IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR COURT ZONAL CENTRE

AT MOSHI

REVISION NO. 13 OF 2016

BETWEEN

SERENGETI BREWERIES LTD..... APPLICANT

VERSUS

GILLIAD P. NJAMBI..... RESPONDENT

(ORIGINAL /MOS/CMA/M/54/2013)

JUDGMENT

18/07/2016 & 21/07/2016

Mipawa, J.

Serengeti Breweries Limited hereinafter referred to as the applicant was dissatisfied with the award and decision of the Commission for Mediation and Arbitration herein after to be referred to as CMA or the Commission and hence seeks this Court to revise the CMA award and quash it[1].

The revision has been initiated by a notice of application made under section 91 (1) (a) and (b), 91 (2) (c) and 91 (4) (a) (b) 94 (1) (b) (i) of the Employment and Labour Relations Act[2]. Rule 24 (1) (2) (a) (b) (c) (d) (e) (f) and (3) (a) (b) (c) (d) and 28 (1) (a) (c) (d) (e) of the Labour Court Rules[3].

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[1] CMA was established under section 12 of the Labour Institutions Act No. 7 of 2004

[2] Act No. 6 of 2004 Cap 366 R.E. 2009 the ELRA

[3] Government Notice No. 106 of 2007. The Rules GN. No. 106 of 2007

The revision was also painted with the chamber summons made under section 91 (1) (a) and (b), 91 (2) (a) and 91 (4) (a) and (b), 94 (1) (i) of the Employment and Labour Relations Act[4]. Rules 24 (1) (2) (a) (b) (c) (d) (e) (f) and (3) (a) (b) (c) (d) and 28 (1) (a) (c) (d) and (e) of the Labour Court Rules[5]. The revision was also supported by the affidavit of one Nataria Wakuru Kimacha[6].

Briefly the facts which cropped or led to this revision to crop may be summarized as follows from the record of the Commission.

The respondent employee Gilliad P. Njambi was employed by the applicant Serengeti Breweries Limited on 15/02/2012 as an empties (bottles) controller in the department of Logistics. His duties was to supervise the receipt of new empty bottles as well as the used bottles. The record shows that the respondent was terminated on 25/03/2013 for misconduct.

The applicant employer had alleged in the Commission that on 17/01/2013 at 7:30 pm., Christopher Ngimonge DW1 was informed by phone that there was cheating at the factory. He went and found that a vehicle from Dar Es Salaam had come with new empty bottles 1,800 however after receiving the said new bottles 1,800; it was revealed that 400 amongst them were old and used bottles. Another vehicle from Himo came with 1,800 new bottles but upon checking it was revealed that 400 bottles were old and used ones which were contrary to the company's police and the requirements of the company of the applicant.

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[4] *op. cit* note 2
[5] Government Notice No. 106 of 2007 *op. cit*
[6] Principal Officer of the Applicant

DW2 Pastory Osca Ruhelwa, DW3 John Hubert Marik, DW4 James Masalu, DW5 Anzuan Thabit the applicant's employer's witnesses testified more or less the same as the Principal witness of the applicant employer DW1 Christopher Ngimonge. When DW5 was cross examined on the reason for terminating the respondent employer told the CMA that the respondent was terminated because being a supervisor he was involved to distort the truth of how many new bottles were brought on the material date. The witness answered that at p. 6 of the award:-

> *...Akijibu maswali ya kudodosa DW5 ameiambia Tume kuwa mlalamikaji alifukuzwa kazi kwa sababu akiwa msimamizi mkuu alihusika kupotosha uhalisia wa chupa mpya zilizoletwa...*

The respondent who was the complainant in the Commission told the CMA that, he supervises the empting of 1800 bottles from Dar Es Salaam and he signed the received note. He testified that on 17/01/2013 the employees who were concerned in the receiving of the empty bottles brought by DHL and the driver together with two persons who were responsible to empty the new bottles from the vehicle signed in the note called "*empty received note*" after satisfying themselves that the goods received were proper.

The respondent further alleged that only 45 minutes after the bottles were empted from the vehicle, he received a phone the vehicle which brought empty bottles from Dar Es Salaam had mixed new and used or old bottles. The employer made a follow up and realized that it was the truth. This was communication between the applicant SBL and

DHL the courier company which brought the bottles from Dar Es Salaam.

The respondent conceded that he failed to inform the applicant on the mixed new and old bottles being a supervisor of the empty bottle section, he conceded also that he ordered other persons to sign the empty received not instead of the respondent as a supervisor signing himself.

The learned arbitrator was of the view that the respondent employee was terminated for steeling 400 crates of new empty bottles which were brought from Dar Es Salaam. The arbitrator however noted that there was "*chilled*" evidence on the fact that the company made a follow up and got explanation that the vehicle from DHL courier had loaded the said bottles, new and old bottles.

The learned arbitrator concluded that in his view the offence of the respondent was that he kept quet without giving information to the employer applicant over the mixed new and old bottles and he agreed with the employer that the respondent might have underground secrets with the driver who brought the bottles.

He awarded the respondent, after he had found that, each side had not given enough evidence to prove the offence and that the applicant employer was supposed to give the respondent a written warning. Therefore instead of reinstatement, he granted the respondent compensation of eight (8) months' salary[7], leave not taken[8]

[7] CMA Arbitration award

and one month salary in lieu of notice at the rate of 950,200/= per months[9], plus severance allowance of 950,206 x 7 ÷ 30 = 221,714.73 ground total came at 7,696,668.60[10].

At the hearing of the revision the applicant was represented by Mr. Njooka Learned Counsel and the respondent was represented by Mr. Komu Advocate.

In his first ground of revision Mr. Njooka submitted that the revision was filed out of time without condonation that the dispute arose on 25/03/3013 and the form CMA F. 1 was received on 25/04/2013 which is three days later from the date of termination. He mentioned Rule (4) of GN. No. 64 of 2007 which states that the first day shall be excluded and the last day shall be included. He concluded that in the scenarios, the first day is 25th March, 2013 and the last day is 24th April, 2013, therefore by failure to file the complaint on 24/04/2013 the respondent was out of time[11].

In response to the first ground of revision on time barred Mr. Komu Learned Counsel for the respondent submitted that the respondent was terminated on 26/03/2013 and the letter was dated 25/03/2013 but the respondent employee was notified on 26/03/2013, he appealed but no result of the appeal was communicated to him. He submitted that from 26/03/2013 when he was notified, the time started

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[8] *ibid*
[9] *ibid*
[10] *ibid*
[11] See submission by learned counsel in Revision No. 13 of 2016 Serengeti Breweries Limited V. Gilliad Njambi

to run from 27/03/2013. The respondent lodged the appeal in the Commission within time.

I entirely agree with the learned counsel for the respondent that the respondent's complaint in the Commission was lodged within time bearing in mind the wording of rule 4 (1) of GN. No. 64 of 2007 which is self explanatory that the first day shall be excluded in computing the days and the last day shall be included. Those are plain wording of the rule which only require for the exclusion of the first day and the inclusion of the last day in computing time or period of time it reads:-

> *4 (1) ...subject to sub-rule (2) for the purpose of calculating any period of time interms of these rules, the first day shall be excluded and the last day shall be included.*
>
> *(2) the last day of any period must be excluded if it falls on a Saturday, Sunday or Public Holiday...*

The Rule does not include a last day if it falls on Saturday, Sunday or public holding. The plain wording of this rule connotes that Saturdays, Sundays, and Public Holidays are included in calculating any period of time provided that any of it do not fall on the last day of the period sought to be calculated.

In that connection I reject the preliminary objection that the dispute was filed outside of the time limit. In calculating the days the dispute was in time.

As regard to the second ground of revision Mr. Njooka challenged that the learned arbitrator erred in calculating the "*benefits*" he granted

to the employee respondent at the salary of 950,250.00 instead of the salary of 754,687.00 which the respondent himself had testified in the CMA that he was receiving the salary of 754,687.00 as per page 35 of the typed proceeding.

Responding to the second ground Mr. Komu submitted that the respondent had submitted that he was entitled to the gross salary of 1,021,480/= after the deduction of taxes he was supposed to be given 950,260/=. The arbitrator awarded the respondent eight month salary but was wrongly calculated at six (6) months.

In determining the second ground 1 found insufficient response from the learned counsel for respondent on two aspect; first the computation of the benefit of the respondents using the salary of 950,260.00 which the counsel has submitted that it was his take home payment after the deduction of basic salary of 1,021,480/=, second the clear evidence of the respondent in the Commission where he told the learned arbitrator that he wanted to be reinstated back to work and that his salary was Tzs 754,687.00 as pointed also by counsel for applicant.

With respect to the learned counsel for respondent employer the salary of 950,260.00 used to calculate the benefits of the employee respondent appears to be "*ghost salary*" because it is not supported by any evidence from the record of the Commission which reading it from cover to cover, the salary of 1,021,980/= or that of 950,250.00 does not appear anywhere. The respondent counsel had tried in this revision to submit that the respondent was receiving 950,250.00 but clear evidence from the mouth of the respondent himself in the CMA was that his salary

was 754,687.00 as rightly pointed by Mr. Njooka Counsel for applicant at page 35 of the CMA typed proceedings the respondent is recorded to have said that:-

> *...Mimi nilikuwa empties control kazi yangu ni kupokea chupa na kuzitoa katika production kutunza record za stock...niliomba kurudishwa kazini au kulipwa fidia. Mshahara wangu kwa mwezi ulikuwa 754,687.00 niliajiriwa hapa Moshi na kuachishwa hapa...*

Mr. Njooka Counsel for applicant argued on the third and last ground of revision that, the learned arbitrator did not consider properly the evidence on record especially that of Christopher Jimonge. He submitted that all the witness of 400 crates of used bottled but in the award the arbitrator in the award referred to the crates of new bottleds about 400. He concluded that the respondent was dismissed due to the loss of 400 crates of new bottle. However from evidence of witnesses:-

> *...The complainant respondent was dismissed by failure to report the truck which arrived with the new bottles and used bottles...kuhusu uaminifu, he failed to report that the first truck came with 1400 bottles. Instead of 1800 new bottles ...he failed to report the truck which came with 1200 bottles among it 800 old (or used) and 400 new bottles...*

Responding to the third ground of revision the respondent counsel submitted that it was not true that the respondent was involved in the loss of 400 crates of beer as the applicant failed to prove that there was a loss of 400 crates of empty beer bottles because the delivery note

showed that they were received 1800 bottles were received by from DHL and the employer did not call any witness from DHL to witness the saga of old bottles on new bottles.

I have duly considered the submission by both parties and read the CMA record ***in ex-abundant cautela*** (with eyes of caution) the question here is not on the discrepancies of evidence or discrepancy on whether there were new bottles (empty bottles) mixed with other 400 old bottles (empty bottles); the question is whether the employer applicant had valid reasons to dismiss or terminate the respondent employee and if procedure was followed and whether termination was an appropriate sanction.

According to the applicant's witness the respondent was dismissed for failure to report the truck which arrived with the new bottles and used empty bottles. The evidence is clear that the respondent confessed that he did not report the fact that the he did not report the fact that the truck had brought new empty bottled mixed with old or used empty bottles. This is clear from the evidence and the arbitrator's comment or decision in the award at page 10 that:-

> *...Ushahidi wa mwajiri na ambao umeungwa mkono na mlalamikaji imethibitika kuwa ulikuwepo mchanganyiko ambapo gari iliyotakiwa kuleta chupa mpya kutoka kiwandani zilichanganywa na zilizotumika wakati huo huo mlalamikaji anakiri kwamba pamoja na kugundua kasoro hiyo hakutoa taarifa kwa mwajiri wake badala yake walitoa taarifa walikuwa wafanyakazi wa chini yake...*

In my view apart from the fact that there was a problem in handling the empty bottles by the DHL because the DHL was the one which loaded the empty bottles and brought them from Dar Es Salaam, I entirely and respectfully agree with the arbitrator that the employer was not right and correct to terminate the respondent for the offence which he confessed that he failed to report to the employer the mixture of old empty bottles and new empty bottles. There was no evidence that the act was deliberate or tainted with dishonest on part of respondent employee towards the employer.

I don't share the views with the learned arbitrator that the respondent's failure to report about the mixture of new empty bottles and old or used empty bottle was an underground move between the respondent and the driver who brought the bottles with a truck.

The act of the respondent employee to confess his failure to report on the issues was by large an indication of regret of what he did. There was no proof that the respondent was dishonest; in my considered opinion the respondent employee was negligent or practiced negligence for not informing the employer about the new empty bottles being mixed with old or used empty bottles.

Le Roux and Van Nierk, in the book titled, the South Africa Law of Dismissal [1994] state the following in respect of dishonest at p. 131:-

> *...Dishonest conduct by definition implies an element of intent. It is necessary, therefore to demonstrate some deception on the part of the employee which may assume a positive form, for example by making a false statement*

or representation or negative form, for example by failing to disclose an interest in a corporate entity with which the employer does business[12]...

Therefore dishonest in the employment context can take various forms, including theft fraud and other forms of devious conduct[13]. In my view the respondents' act of neglecting to inform the employer on the old and new bottles was not a form of devious conduct so to speak.

I find that "*kukosa uaminifu*" dishonest as put forward by the employer applicant against the respondent employee was wrong in the circumstances. The "***charge de la preuve***" (burden of proof) which rest on the employer was not discharged on the balance of probabilities. Convention No. 158 of 1982 of the ILO[14] termination of employment convention provides that the burden of proving the existence of a valid reason for termination as defined in article 4 of the convention shall rest on the employer.

The sanction of termination was not an appropriate penalty on the alleged offence of failure to report to the employer the fact that the truck had carried mixed new empty and old or used empty bottles. A reprimand was suffice. The employer did not consider the following before making the decision to terminate the employee:-

1. *The gravity of the misconduct and the circumstances surrounding the Commission of the offence.*

[12] Le Roux and Van Nierk, the South Africa Law of Dismissal [1994] p. 131

[13] ILO refers to International Labour Organization established under United Nations Charter, 1948 (agencies of United National)

[14] See also John Grogan work place law 7th edition

2. *The circumstances of the infringement itself of the offence alleged.*
3. *The employee's circumstances for example the employees status within the undertaking and previous disciplinary record.*
4. *Other employees have been dismissed for the same offence, the employer must be consistent when meeting out discipline.*

I think by and large that had the employer considered the above factors ***interalia*** he could have not terminated the respondent.

On procedural aspect the learned counsel for the respondent employee submitted that the employer did not follow the procedure because he was not given the right to appeal and was not provided with the outcome of the appeal. It seems to me that the counsel for respondent is arguing that failure by the employer to comply with one aspect of procedure possibly under the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007, then the employer acted unfairly. In view of compliance with the Code of Good Practice on procedural fairness, suffice it, to borrow here the wisdom of the Learned Author and Professor of Law at the University of Kwazulu Natal in his article titled "*unfair dismissal*" a contributing article in Prof. Du Toit et al Labour Relations Law: A Comprehensive Guide [2015] that:-

> *...When assessing compliance with the Code of Good Practice, arbitrators must guide against a "mechanical check list approach". It does not follow that an employer*

who failed to comply with the one or more of its recommendation has acted unfairly. The test is whether there has been substantial compliance with overall obligation to allow an employee opportunity to rebut the allegations of misconduct and bring to the attention of the employer any relevant information before a final decision is taken...

In view of the above discussion I entirely agree with the learned arbitrator that the employer did not have any valid reason to terminate the respondent, an appropriate sanction was to reprimand the respondent by giving him a written warning.

I hold also that the employer followed the procedure substantially. On relief I quash and set aside the arbitrators computation of the benefit by using the salary of 950,200/= which does not exist in evidence and I substitute therefore the salary of 754,687/= which in evidence was the salary of the respondent employee thus:-

1. *Salary in lieu of notice 28 = 754,687/=.*
   ...as per S. 41 (1) (b) (ii) of the ELRA No. 6 of 2004 which requires 28 days notice, for monthly based employee and not thirty (30) days.
2. *Leave not taken 28 days = 754,687/=*
3. *Severance pay 754,687 x 7 ÷ 30 = 176,093.63*
4. *Compensation of eight months' salary 754,687 x 8 = 6,037,496*
   Grand Total comes at Tshs 7,722,963.63

In the event the revision is unsuccessful save on the salary of the respondent only.

So ordered.

I.S. Mipawa
JUDGE
21/07/2016

Appearance:-

1. Applicant: Elibariki Zakaria, Principal Officer
2. Respondent: Present in person

Court: Judgment is read over and explained to the parties as shown in the appearance above.

I.S. Mipawa
JUDGE
21/07/2016