-C that;

> *.... The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However this discretion must be exercised fairly. A court should therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable...*[13]

In the case at hand the arbitrator was right not to interfere with the sanction imposed by the employer by terminating the applicant employee. I will also not lightly interfere the sanction imposed by the employer to the

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applicant employee [to wit termination] as it was reasonable in the circumstances of the case. I will also not interfere the Arbitrator's decision. On the issue of procedural fairness, the applicant through his personal representative of party's own choice Mr, Nynjugu Masudi argues that procedure to terminate the applicant was not followed by the Respondent/employer that the Code of Good Practice Rules GN 42 of 2007 which puts clearly how the employer should conduct disciplinary hearing was not followed by the employer. With great respect to the applicant's representative the issue of procedural fairness did not feature before the commission for mediation and arbitration and it was not complained for by the applicant before the CMA I entirely and respectfully agree with the Learned Counsel for the Respondent M/s Theresia Clemence that the applicant had filled form no. 1 in the commission for mediation and arbitration indicating at the first column with number one that he was complaining of substantive fairness that there was no valid reason(s) to terminate, but he did not tick the second column of procedural fairness, in which case this court cannot deal with an issue that was not dealt and evidenced in the CMA arbitration, as rightly pointed by the learned counsel for the respondent that;

> *...the employee ticked substance only as an area which he was complaining of and he did not complain on the procedure...Therefore arguments by the applicant that the disciplinary hearing terminated the employment has no basis and the applicant cannot bring it at the level of revision because the applicant never complained of the*

procedure and if he could have complained them the CMA could have heard the same and decided, the court.. cannot deal with the matter not dealt with the CMA..[14]

Now since the matter which was not dealt with in the commission for mediation and arbitration was not a matter on/jurisdiction I will not entertain it lest the law could be turned an ass and a scare crow of the law. The applicant cannot complain of procedural fairness now because he did not complain before the CMA which could have decided whether or not the procedure to terminate was followed by the employer in which case evidence could have been produced from both sides. I view the applicant's attempts as mere kicks of a dying horse in **articulo mortis** [at the point of dealt] and I reject it.

I will not disturb the arbitration award as prayed by the applicant. The applicant should consider himself a luckiest creature in this world under the sun for being awarded severance allowances and for the purpose of adhering to ILO Convention 100 Equal Remuneration convention 1951 I will left as it were the arbitrator decision to award the applicant severance allowance.

I consider it as remuneration awarded by the arbitrator by ordering the employer to give the applicant the severance allowances as 'remuneration' or payment arising out of the worker's employment. Article 1 of Convention 100 of the ILO defines remuneration that;

[14] Record: proceedings in revision 112 of 2013 Nicodemus Mwita vs Bulyanhulu Gold Mine (HCLD)

...the term remuneration includes the ordinary basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly whether in cash or in kind by the employer to the worker and arising out of the worker's employment....[15]

I think will respect to the representative of the applicant he was not correct to challenge the decision of the arbitrator in awarding the applicant severance allowance to be paid by the employer although he [applicant] was terminated. It was not a sin for the arbitrator to award the applicant the severance allowance in the circumstance of the case and indeed the money that could be paid by the employer to the employee as severance allowance are those arising out of the worker's employment. Martin Oeiz wrote,

...The definition of ***"remuneration"*** *in convention no. 100 makes it clear that payments at issue are those arising out of the worker's employment...*[16]

The payment of severance allowance to the applicant was considered by the arbitrator in view of the circumstance of the case and it was by and large not " an employment sin" for the arbitrator to award the applicant the severance allowances. In addition the money in severance allowance arise out of the worker's employment, then what was wrong? Nothing indeed.

[15] See also gender equality amd Decemt wprl selected ILO conventions and recommendations that promote Gender Equality as of 2012 ILO third revised Edition at pg 3

[16] Equal pay: an introductory guide by Martin Oeiz ILO 2013 at pg 35

Lastly the Employment and Labour Relations Act no. 6 of 2004 also defines remuneration to mean;

> *....the total value of all payments in money or in kind made or owing to an employee arising from the employment of that employee*[17]

In the event and on the foregoing this application for revision lacks merits and it cannot stand.

I proceed to dismiss it. Application for revision number 12 of 2013 is hereby dismissed in entirely and the arbitrator award of the Commission for Mediation and Arbitration is hereby confirmed.

I.S Mipawa
Judge
15/11/2013

[17] Employment and Labour Relations Act no. 6 of 2004 Cap. 366 RE 2002 section 4