

**IN THE HIGH COURT OF TANZANIA**

**IN THE DISTRICT REGISTRY**

**AT MWANZA**

**LABOUR REVISION NO. 58 OF 2020**

**(Originating from CMA/MZA/NYAM/28/2020/30/2020)**

**KIC SECURITY & SERVICES CO. LTD ..... APPLICANT**

**VERSUS**

**DEOGRATIUS MUSSA BALUHI ..... RESPONDENT**

**RULING**

*19/01/2021 & 20/04/2021*

**W. R. MASHAURI, J;**

This application for revision is brought in this court under rule 24(1) 24(2) (a)(b)(c)(d)(e)(f) and 24(3) (a)(b)(c)(d) of the Labour Court Rules G.N. No. 6 of 2007 and rule 28(I) (a)(b)(c)(d)(e) of the Labour Court Rules G.N No. 6 of 2007, and section 91(1) (a)(b), 91(2) (b) of the Employment and Labour Relations Act Cap. 366 R.E. 2019.

The orders of this court sought by the applicant as indicated in his notice of application are: -

1. To call and revise the decision and orders made by the CMA of Mwanza at Mwanza in labour dispute No. CMA/MZA/NYAM/28/2020/30/2020 delivered on 13<sup>th</sup> day of July, 2020.
2. To set aside the award given in dispute No. CMA/MZA/NYAM/28/2020/30/2020.
3. To make any other orders as this court may deem fit to grant.

The applicant is enjoying the services of Mr. Mhingo learned counsel. The respondent is appearing. In person in his submission in support of the application, Mr. Mhingo learned counsel supported the application as deposed by the applicant Paulo Malima. He contended as well as done by the applicant in his affidavit that, the Arbitrator who heard the dispute did not put into account the evidence of one Jackson (PW1) who was Manager Assistant of the applicant company KIC Security and Services Co. Ltd.

That, in his evidence, Jackson (PW1) was Manager Assistant of the Applicant KIC Security and Services Co. Ltd. In his evidence Jackson (PW1) said was working together with the respondent who was employed by KIC from 14/11/2018 to 3<sup>rd</sup> December, 2019 as marketing officer whose duty was to search for markets. That from ever since he was employed on 14/11/2018 to 3<sup>rd</sup> December, 2019 has never ever got a single customer.

In his evidence one Jackson Malima said that, the respondent was requested to attend various meetings of the company in which he agreed to have failed to perform his duties effectively which is contrary to the terms of his employment contract.

That, although the respondent was attending his work regularly but was sometimes going to work being drunk of alcohol that, his submission that the respondent was manager of the applicant is a mere confusion of which is not fatal because the core function of the marketing officer was looking for customers and/or markets and that he worked as they had agreed with the applicant as per terms stated in the deed of employment and that he got four customers namely Nyehunge, Koreans and Chines and the evidence that he got 4 customers is a contract deed with the said companies, as without which there is no evidence to prove that he got the said markets/customers as he alleges.

Having so submitted, Mr. Mhingo counsel for the Applicant prayed the court to allow the applicant's application and discard the respondent's allegation.

On his part, the respondent Deogratius Mussa Baluhi condemned the learned counsel for the applicant to have said lies. That, he was employed

by the applicant as marketing officer a not Marketing Manager and he got customers and/or markets.

That the said Jackson was employed as an accountant and not manager as he has said in his submission before.

That, it is also in record that the respondent was going to work being drunk of alcohol which is an offence contrary to the provisions of S. 9 of G.N. No. 42 of 2007 which is a general offences and breach of organization rule which states the offences which may be done by employees.

That, since the respondent was working with together Jackson, the issue of alcoholic test is immaterial. The CMA therefore made an error to award the respondent Shs. 2,100,000/= notice of 28 days and compensation for 12 months' salary.

The learned counsel lastly said that, he so said because the respondent had violated the agreement of his employment. That this evidence was given by Jackson Malima (PW1) who was Manager Assistant of KIC working with the respondent who was well known by Jackson Malima (PW1) who was a Manager Assistant of KIC working together with the respondent Jackson Malima who also said in his evidence that, one time the respondent was called to attend meetings of the company and he agreed to have failed to

perform his duty effectively, contrary to the terms of his employment contract. That although the respondent was attending his work regularly but was coming being drunk of alcohol and he was easily identified when he was drunk and therefore the allegation of alcoholic test was immaterial.

Jackson Malima further said in his evidence that, the respondent was on several occasions called to attend the company meetings and before the meeting was admitting to have failed to perform his responsibility well. He agreed to have failed to get any market/customer contrary to the terms of employment with his employer (KIC).

It is also in record that, he was not regularly attending his work and sometimes he was going to work being drunk of alcohol which is contrary to the provisions of section 9 of G.N. No. 42 of 2007 which state the general offences that can be committed by the employee.

Upon so submitted, Mr. Mhingo learned counsel for the Applicant told the court that, since the respondent was working together with Jackson (PW1|) the allegation of alcoholic test is superfluous. On that regard, the CMA therefore wrongly awarded the respondent Tshs. 2,100,000/= and notice of 28 days as well as compensation for 12 months' salary because the respondent had violated his terms of contract of employment.

In reply the respondent Deogratius Mussa Baluhi denied the submission by Mr. Muhingo and said was a lie. That, he was employed as Market Officer and not Market Manager and in the course of his employment he got several markets and/or customers contrary to what Jackson Malima who was employed as an accountant and not Marketing Manager in his evidence and he got many markets/customers including Nyehunge, Koreans and Chainees companies as indicated in the typed judgment of the trial Tribunal.

That, upon got the said markets and/or customers, he notified the Director of KIC but he did not take prompt action until the companies were taken by other customers/markets and/or security companies.

That, the customers he got were persons and/or companies which were selling motor car and solar batteries.

On the allegation of going to work being drunk of alcohol, Mr. Deogratius denied to have ever went to work being drunk of alcohol.

In rejoinder, Mr. Mhingo learned counsel for the Applicant submitted that, the allegation by the respondent that he was employed as marketing officer and not Marketing Manager is a mere confusion which cannot distort the whole meaning that, he was coming to work being drunk of alcohol and that he failed to discharge his duties well.

Mr. Mhingo learned counsel for the applicant prayed the court to allow the application and set aside the orders of CMA of: -

1. Notice of 28 days Shs. 150,000/=.
2. 28 days leave Shs. 150,000/= and
3. Compensation of salary for 12 months Shs. 1,800,000/= which make a total sum of Shs. 2,100,000/=.

Lastly the respondent submitted that, the claim of a total of Shs. 2,100,000/= as indicated above is his right by virtue of the provisions of S. 4(i)(b)(ii) of the employment and Labour Relations Act No. 6 of 2004.

The evidence of the complainant in the CMA was as follows: -

Before the CMA, the complainant Deogratius Mussa complained to have been unfairly terminated by KIC Security Services Co. Ltd, the employer.

In his evidence Jackson P. Malima who is referred to as DW1 said was employed by the Applicant KIC as Assistant Manager.

The complainant Deogratius Mussa Baluhi also said in his evidence before the tribunal that, in his evidence the 1<sup>st</sup> witness Jackson P. Malima (DW1) said was employment by the applicant KIC and before was promoted to be an Assistant Manager was employed as an accountant, and he was in

work when the complainant was employed. He well knows the complainant/respondent as he was his co-worker. The respondent was employed as Marketing Manager on 14/11/2018 on salary of Tshs. 250,000/=.

That in their office, they were making meetings together with the Director in every after three months, so as to know the character of every employee, in respect of doing their work. The Director was chairperson of the meeting. When the manner of the respondent in the course of doing his work was deliberated, in that meeting the Director said that respondent's employment was temporary for three months on an agreement to look for customers/markets on behalf of the marketing manager. DW1 said that up to that time the respondent had got no single customer/market for the period of three months from his date of employment. He asked the Director to add time to him and the Director agreed and added him to proceed working, and was paid his salaries as indicated in the claim invoice exh. AB – 2.

That, one time the respondent was enjoined by the Director to take an invoice to the Korean's Office and what the respondent did is that, he did not serve the responsible customer but he left the invoice in the kitchen. The Director convened a meeting so as to know what caused the respondent to do so. The respondent agreed to have taken the invoice to the korean's office

but he left it in the kitchen. The Director also blamed the respondent for coming to work being very drunk for two to three days and he pleaded guilty to all that was said by the Director and he asked for pardon and was pardoned. After a lapse of some time, the Director convened another meeting, the respondent was asked by the Director asked the respondent why he was coming to work being too drunk (amelewa kupindukia). The Director was chairperson of the meeting. When the conduct of the respondent in the course of doing his work was deliberated, in that meeting the Director said that respondent's employment was temporary for three months on an agreement to look for customers/markets on behalf of the marketing Manager. DW1 said that up to that time the respondent had got no single customer/market for the period of three months from his date of employment. He asked the Director to add time to him and the Director agreed and added him time to proceed working and was paid his salaries as indicated in the claim invoice exh. AB – 2.

That, onetime the respondent was enjoined by the Director to take an invoice to the Korean's office and what the respondent did is that, he did not serve the responsible customer but he left the invoke in a kitchen the Director convened a meeting so as to know what caused the respondent to do so. The respondent agreed to have taken the invoice to the Korean's

office but he left it in the kitchen. The Director also blamed the respondent for coming to work being very drunk for two to three days and he pleaded guilty to all that was said by the Director and he asked for pardon and was pardoned. After a lapse of some time, the Director convened another meeting whereby the respondent was asked by the Director why he was coming had come to work being too drunk (amelewa kupindukia) but did not say anything save admitting all that was said by the Director. The Director therefore decide to terminate his employment and paid his terminal benefits as indicated in exhibit AB – 3. DW1 said the respondent was not demanding anything from the applicant at the time of his termination. The Director requested the respondent to write anything in respect of.

After closure of the Applicant's case, the respondent was given chance to defend his case. In his evidence, the respondent who is referred to as DW1 said was employed by KIC Security Service Co. Ltd in October 2018. That, upon lodged his application for work to the Director was given a form (exh. CD-I) for filing it. Upon filed it, he took it to the Director where he met other four persons namely Jackson Malima (accountant) Pudensiana (secretary), Abbas (Marketing Manager) and he was employed on the very day 13/11/2018. That when he took his form, he did not meet the Director, and when the Director returned back to his office, he found the respondent

already in work working and the Director and accountant agreed to pay the respondent salary of Tshs. 220,000/=. He was paid salary Shs 170,000/= and posho Shs. 50,000/= total 220,000/= in the course of his employment, the first customer/market he got was Nhehugne Bus Stand located at Buzuruga in the city of Mwanza.

That the respondent's duty was looking for costumers as well as serving payment invoices to customers.

That when worker's meetings were convened, he was writing minutes of the meeting. And according to the respondent's mode of operandi was requested by the Manager Mr. Webiro, to write his explanations in respect of the conduct he was demonstrating in his work. The respondent wrote his statement in which he denied the allegations.

The issues are: -

1. Whether the respondent was fairly or unfairly terminated.
2. Whether the employer properly followed the procedure of terminating the respondent.
3. What relieves each party is entitled.

It is cardinal principle at law that, any employer, arbitrator or judge who is required to decide as to termination for misconduct is an unfair shall

consider whether or not the employee contravened a rule or standard regulating conduct relating to employment.

In law, the reasons which may justify termination by the employer are: -

- (a) Conduct.
- (b) Capacity.
- (c) Compatibility or
- (d) Employer's operational requirement.

It is on record and not disputed in this matter that, the respondent who was employed by the applicant as marketing officer whose core duties were, looking for customers as well as serving invoices to customers and/or markets as referred by the applicant's learned counsel in his submission.

It is evidenced by the first witness (DW1 that) when the respondent was employed by the applicant DW1 was in work. He therefore well knows the respondent who was employed as Marketing Officer on 14/11/2018 and in their office there was a tendence of making workers meetings and the Director was asking each worker to account on his conduct of his work. In one meeting the respondent, was asked by the Director why he did not come to work for two consecutive days and in reply the respondent agreed that for two to three days was coming to work being drunk.

Director requested each worker to give details in respect of his performance of work the meeting was conducted after a lapse three months from 14/11/2015 when the respondent was employed and was gathered that the respondent had failed to get a single customer and/or market. Without his objection, his salary was reducing from 250,000/= to 220, and his salary invoice was not signed by SAE KYUNG as indicated in his salary invoice exh. AB-01.

According to the evidence of Jackson P. Malima DW1, another duty of the respondent was serving invoices to customers.

That, one time the respondent was requested to serve a salary invoice exh. AB-2 to the office of Koreans but for the reasons he alone was aware, he did not serve the said invoice to the office of Koreans and instead, he left it in the kitchen and when he was asked why he did so, he admitted to have done the fault and he prayed for pardon. He was pardoned by the Director but his salary was again reduced form Shs. 220,000/= to 170,000/=.

It is also on record that despite of several times of being warned by the Director, the respondent was going to work being drunk and according to the evidence by DW1 this conduct by the respondent to come to work being

The respondent agreed and prayed for pardon by the Director and was pardoned. Thereafter the Director terminated the respondent and was paid his terminal benefits, including a salary of November, 2019. That, one time, the respondent was asked to take an invoice to one of the company's customers and upon reaching the said invoice he did not serve the Director of that company and instead, he left the invoice in the kitchen. When the Director asked him of that allegation, he agreed and prayed for pardon.

Under common law, termination of employment includes: -

- (a) A lawful termination by employee because the employer made continued employment intolerable for the employee. It is also fair if the employee made intolerable conduct to the employer.

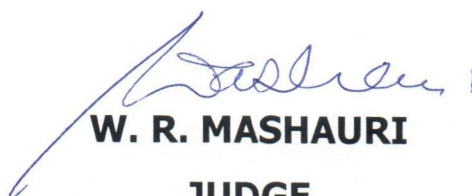
In this matter as submitted by learned counsel for the applicant the respondent had a tendency of convening workers' meetings so as to discuss on the conducts of workers, and in most meetings. The director of KIC was complaining against the complainant/respondent for failure to perform his duty well it is in record that, from ever since he was employed as marketing officer on 14/11/2018 on payment of salary of Shs. 250,000/= per month. When the Director convened a meeting, so as to weigh out the conduct of workers in the course of doing their work. Where the

drunk was intolerable to the employer. The termination of the respondent from his employment was therefore justifiable. Hence a fair termination.

In the event this application for revision is allowed with an order that the orders of CMA of 28 days leave Shs. 150,000/= and compensation of salary for 12 months Shs. 1,800,000/= which make a total sum of Shs. 2,100,000/= are hereby quashed and set aside the application is allowed.

No order as to costs is made.



  
**W. R. MASHAURI**  
**JUDGE**

**20/04/2021**

Date: 20/04/2021

Coram: Hon. W. R. Mashauri, J

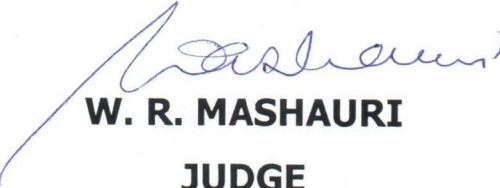
Applicant:

Respondent:

B/c: Elizabeth Kayamba

**Court:** Ruling delivered in court in presence of all parties this 20<sup>th</sup> April, 2021. Right of appeal explained.



  
**W. R. MASHAURI**  
**JUDGE**

**20/04/2021**