

IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

HC. LABOUR REVISION NO. 40 OF 2020

*(Arising from the Award of the Commissioner for Mediation and Arbitration at
Mwanza in CMA/MZ/ILEM/195/2019/96/2019)*

SBC TANZANIA LIMITED APPLICANT

VERSUS

NICAS GILBERT KAVELLA RESPONDENT

J U D G M E N T

Date of last Order: 16.11.2020

Date of Judgment: 26.11.2020

A.Z.MGEYEKWA, J.

The applicant; SBC TANZANIA LTD in this Revision was dissatisfied with the arbitrator's award in CMA/MZ/ILEM/195/2019/96/2019 whereas, the Commission for Mediation and Arbitration decided in favour of NICAS GILBERT KAVELLA, the respondent. The application before this court is

supported by an affidavit deposed by Phocas Lusato, Principal Officer of the applicant. The respondent challenged the application by filing a Notice of Opposition and a Counter-Affidavit deponent by Nicas Gilbert Kavella, the respondent. The applicant in his chamber summons prays for the following Orders:-

- 1. That this Honourable Court may be pleased to call for records of the proceedings at the Commissioner for Mediation and Arbitration in Labour Complaint No. CMA/MZ/ILEM/195/2019/96/2019 for the purpose of satisfying itself to the correctness legality or propriety of the decision by Hon. Msuwakollos. S. Arbitrator dated 30.03.2020.*
- 2. That, this Honourable Court be pleased to revise the above-stated decision on payment of employment rights or all remuneration, compensation and other benefits and set it aside; and*
- 3. That, the Court may revise the proceedings and make such order as it deems fit.*

Before going into the merits of the revision, it is important to comprehend what transpired in the Commission for Mediation and Arbitration which cropped the present revision. The applicant and the respondent had an employer and employee relationship. The respondent was employed as

a Human Resource Manager since a Sales Man and he used to drive the vehicle which were on sale. The Human Resource Manager (DW1) testified to the effect that the respondent was terminated from employment because of drunkenness. The reason for his termination was drunkenness. The respondent was arraigned before the disciplinary committee and on 12th April, 2019 the respondent appeared before the disciplinary committee whereas the minutes' sheets of the meeting was tendered before the Commission for Arbitration and Mediation. After hearing, he was found guilty and the penalty was termination from the employment.

The complainant could not see justice and appealed to the Managing Director whereas, he sustained the disciplinary committee decision and decided to terminate the employment contract of the respondent. Aggrieved, that he was unfairly terminated from employment, the respondent filed a *Labour Complaint No. CMA/MZ/ILEM/195/2019/96/2019* before the Commission for Mediation and Arbitration. After the determination of the complaint the CMA on 30th March, 2020 decided in favour of the respondent whereas the CMA awarded the respondent a compensation of 12 months' salaries and terminal benefit. The applicant was ordered to pay the respondent a total Tshs. 6, 938, 547, 33/=. Undeterred, the applicant decided to file the instant application.

When the matter was called for hearing Mr. Kabago, learned counsel and Mr. Angela Kindimba, learned counsel were representing the applicant and the respondent respectively.

Supporting the application, Mr. Kabago, learned counsel for the applicant urged this court to adopt his affidavit as integral part of his submissions at the hearing. He argued that in accordance to section 37 of the Employment Labour Relations Act the employer is the one who is required to prove whether there is a valid fair reason for terminating the employee.

He avers that the employer was required to make sure that the procedure was fair or hearing was conducted accordingly to section 37 (2) (a) (b) of the Employment Labour Relations Act. He also referred this court to section 37 (4) and Rule 9 of the Employment Labour Relations (Good Practice). He added that for the employer to prove its burden of proof is on the balance of probability as stipulated under Rule 9 of the Employment Labour Relations (Good Practice).

It was Mr. Kabago's further submission that in fair hearing or fair procedure it's upon the employer to prove if the disciplinary hearing was

conducted. He referred this court to page 3 to 6 of the award where it is shown that the respondent received a letter to defend himself, he replied then he was served with a 48 notice to appear before the employer. He went on to argue that the disciplinary hearing was conducted and the applicant was given right to file an appeal. He insisted that fair procedure was adhered to.

Mr. Kabago continued to state that there was a valid reason to terminate the respondent's employment. He added that the reason for termination was drunkenness. He cited section 37 (2) (b) (i) of the Employment Labour Relation Act, the issue of conduct was drunkenness and it was proved by the applicant's witnesses one DW1 and he tendered an Exh.AB-5. Mr. Kabago went on to state that DW2 and DW4 also mentioned the issue of drunkenness. Mr. Kabago went on to state that DW5 testified to the effect that he took an alcohol test and the respondent was found drunk thus, the applicant proved that the respondent was drunk. Mr. Kabago fortified his submission by referring to this court on pages 11 to 13 of the CMA proceedings and on pages 6 to 7 of the Arbitrator's award.

Mr. Kabago did not end there, he faulted the Arbitrator for admitting a document while the applicant raised an objection. He went on to argue that Rule 24 (6) of the Labour Institution(Mediation and Arbitration Guidelines) Rules, 2007 requires parties to exchange documents but the respondent did not serve the respondent with the said document. He argued that the admission of the said document was contrary to sections 67 and 68 of the Evidence Act Cap.6 [R.E2019].

Finally, the learned counsel prays this court to quash and set aside the arbitrator's award and make findings that the application has merit.

Responding, Ms. Angela, the personal representative submitted that the respondent was unfairly terminated because the said reasons for termination was not proved and the procedure was not followed. She went on to argue that DW4 testified that he was instructed by the Manager to say what they saw, he said he was directed to restrain the respondent not to vacate the work premises because he had sales money. She went on to state that the respondent deposited the money in the bank at 20:00 hours and had already punched the machine ready to leave. Ms. Angela went on to state that the respondent requested the applicant to bring the punching machine and CCTV

footage to show the time taken but they did not act upon it. She added that the alcohol test was alleged to have been done at 19:00 hours while the respondent was at his workplace and the respondent did not sign the alcohol tests document.

The personal representative for the respondent avers that DW5 testified that the respondent was found in possession of bangi and caused a disturbance at the work place. She said that DW5 did not appear before the disciplinary hearing and the manager was not called to testify at the CMA while he was a key witness. Ms. Angela stated that parties exchanged documents at the CMA and the original documents were in hands of the applicant.

In conclusion, she prays this court to dismiss the application and allow the respondent to execute his award.

Rejoining, the learned Advocate for the applicant reiterated his submission in chief and added that the respondent went to work while he was drunk. He argued that the records are silent that the respondent requested for CCTV footage and the punching machine. He also refuted that DW5 did not say that the respondent was found in possession of *bangi*. Mr.

Kabago stated that there was no need to call the manager to testify since his evidence was not necessary. He added that the record is silent if the respondent's witnesses asked the whereabouts of Michael.

Lastly, he insisted that the documents tendered were not given to the applicant and insisted that a notice to produce was not tendered at the CMA. He urged this court to quash the CMA award.

I have gone through the CMA records and this court dully considered the submissions of both learned counsel with eyes of caution. The issue for determination is *whether the award was properly procured*. I am going to address the matter which is brought before this court by the learned counsel for the applicant that the termination was fair.

Having evaluated the submissions by both learned counsels, in light of court records and arbitrator's reasoning in the award that there was no valid reason for terminating the applicant for the reason that the applicant did not follow proper procedure in terminating the respondent. It is the established principle that for termination of employment to be considered fair there must be substantive fairness and procedural fairness of termination of employment.

In determining the issue whether or not the procedures for termination of employment were followed fairly. According to the facts and evidence of this case, the applicant was terminated from employment for misconduct. Thus, in determining whether the arbitrator was justified in deciding the respondent's termination was procedurally unfair, I am compelled to observe the position of the provision of section 37 (2) (c) of the Employment and Labour Relations Act, No.6 of 2004 which provides that:-

"A termination of employment by an employer is unfair if the employer fails to prove that the employee was terminated following a fair procedure."

Equally, Rule 13 of the Employment and Labour Relation (Code of Good Practice) GN.42 of 2007 provides clear the procedure for termination of employment. First and foremost Rule 13 of GN.42 of 2007 requires the employer to investigate to ascertain whether there are grounds to conduct a disciplinary hearing. It is a requirement of the law, and practice of this court in various cases to mention a few see the case of **Sharifa Ahamed v Tanzania Road Haulage (T)** 1980 Ltd Revision No. 299/2014 and **Richard Mwanasasu v Toyota Tanzania Limited** Revision No. 282 of 2015 DSM Registry (unreported) where it was held that:-

" Termination of employment contract by an employer is unfair if the employer fails to prove the reasons for the termination is valid or followed a fair procedure."

In the instant application, the applicant issued a letter requesting the respondent to explain why he goes to work while drunk. To substantiate his testimony DW1 tendered Exh.AB -1. The applicant notified the respondent that the disciplinary hearing was scheduled on 9th April, 2019, the notification was tendered in court as Exh. AB -3. The applicant conducted a disciplinary hearing and the minutes were tendered as Exh.AB - 4 collectively were tendered at the Commission for Mediation and Arbitration to prove that Company was guided by procedure and the law.

Then the applicant was informed that he has right to appeal and the respondent filed an appeal before the Executive Director and the same was admitted by the CMA as Exh.AB-6. Correspondence from the respondent apologizing that he will change his drunkenness habit the same was admitted as AB -7 collectively.

Apart from the exhibits tendered to prove that the procedure was followed in terminating the respondent the employer also tendered an Exh.

AB-5 alcohol test prepared by DW5 he testified that the test revealed that the respondent was found drunk the test was conducted at 19:30 hours. The respondent claimed that he was around the office premises.

The record reveals that DW4 testified that at 19:00 the respondent arrived at the office while drunk and DW5 testified to the effect that the respondent was tested at 19:30 hours on 13th March, 2019 and the claim letter states the same that on 13th March, 2019 while at work the respondent was found under alcohol influence the same amounted to gross misconduct. In his reply, the respondent denied the allegation see Exh. AB -2 and stated that on 13th March, 2019 he went to the depot to collect the vehicle.

I differ with the respondent's testimony that the ground of his termination was based on Exh. AB- 5. I am saying because the applicant had other means to prove that the respondent was drunk while on his duty. Reading the record, the respondent acknowledged and apologized that he was drunk and caused a car accident Exh. AB7. Apart from the alcoholic test Exh. AB5, the record, and evidence in the record reveal that the applicant's witnesses; DW1 to DW5 confirmed that the offence committed by the respondent was drunkenness. DW2 and Augustino Samson, Administrator

Officer made their statements the same were admitted at the CMA as Exh. AB-5 Collectively. The issue of punching machine and CCTV footage were not necessary to be tendered at the CMA since the exhibits tendered sufficed to prove that the respondent was drunk while on duty. Therefore, in my respectful opinion, the alleged offence of misconduct was proved.

After a thorough perusal of the CMA record and considering what I have gathered in line with the legal requirement for procedural fairness principle in termination of employment, it is my considered opinion that the applicant complied with procedurally fairness before he terminated the respondent. The employer complied with checklist provided for under Rule 13 of the Employment and Labour Relation (Code of Good Practice) GN.42 of 2007. Therefore, the Arbitrator was not correct to hold that the procedure was not followed.

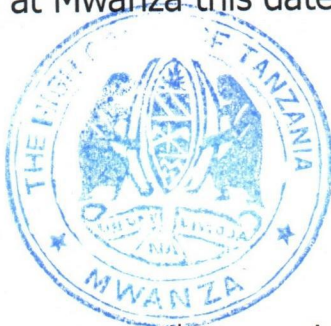
For the foregoing reasons, I find merit on the first ground. Having done so, I am in accord with the learned counsel for the applicant that the respondent's termination was procedurally fair thus, the applicant does not require to compensate the respondent. As already alluded above, this appeal

can be disposed of on this ground only. In the premises, I refrain from deciding on the second ground, since it will be an academic exercise.

For that reason, I hereby grant the application, quash, and set aside the decision and award of the Commission for Mediation and Arbitration. The termination of the respondent is, as a result, found to have been based on justifiable reasons. Since this is a labour matter I make no order as to costs.

Order accordingly.

Dated at Mwanza this date 26th November, 2020.




A.Z.MGEYEKWA

JUDGE

26.11.2020

Judgment on 26th November, 2020 in the presence of Mr. Kabago, learned counsel for the applicant and Ms. Angela, personal representative for the respondent.


A.Z.MGEYEKWA

JUDGE

26.11.2020

Right to Appeal fully explained.