

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LABOUR REVISION No. 04 OF 2019

(C/F MOS/CMA/ARB/69/2016)

SERENGETI BREWERIES LIMITED APPLICANT

VERSUS

JAMES MWAFUTE RESPONDENT

Date of last order 02/12/2019

Date of Ruling 24/03/2020

RULING

MKAPA, J:

The applicant has brought this application seeking a revision of an arbitration Award of the Commission for Mediation and Arbitration (the Commission) in Labour Dispute No. MOS/CMA/ARB/69/2016 delivered on 20th December, 2018 (T.S. Malekeka - Arbitrator)

The brief facts which gave rise to this application is to the effect that, respondent was employed by the applicant on 02nd May 2011 as head of logistics. His tasks according to job description was to control and supervise movement of beers from the production department to the customers. It was alleged that, on 17th February 2016, the respondent fraudulently participated in the movement of 1500 crates of beer to unknown location which resulted into

occasioning a loss to the tune of shillings sixty million (Tshs 60,000,000/=). Following this incident respondent was suspended. The matter was investigated as per the disciplinary procedures until 23rd May 2016 when he was officially terminated for misconduct namely fraud, forgery and or dishonesty. Upon termination he was paid all his terminal benefits including his salary until end of his employment, leave allowance, transport allowance back to Mbeya and severance. He knocked the Commission's doors praying for reinstatement. The same was granted. Aggrieved, the applicant brought this application for revision with the following grounds;

1. The Honourable Arbitrator erred in law and fact in nullifying the evidence adduced by Evance Komu (RW2) on the ground that it was a hearsay evidence hence failed to analyse the same.
2. The Honourable Arbitrator erred in law and fact in concluding that it was mandatory for Neema Mwafongo to testify.
3. The Honourable Arbitrator erred in law and fact in disregarding Charles Haule - RW1's evidence and Amos Mkumbo – RW3 and all the documentary evidence tendered by the applicant.

4. The Honourable Arbitrator erred in law and fact in failing to analyze the contradictory evidence adduced by the respondent.
5. The Honourable Arbitrator erred in law and fact in failing to consider the arguments (closing submission) presented by the applicant.
6. The Honourable Arbitrator erred in law and fact in not considering the fact that the respondent had failed to prove that he was not negligent in his duties.
7. The Commission erred in law in holding that the respondent's termination was substantially unfair.

By parties consent, the court ordered this revision be disposed of by filing written submissions. The applicant was represented by Ms. Nuhu Mkumbukwa, learned advocate, while the respondent had the services of Mr. Jamael Ngowo, also learned advocate.

Supporting the revision Ms. Nuhu submitted on the first and second ground to the effect that, the Commission erred in nullifying the testimony adduced by Evance Komu RW2 as being a hearsay evidence from Neema Mwafongo while both of them were the ones who discovered the production and sales of 1500 crates of beer. It was Ms. Nuhu's further contention that, from page 15 to 23 of the typed proceeding, RW2 testified to the effect that, as a security

manager, he was the one who prompted Neema to review the CCTV footage for beer production on the night of 16th February 2016. They counted the palates together and found that there were 150 palates with 50 crates of Tusker beer each and one palate with 12 crates of castle lager beer produced. Further that, CCTV footage and certificate of authenticity were both admitted as exhibit RE13 to prove the said production. It was Ms. Nuhu's further argument that, after watching the CCTV footage RW2 and Neema Mwafongo went to security personnel to review records on who received beers from packaging to the warehouse and the report matched from what they saw on CCTV footage.

Ms. Nuhu further averred that, RW2's testimony narrated that, when they compared the count sheet from the respondent for three days from 16th to 18th February, 2016, the same showed movement of beers from packaging to the store and finally to the customer, there was a total of 7904.1 crates while the CCTV Review revealed that there was production of 9012 crates. The beer count sheet was admitted as exhibit RE15.

RW2 went on testifying that during trial at the Commission after discovering the variance between the CCTV footage and beers count sheet together with Neema they compared with the sales record of 17th February 2016 and discovered that a truck loaded

with 1500 crates of tasker lager beer was dispatched from the applicant's factory vide Delivery Note No. 1.041,620,654, Invoice No 9870085612, Truck No. T. 289 ARL Trailer No T210 ARA and Seal No. 9608789-90. These information were obtained from Security Log Book which was admitted as Exhibit RE16. Thereafter, Neema Mwafongo emailed the report to the plant manager. At the conclusion, Ms. Nuhu argued that, RW2's testimony is not a hearsay from Neema Mwafongo as provided under **section 62 of the Evidence Act**, Cap 6, R.E. 2002 and ought to be taken into consideration by the Commission. Also Neema Mwafongo was not a compellable witness as her narration would have been a repetition. In support of her argument she cited the case of **Trevor Prince and Another V Raymond Kelsall**, [1957] E.A. 752 where the court held that;

"Where it is apparent that the evidence has not been subjected to adequate scrutiny by the trial court before expressing a view, derived from the demeanor of the reliability of the witness, it is open for an appellate court to find that, the view of the trial judge regarding the witness is ill founded and where wrong inference have been drawn from evidence, it is duty of the appellate court to evaluate the evidence itself."

On the third ground Ms. Nuhu explained further that, Charles Haule-RW1 being a human resource officer testified at page 5 through 13 to the effect that, respondent as head of logistics was responsible for overseeing movement of beers from applicant's factory to the customers as well as keeping the beer account. That his termination, was due to disclosure of fraud incident whereby crates of beers were moved out of the applicant's factory without following proper procedures. Such disclosure was followed by an intensive investigation report which was admitted as exhibit RE3. Ms. Nuhu contended further that, the Commission did not analyse the said report. The same was in respect to testimony of RW3 as revealed at pages 26-28 of the typed proceedings. RW3 testified to have loaded 1500 crates of tusker beers on 17th February, 2016 but when he brought the payment voucher to the respondent to sign, he did not sign instead told him to leave the same on his table. Ms. Nuhu explained further that, on the following day the said voucher went missing and the respondent told him to write another voucher showing that what was loaded was empty crates.

It was Ms. Nuhu further argument that, RW3's testimony corroborates that of RW1 and RW3 but the same was never considered by the Commission. She added that even the documentary evidences tendered to wit; exhibit RE1 to RE17 were

never adequately considered by the Commission which consecutively proved that the respondent was fairly terminated substantively and procedurally. Ms. Nuhu averred further that, as the respondent objected that there were no loss of beers on the material date, it was of utmost importance for the arbitrator to evaluate the said documentary evidence so as to unveil the truth before reaching its decision.

As to the fourth ground, Ms. Nuhu argued that, at page 42 of the Commission's typed proceedings respondent testified to the effect that, when the applicant conducted the investigation no loss of beer was ever confirmed, the fact which is not true. Regarding the fifth ground Ms. Nuhu argued that, the arbitrator failed to consider closing submissions by the applicant as the same does not feature anywhere in the Award contrary to rule 27 (1) (3) (d) of the Labour Institutions (Mediation and Arbitration guidelines) Rules 2007.

Supporting the sixth ground of revision, it was Ms. Nuhu submission that, the respondent failed to prove that he was not negligent in his duties as head of logistics that resulted into a loss of 1500 crates of tusker lager beer. That he did not discover and report such loss whereby beers moved out of the applicant's plant using Machare Truck, thus he cannot escape liability for being negligent in the performance of his duties. Thus, it was Ms. Nuhu's

Mr. Ngowo submitted further that, the burden of proving that the termination was fair substantially and procedurally lies on the applicant as stipulated under section 37 (2) (a) (b) of ELRA. However, the applicant failed to tender documentary evidence explaining that, reasons for termination was fair. Resisting the revision, Mr. Ngowo explained further that, the respondent being head of logistics, there is a specified form which he signs when receiving beers from the production department. However such documentation was never tendered at the Commission during the trial so as to show the amount of beers produced *vis-a-vis* the amount of beers handed over to the respondent. Therefore Arbitrator's findings in analyzing RW1 and RW3's testimonies did lack direct evidence to prove charges against the respondent's misconduct.

Furthering his submission, Mr. Ngowo argued that, the respondent did not give contradictory evidence but rather the applicant tried to frame stories against him but failed since the allegations did not hold water. That, documentary evidences including the CCTV footage admitted at the Commission did not prove that the respondent was directly or indirectly involved in the allegations which were levelled against him that is why he was not even aware of the said theft.

On the issue of closing argument, Mr. Ngowo averred that, it is not a mandatory procedure that a closing submission must be considered by the Commission in the Award. Further that, it was not the duty of the respondent to prove that he was not negligent but rather the applicant as employee was the one who had the duty to prove that termination was grounded on fair reasons. Regardless, considering the findings, a warning would have been enough rather than termination. He finally prayed that the award be confirmed and the revision be dismissed with costs.

In rejoinder, Ms. Nuhu reiterated her stance in submission in chief and maintained that both reason for termination and procedures thereof were properly adhered in terminating the respondent.

Having considered either party submissions and after a thorough perusal of the proceedings and decision of the Commission, it is undisputed that the procedure for termination was followed. The main issue for determination therefore is whether the reasons for termination were fair.

As mentioned earlier, the main reason for applicant's termination was gross negligence resulted into a loss of company's property to wit; 1500 crates of tusker beer amounting Shillings sixty million (Tshs. 60,000,000/=). The Commission held that such negligence was never proven by the applicant hence the reason for his

termination was not fair. My perusal of the testimonies of applicant's witnesses revealed that before his termination an internal investigation was conducted by one Neema Mwafongo and later by RW2, Corporate security and the investigation report was admitted as Exhibit RE3. The said report revealed that, a total of 1500 crates of tusker lager beer were not accounted for. That, according to the CCTV Footage, 9012 crates of tusker lager beer were produced on 16th and 17th February, 2016 but the beer count revealed that on 17th February 2016 the stock was 7904.1 crates only. Beer count sheet was admitted at the Commission as RE15 and variance was never accounted for. Moreso, exhibits tendered have revealed that gate passes were all written by the respondent and no truck was allowed to leave the applicant's plant without respondent's signature and authorization from his department.

It was further on record that, Machari truck with registration No. T 289 ARL, trailer No. T 210 ARA and seal No. 9608789-90 was dispatched from the applicant's factory on 17th February, 2016 using Delivery Note No. 1,041,620,654 and Invoice No. 987085612. The said information was obtained from the log book which was admitted as exhibit RE16. However, although it is undisputed that there was loss of the said crates there was no document on record showing the authorization of release of the

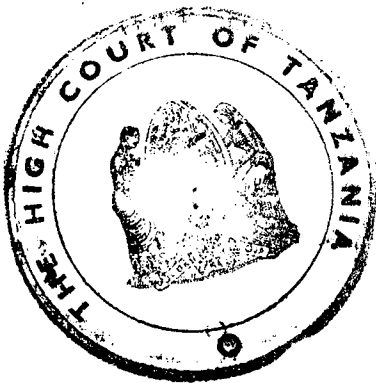
truck which left the premises with the said crates of beer. Such authorization had to come from the respondent's department. In the circumstance it is clear that, the respondent failed to keep proper records of movement of beer on the date of incident (17th February, 2016) or to report the same contrary to his responsibilities as per the job description.


For the reasons discussed, I am of the settled view that, the reasons for suspension and later termination of the respondent's employment were fair. Thus the Commission's decision faulted in holding otherwise.

As to the fairness of the procedure, it is undisputed that the applicant was accorded the right to be heard and the committee reached its decision and proper procedure were followed in terminating respondent's employment as provided for under section 37 (2) (a) (b) of the ELRA, and rule 11 and 12 of Code of good conduct G.N. 42/2007. It is evident that the applicant was first suspended, accorded right to be heard with witnesses and then the committee reached its decision. The applicant was also given his terminal benefits and accepted that means he accepted the decision of the Committee and he never challenged the same since. Thus in my view termination of the respondent's employment was reasonably fair and procedurally correct.

Since the applicant was paid and accepted all his terminal dues and nowhere in the record reveals that the applicant was issued with the Certificate of Service as per section 44 (2) of the ELRA, I order the respondent to comply with the requirements of section 44 (2) of the ELRA. Accordingly, I allow the revision, set aside and quash the Commission's Award with no order as to costs.

Dated and delivered at Moshi this 24th Day of March 2020.




S. B. MKAPA
JUDGE
24/03/2020