IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

LABOUR REVISION NO. 47 OF 2016

[Original Commission and Arbitration Dispute No. CMA/MZ/NYAM/130/2015]

SERENGETI BREWERIES LIMITED ..... APPLICANT

VERSUS

MATHIAS ULAYA ..... RESPONDENT

RULING

6th September, 2018 & 24th January, 2019

M.M. SIYANI, J.

The applicant is seeking a Revision of Arbitrators Award dated 6th April 2016 on the following reasons:

(i) The CMA erred in law and in fact in failing to hold that the refusal to sign performance reports and other documents was justifiable, and amounts to gross insubordination constituting a fair reason for termination.

(ii) That the CMA erred in law and in fact by awarding excessive reliefs which were not claimed by the Respondent

(iii) That CMA erred in law and in fact by failure to consider properly evidence on record as testified by the Applicant's witnesses.

(iv) That CMA erred in law and in fact for failure to consider the exhibits tendered by the applicants during trial as well as and admission and apologies offered by the respondent before trial.

(v) That CMA erred in law and in fact for holding that the reasons for termination of the Respondent's employment were biased, unclear and unfair.

The applicant's affidavit among other things contained the following facts:

That the respondent cause of termination was due insubordination which was preceded by a fair displinary hearing. Aggrieved by the termination, the respondent referred the dispute to Commission for Mediation and Arbitration Mwanza where the following main issues were framed:

(a) Whether the reason for termination was fair

(b) Whether the fair procedure was followed or not

That the Commission issued an award on 6th April 2016 in favour of the respondent on the reason that despite the procedure of termination being fair but his termination was unfair as the offences charged could have been punished by a written warning and not termination. The respondent

was therefore awarded 12 months compensation for unfair termination. Aggrieved, the applicant opted to apply for revision on the reasons listed above. The respondent's counter affidavit on the other hand was to the effect that through the Arbitrators award, his termination was found to be substantive unfair and consequently the reliefs granted were reasonable.

During the hearing of the in this Court, the applicant was represented by Counsel Upendo Mbaga while the respondent appeared in person and unrepresented. Submitting in support of the application the learned counsel for the applicant contended that Rule 9 (4) (a) of the Employment and Labour Relations Act (Code of good practice) makes it clear that the conduct of an employee may lead to termination of his employment. She argued that the respondent was terminated for having absconded from his work for three days and failure to sign sales report upon being directed to do so by his employer. It was submitted that while abscond may attracts reprimand, refusal to obey employer's instructions may lead to dismissal. Ms Mbaga supported her arguments by referring Rule 12 (3) (f) of the Employment and Labour Relation Rules (2007). The learned counsel argued that evidence tendered at CMA proved that the respondent refused to sign sales report and absconded work for three

days and that's a reason why he was subjected to displinary committee where he was found in breach of contract hence his termination.

Miss Mbaga therefore contended that CMA erred in holding that the respondent was unfairly terminated and proceeded to award him 12 months' salary compensations, a relief which was not even claimed by the said respondent. To the learned counsel, the applicant complied with the requirements of the law under both Rules 12 (1) & (2) and 13 of the Employment and Labour Relations (Code of Good Practice) Rules 2007 on fairness of the procedure and the respondent who apologized before to his employer for his conducts, was fairly terminated.

In response, the Respondent strongly denied to have been fairly treated prior to his termination. He contended that the applicant's disciplinary policy and procedures (GF-9) was not adhered to as he was not given a notification of hearing and that the tendered notification (GF-6) was a forged document which indicated a date of hearing as a date of service. The respondent conceded to have absconded work for two days as per exhibit GF-7 and not three days as alleged by the applicant. He argued that he didn't sign the performance report issued to him by the respondent as the same had some errors. However despite informing the

management of the defects in the report and apologizing for absconding work, the applicant proceeded to terminate the respondent's employment without any reprimand.

In her rejoinder counsel Mbaga, reiterated her earlier submissions and went on to argue that the issues of notification letter under exhibit GF-6 was not raised by the respondent at CMA where the respondent admitted to have been notified through his email and the hard copy served to him on the meeting date. That notwithstanding, the learned counsel suggested that had the respondent found the notification time to be insufficient, he would have requested for more time.

I have taken into consideration the rival arguments from both parties in light of the facts from the CMA records of proceedings and award and in disposing this application, I will respond to the question whether or not CMA's decision was justified in its holding that the Respondent's termination was unfair. To make it clear, I will be considering whether the respondent was fairly terminated from employment in terms of reasons and procedures. I have decided to take that cause because, arguments by parties indicates this to be a point of contention as while the applicant

believes the required disciplinary procedures were strictly followed and so the termination was fair, the respondent on the other side is of the view that failure to abide with the disciplinary rules by the applicant meant the termination was unfair. I therefore believe this issues is the basis of this application and that the rest of the issues will be covered in the cause of responding to this issue.

As indicated above the respondent's termination was alleged to be due to misconduct. Exhibit GF-11 which was a termination of employment letter issued to the respondent, reveals that later was guilty of insubordination and absconding from work. Rule 11 of the Employment and Labour Relations (Code of Good Practice) Rules GN No. 42/2007 provides a clear guideline in mandatory terms on the steps to taken by the employer in managing conducts. Among others, the Rule requires employers to ensure procedures of invoking disciplinary measures are taken in accordance with the Rules. Of the outmost is the right to be heard. Rule 3 to the guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedure strictly imposes a duty for the employers to advise the employee in writing on the allegations, time and date of the proposed hearing, giving them a reasonable opportunity to prepare their defense.

In my considered opinion, the essence of the law above is to ensure fairness of the proceedings by giving the employee sufficient notice on the allegations against him. That is why in compliance to that requirement, the applicant prepared what they titled "Disciplinary Policy and Procedures" which was tendered as evidence at CMA and admitted as Exhibit GF-9. For easy of reference, I have reproduced the contents of Paragraph 4:5:2 of Exhibit GF-9 as hereunder:

> *4:5:2 Notification of hearing specifying charges, date, time, venue and the right to representation, must be served to the complainant and the alleged offender at least three days before the hearing date by the Human Resource Representative.*
> [Underlined Emphasis supplied]

The applicant's Disciplinary Policy above indicates he was supposed to notify the respondent at least three days prior to disciplinary hearing which was conducted on 23rd February 2015. Admittedly, the respondent conceded to have been notified of the disciplinary hearing first by email and then through a hard copy. This can be evidenced at page 37 of the CMA's typed proceedings. According to exhibit GF-6 which was the notification of hearing applicant's Disciplinary Proceedings Records, the

respondent was served on the date of hearing. The record does not show when the email informing the applicant of the disciplinary action against him was sent. It is even unknown whether the email complied with the applicant's Policy in respect of contents.

As the applicant being an employer had the duty to ensure fairness in terms of procedure and reasons; and since no evidence was tendered before the commission to indicate that the respondent was notified of the charges against him at least three days prior to hearing, then the respondents arguments that the applicant did not comply with his own Disciplinary Policy cannot be ignored. Indeed, it is an established principle under section 37 (2) (c) of the Employment and Labour Relations Act Cap that termination would be unfair in law if its process did not follow a fair procedure. The applicant herein had a duty to prove that the respondent's employment was terminated in accordance with a fair procedure of which in my view, fairness in terms of procedure was not proved before the commission.

That being said, the arbitrator was justified in his conclusion and I find no basis of interfering with his findings. For the reasons above, the

application lacks merits and the same is hereby dismissed. I order each party to bear its own costs.

Dated at **MWANZA** this 24th January 2019

M.M. SIYANI
JUDGE