**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**(LABOUR DIVISION)**

**AT MBEYA**

**REVISION NO. 24 OF 2019**

(Originating from the Complaint Ref. CMA/MBY/129/2018 of the Commission for Mediation and Arbitration for Mbeya at Mbeya)

**EMMANUEL TALALAI.....APPLICANT**

**VERSUS**

**COCACOLA KWANZA LTD.....RESPONDENT**

**JUDGEMENT**

Date of Last Order: 07/05/2020
Date of Judgment: 08/07/2020

**MONGELLA, J.**

The Applicant is calling upon this Court to call for, examine and revise the proceedings, and Award of the Commission for Mediation and Arbitration in Labour dispute no. CMA/MBY/129/2018. The application is brought under section 91(1)(a), (2)(b) & (c), (4) (a) & (b) and 94 (1) (b) (i) of the Employment and Labour Relations Act, Act No. 6 of 2004 as amended; and Rule 24(1), 24(2)(a), (b), (c), (d), (e), (f), Rule 24(3)(a), (b), (c), (d) and Rule 28(1)(a) (b), (c), (d), (c), (d), (e) of the Labour Court Rules, 2007 GN No. 106 of 2007. It is supported by the affidavit of the applicant **Emmanuel Talalai**, which was adopted to form part of the applicant's submission.

The applicant appeared in person while the respondent was represented by Mr. Mika Mbise, learned advocate. The application was argued by written submissions.

The brief facts of this matter are as follows: The applicant was employed by the respondent company in water treatment section on 1st November 2010. He was terminated on 19th October 2018 on ground of gross negligence. Following the dismissal, he appealed unsuccessfully within the internal disciplinary system. He thereafter filed a dispute within the Commission for Mediation and Arbitration (CMA) whereby he was also unsuccessful. Disgruntled by the CMA decision he has filed this revision calling for determination of the matter on the following grounds:

(i) *That the Hon. Arbitrator erred in law and facts when he made a finding that the complainant/applicant was terminated for a valid reason and in accordance with fair procedure in disregard of clear evidence on record that the respondent did not follow the laid down legal procedure.*

(ii) *That the Hon. Arbitrator erred in law and facts by entering decision in favour of the respondent employer without considering the applicant's evidence in his defence.*

Arguing on the first ground, the applicant contended that as per section 37 of the ELRA, there was no fair and valid reason to warrant termination of his employment. He submitted that he worked for 8 years without any problems with the respondent thus it is inconceivable to charge and

terminate him on negligence. He said that the offence was also not proved at the disciplinary committee and at the CMA and the Hon. Arbitrator failed to evaluate the evidence adduced before him. He said so arguing that the respondent did not conduct investigation and come up with a report before conducting the disciplinary hearing meeting something which was contrary to the law. He referred to Rule 13 (1) & (5) of the Employment and Labour Relations (Code of Good Practice), GN No. 42 of 2007 (hereinafter referred to as GN No. 42/2007) and argued that the provision requires the employer to conduct investigation to ascertain whether there are grounds for hearing to be conducted. He said that no evidence was presented at the CMA regarding the investigation conducted by the employer.

He further argued that though the applicant was suspended by the respondent through a letter dated 05.10.2018 tendered at the CMA which purported to conduct investigation, the CMA failed to put its attention on the fact that no investigation report was tendered. He was of the view that the investigation report would have afforded an opportunity to the applicant to challenge the same. He said that the defence that he put up at the disciplinary hearing, to wit, "*to contact manual chemical backwash was the solution to the leakage problem*" needed investigation to ascertain if the same was right or not taking into account that what happened was very technical. Citing the case of ***Aggrey Sapali v. Mkuu wa Chuo MUST***, Revision No. 22 of 2015 (HC at Mbeya, unreported) which emphasized the need for the employer to conduct investigation to satisfy whether there are grounds for hearing, he concluded that the reason for

termination was not established thus there was no fair trial at the disciplinary hearing.

On the second ground, the applicant contended that the Hon. Arbitrator grossly erred for not considering his defence evidence. He submitted that in the purportedly failure to perform his duties while operating the ultra-filtration plant he was not alone. He said that there were other mechanical technicians who were fixing Uf3, which had to be tested after being fixed. He said that, before testing they had a discussion with the Manufacturing Manager, one Mr. Magala, whereby they discussed about the problem and agreed that they could not contact CIP because they had no CIP pump by then. He said that to arrest the problem of leakage that had happened the only option was to contact "manual chemical backwash." He said that they work as a team in their department but he was charged alone, leaving out the production manager. He added that the production manager was also not called to testify at the disciplinary hearing or at the CMA. He concluded that this defence of his was tendered at the CMA by the respondent employer and formed part of his evidence, but was ignored by the Hon. Arbitrator without assigning any reason, hence arrived at unfair and unjust decision. He prayed for the CMA Award to be quashed and for the respondent to be ordered to pay him compensation for unfair termination.

In reply to the appellant's submission, Mr. Mbise first raised a concern to the effect that the affidavit in support of the applicant's application was not drafted in accordance with Rule 24 (3) of the Labour Court Rules, GN 106 of 2007. He submitted that the provision requires an affidavit to

contain the names, description and addresses of the parties; a statement of the material facts in a chronological order, on which the application is based; a statement of the legal issues that arise from the material facts; and the reliefs sought. He argued that the applicant's affidavit is not inconformity with these requirements as from paragraph 1 to 7 the deponent has provided the history of the matter, which does not comprise the statement of material facts upon which the application is based. To buttress his position he referred to the case of ***Omary Kitwana v. Tanzania International Services Ltd.***, Revision No. 190 of 2011 whereby this Court (Rweyemamu, J. as she then was) held that:

> *"An arbitrator's award is not appealable, it is final and binding on the parties, save that it can be revised by the Court on its own motion, or on application by the aggrieved party, on grounds recognised under the law...an award is revisable if there was misconduct on the part of the arbitrator, it was improperly procured, and the award is unlawful, illogical or irrational."*

He also cited the case of ***Audax s/o Andrew v. Coca Cola Kwanza Ltd***, Revision No. 19 of 2017 whereby this Court (Ngwembe, J.) while citing in approval the case of ***Omary Kitwana*** (supra) held:

> *"...Affidavit supporting a chamber summons for revision, must contain evidence and raise substantial issues, which the applicant supports his prayers contained in the chambers summons. Though I am not intenting to build mountain on this affidavit, yet I find the reasoning of Judge Rweyemamu in the case of* ***Omary Kitwana v. Tanzania International Services Ltd.****, Revision No. 190 of 2011 becomes a long living guidance on Labour matters. The*

*applicant and his advocate should adhere to that legal advice."*

He concluded on this issue by arguing that from what has been presented in the applicant's affidavit no statement of legal issues can be drawn and the same cannot be remedied through written submissions or rejoinder.

However, he proceeded to argue on the grounds of revision raised by the applicant. He argued that there is clear evidence on record that the applicant was charged with gross negligence and found guilty. He challenged the argument by the applicant to the effect that no investigation was conducted by the respondent. On this, he argued that the applicant never raised the issue in the CMA Form No. 1 which is taken as the plaint and the same was never raised at the hearing through cross examination when the respondent's witnesses adduced evidence. He contended that the law is settled to the effect that the arbitrator's award cannot be revised on grounds not raised in arbitration or in the arbitral award. Apart from this stance, Mr. Mbise argued further that an investigation was conducted by the respondent. He submitted that the record speaks loudly that the applicant was first suspended to pave way to investigation the results of which led the employer to a decision that there were grounds for conducting disciplinary hearing. He added that it is from the investigation report that the charges were drawn and served on the applicant. He referred this Court to page 6 of the typed proceedings whereby DW1 one Teddy Shangwe testified as to the investigation conducted.

Mr. Mbise argued further that Rule 13 (1) of GN 42/2007 requires the investigation to be conducted by the employer to ascertain whether there are grounds for a hearing to be held. He was of the position that the Rule does not require any form of investigation report to be composed or submitted at the hearing as suggested by the applicant. He argued that what is important is that the investigation was conducted and the employer ascertained that there were grounds for the hearing to be held. He distinguished the case of ***Aggrey Sapali*** (supra) cited by the applicant arguing that in the matter at hand there is clear evidence of investigation being done and the applicant did not cross examine the respondent's witnesses on that. He added that when the respondent was adducing his evidence he did not say anything regarding investigation report.

On fairness of reasons for termination, he contended that the evidence on record showing that the applicant admitted substantial part of the facts of the case against him both at the disciplinary hearing as well as during arbitration proceedings. He referred this Court to page 6 of the proceedings whereby DW1 testified on the same, to page 12, 13 and 14 whereby DW2 one Jason Barnabas also testified on the same, and to page 16 whereby the applicant stated on oath that the problem occurred and loss resulted from his act of "commanding manual chemical backwash" while production was in progress.

Regarding the applicant's claim that, his defence was not considered, Mr. Mbise argued that a substantial part of the award clearly shows that his defence was appraised. He referred to page 3 to 9 of the award whereby both parties' defence was appraised and the Hon. Arbitrator concluded

that the applicant acted unprofessionally and grossly negligent by "commanding manual chemical backwash" causing serious loss to his employer. He added that the applicant's only defence was that he was forced to do so by one Mr. Magala, however the Hon. Arbitrator after thoroughly reviewing the evidence ruled that the applicant was not forced. He said that what features on record is that the said Mr. Magala instructed for the machines to be cleaned but there is no evidence to the effect that he forced on the methodology of doing it, to wit, "commanding manual chemical backwash." Thus the Hon. Arbitrator concluded that the termination occurred for valid reasons. He concluded that the issue of reliefs was dealt with and the Hon. Arbitrator saw the reliefs claimed were baseless as termination was fair. He prayed for the application to be dismissed.

The applicant first rejoined on the issue regarding competence of his affidavit in support of the application. He argued that the affidavit is in conformity with Rule 24 (3) of the GN 106/2007. He contended that the learned counsel's argument is directed at misleading this Court. He was of the view that if the learned counsel saw that the affidavit conflicts the provisions of the law then he ought to have raised a preliminary objection and not raising the same at the stage of written submission. He argued that the case of ***Omary Kitwana*** (supra) cited by the respondent's counsel in fact supports his application because his application is based on the errors committed by the Hon. Arbitrator by failing to consider that the respondent failed to follow fair procedure in terminating his employment and thus the award was improperly procured and unlawful.

He as well challenged Mr. Mbise's contention that the issue of investigation was never raised in the CMA. He argued that in his CMA Form No. 1 he wrote that the employer did not follow prescribed legal procedures and that the said procedures include investigation. Referring to section 39 of the ELRA he argued that the duty to prove fair termination is vested on the employer and not the employee. He further reiterated his position that the investigation report was not tendered during the disciplinary hearing and at the hearing in CMA by the respondent to show that he used the same to prove the allegations laid against him. He thus maintained his stance that no investigation was conducted as required under the law.

I have given the rival submissions by the parties the consideration they deserve. I have also laboured to thoroughly read the record of the CMA as presented in this Court. Basically, there are two issues calling for determination by this Court. The first is whether the reason for termination is unfair for lack of investigation report, and the second is whether the Hon. Arbitrator did not consider the applicant's defence thereby arriving at unjust decision. However, before I embark on determination of these two issues, I wish to deliberate on the issue raised by Mr. Mbise concerning the competence of the applicant's affidavit.

As he mentioned, Rule 24 (3) of GN 106 of 2007 requires an affidavit to contain the names, description and addresses of the parties; a statement of the material facts in a chronological order, on which the application is based; a statement of the legal issues that arise from the material facts; and the reliefs sought. I have gone through the applicant's affidavit and

found as argued by Mr. Mbise, a history of the events been presented from paragraph 1 to 6. However, the most relevant facts to this case have been presented from paragraph 7 to 12 whereby the applicant states that his claims were dismissed by the CMA and he has also presented the issues to be determined by this Court and the reliefs he seeks from this Court. I shall thus not allow this issue to detain me much because the history presented from paragraph 1 to 6 cannot render the whole affidavit defective. If the said paragraphs are indeed offensive they could be expunged and still won't have the effect of rendering the whole affidavit defective. Nevertheless, I do not see the need to expunge the same. See: ***Stanbic Bank Tanzania Limited v. Kagera Sugar Limited***, Civil Application No. 57 of 2007, and ***Phantom Modern Transport (1985) Limited v. D. T. Dobie (Tanzania) Limited***, Civil References Nos. 15 of 2001 and 3 of 2002.

I now turn to the issue regarding investigation report being presented at the disciplinary hearing and at the CMA. The requirement to conduct investigation is provided under Rule 13 (1) of GN 42/2007. It specifically states:

> *"The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held."*

Considering the above provision I can say that the purpose of conducting an investigation is to establish whether there are grounds justifying a hearing to he held. The said provision does not direct that an investigation report be tendered in evidence. In fact there is no such requirement under any provision of the law. In my view, the contents of the investigation are revealed by the witnesses testifying during the disciplinary hearing and the hearing at the CMA. The report might be

necessary if the point of contention in the labour dispute lies on the investigation conducted. .

To buttress his position the applicant relied on the case of ***Aggrey Sapali*** (supra). I have read the case and just as argued by Mr. Mbise, I do not find it in any way supporting the appellant's case. In this case the learned judge reiterated the position under Rule 13 (1) of GN 42 of 2007 on the need to start the termination process by conducting investigation. There was no argument as to the tendering of the report in the disciplinary committee or at the hearing in CMA and the Court did not make any findings on that aspect.

In the matter at hand, the respondent's witnesses, particularly DW1, testified that an investigation was conducted whereby the applicant was suspended to give way to the same. As argued by Mr. Mbise, the applicant never cross-examined on this fact. The law is settled to the effect that facts not cross-examined are taken to have been accepted by the party affected. In ***Bakari Abdallah Masudi v. The Republic***, Criminal Appeal No. 126 of 2017 at page 11 the Court of Appeal held:

> *"It is now settled law in this jurisdiction that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of witness's evidence on that aspect."*

See also: ***Damian Ruhele v. Republic***, Criminal Appeal No. 501 of 2007 (unreported); ***Nyerere Nyague v. Republic***, Criminal Appeal No. 67 of 2010

(unreported); ***George Maili Kemboge v. Republic***, Criminal Appeal No. 327 of 2013 (unreported). In rejoinder, the applicant replied to Mr. Mbise's contention that he never raised the issue of investigation even in his CMA Form No. 1. He said that in the said form he stated that "*the employer did not follow prescribed legal procedure.*" I have gone through the applicant's CMA Form No. 1 and at item 4 (a) on procedural issues it is written that:

> *"THE PRESCRIBED AND LEGAL PROCEDURE REQUIRED FOR TERMINATION WERE NOT FOLLOWED BY THE EMPLOYER"*

With all due respect, what was stated by the applicant as quoted above is too general. The ELRA and GN 42 of 2007 provide for a number of procedures to be adhered to by the employer upon termination of an employment contract. Thus stating that the prescribed legal procedure for termination was not followed does not suffice to inform on which exact procedure was not followed. It was thus imperative for the applicant to demonstrate during the hearing as to what exact procedure was not followed by the employer. He could demonstrate the same by cross examining the respondent's witnesses and or during adducing his own testimony. Unfortunately, this was not done and it is thus incorrect to bring up the issue at this stage of revision as it amounts to a new fact/evidence. The law is settled to the effect that facts not canvassed at the trial cannot be entertained during appeal/revision. The Court of Appeal (CAT) in ***Farida and Another v. Domina Kagaruki***, Civil Appeal No. 136 of 2006 underscored this position of the law and held that:

> *"It is the general principle that the appellate court cannot consider or deal with issues that were not canvassed, pleaded and or raised at the lower court."*

The question that follows is therefore whether the reason for termination is fair. This question shall be answered in the course of dealing with the second issue as to whether the applicant's evidence was not considered by the Hon. Arbitrator. I have gone through the CMA award and found that the evidence of both sides was considered accordingly. Specifically at page 6 the Hon. Arbitrator stated:

> *"After considering the oral evidence of both parties and the documents submitted, it is crystal clear that the Complainant was terminated in accordance with a fair procedure. The handwritten record (Exh. DW.5) dully signed by the participants demonstrate all rights of the Complainant were observed. The Complainant did only indicate in Complaint form (CMF1) that proper procedure was not followed which does not feature in cross examination of Respondent's witness particularly Teddy Shangwe who testified concerning the procedure when the Complainant enjoyed the services of learned advocate. Complainant's evidence also did not challenge any aspect of procedure followed during termination. I am satisfied on the balance of probabilities that Complainant's termination followed a proper and fair procedure."*

The applicant was terminated for gross negligence causing a loss of more than T.shs. 80,000,000/- (Eighty Million) to the employer by his action of "commanding manual chemical backwash." He did the same knowing of the effect it has on the employer's products and business. Apart from DW1 and DW2 who testified on the same, the applicant himself admitted to

have done so, but put up a defence to the effect that he was forced to do so by one Mr. Magala. The Hon. Arbitrator at page 7 to 8 of the Award appears to have given this defence due consideration. For ease of reference, I wish to reproduce what the Hon Arbitrator specifically stated as hereunder:

> *"...I am of the view that the complainant was not instructed or forced to command manual chemical back wash. In the show cause letter and in the disciplinary hearing minutes, the complainant stated he was told by Mr. Magala to clean the machine and test the same, the question being what to be done which was quite correct. The complainant further stated he had a discussion with Mr. Magala on the aspect of how to clean the machine which is technical part and he (The complainant) had a leading role. The complainant lamented of having arguments with Mr. Magala forcing him or giving him orders contrary to operation manual of water treatment and that he was punished by warning letter, the argument which neither feature in the disciplinary hearing committee nor the warning letter and its associated alleged misconduct was not tendered by the complainant. The first question of was it proper for the complainant to command manual chemical back wash. Its answer is no.*
>
> *As discussed above, the complainant was instructed to clean the machine. There is no evidence that he was forced on the methodology of doing it i.e. commanding manual chemical back wash..."*

I in fact endorse the reasoning and finding of the Hon. Arbitrator. Being the in-charge of the water treatment plant and having worked at the station for eight good years, the applicant who testified to have been aware of the consequences of his actions, ought to have taken extra care. I do not subscribe to the argument that he was forced to do the

opposite by the said Mr. Magala. As observed by the Hon. Arbitrator there is no evidence to such effect. In my view as well, even if there was such evidence he still would have been liable for the misconduct by obeying an unlawful order. The law protects employees from being terminated for disobeying unlawful order. The applicant therefore had no tangible reason to obey such an order, if at all it was given by the said Mr. Magala. See: Section 37 (3) (a) (ii) of the ELRA.

Having said all, I find the applicant's application devoid of merits and hereby dismiss it in its entirety. The CMA Award is upheld in its entirety. Being a labour matter I make no orders as to costs.

Dated at Mbeya on this 08th day of July 2020.

**L. M. MONGELLA**

**JUDGE**

**Court:** Judgment delivered in Mbeya in Chambers on this 08th day of July 2020 in the presence of the applicant and Mr. Mika Mbise for the respondent.


**L. M. MONGELLA**

**JUDGE**