IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LABOUR REVISION NO. 09 OF 2021

(Arising from Labour Dispute MOS/CMA/ARB/25/2015)

SERENGETI BREWERIES LIMITED ..... APPLICANT

VERSUS

SIMON PISSY ..... RESPONDENT

JUDGMENT

MUTUNGI .J.

The applicant Serengeti Breweries Limited (SBL), aggrieved by the Award of the Commission for Mediation and Arbitration for Kilimanjaro at Moshi (the CMA) in Labour Dispute No. MOS/CMA/ARB/39/2017 delivered on 29th April, 2016 has lodged this application seeking this Court to examine the records and proceedings with a view of satisfying itself as to its legality, propriety and correctness and thereafter set aside the Arbitral Award.

The genesis of the dispute is to the effect that, the respondent was employed by the applicant on 8th October, 2012 on

permanent basis as Shift Engineer. On 29th April 2015, he was terminated having been found under the influence of alcohol while on duty, after the disciplinary hearing conducted on 10th April, 2015. The said committee in its finding was settled, the respondent had violated paragraph 8.4.8 of the applicant's disciplinary policy and procedure. To the contrary the respondent defended himself that, he had online tasted the alcohol in the cause of his duties. The applicant strongly refuted no sensory panel team sat to conduct the tasting on the material day. After termination he immediately thereafter filed his complaint at the CMA which ordered the respondent be reinstated in his position by the applicant herein without loss of remuneration.

Aggrieved, the applicant is seeking revision against such decision on the following grounds as found under paragraph 11 (a) to (g) of the applicant's affidavit: -

(a) That, the CMA erred in law and fact in holding that DW1 is not competent witness to testify at the CMA basing on the answer he provided during cross examination by the respondent's representative.

(b) That, the CMA erred in law and fact in holding that the respondent was required to test the beer without following the procedures and merely based its decision on the qualification and post of the respondent without considering the procedures of the applicant's company.

(c) That, the CMA erred in law and fact in holding that the alcohol test was conducted with reasonable apprehension of malice, hatred and headhunting

(d) That the CMA erred in law and fact in holding that the procedure for termination was not fair

(e) That, the CMA erred in law and fact in failing to consider properly evidence on record as testified by the applicant's witness.

(f) That, the CMA erred in law and fact in holding that reasons for respondent's termination were unfair.

(g) That, the CMA erred in awarding excessive reliefs.

During hearing which was done by way of written submissions, the applicant was represented by Mr. Geofrey Geay Paul, learned advocate while the respondent was represented by Jamael Ngowo, his personal representative.

Supporting the revision, Mr. Paul submitting on the 1st ground averred, DW1 (Charles Haule) was more than competent to testify for the applicant as a human resource officer thus the CMA erred in holding that he was incompetent. He argued, there was no contradictions whatsoever raised by DW1's testimony and since the Arbitrator never pointed out those contradictions, it was erroneous of him to impugne his testimony and deny him the right to be cross examined. He cited the case of **Hatibu Sandhi and Others Vs. Republic [1996] TLR 12** to underscore the fact that failure to cross examine a witness on important matters amounts to admitting what the witness said. Further DW1 understood all questions put to him and accordingly gave rational answers hence was a competent witness.

On the 2nd ground, the learned advocate averred, the Arbitrator reasoned, it was proper for the respondent to taste alcohol while on duty as he was a qualified and certified taster. However, it was an erroneous remark since alcohol testing is done by a panel and not individuals as per the procedures laid down in the applicant's plant. He argued, even if the respondent was a qualified taster, he was not part of the panel that tests alcohol as he wasn't employed as

such. In that regard, he had to follow the required procedures in place before carrying out any testing. More so, no testing was done by the testing panel on the material day. The learned counsel argued further, DW3 was the only one who was allowed to conduct online testing as a Brewer Operator and since the respondent was employed as a Shift Engineer he was not allowed to do online testing as he alleged.

Regarding the 3rd ground Mr. Paul argued, the alcohol test done to the respondent was not malicious, just because the respondent testified against the applicant in labour dispute MOS/CMA/M/39/2015 between the applicant and Leonard Mushi. He argued the Arbitrator erred in relying on speculations instead of facts as presented in the CMA and he cited the case of **Antony Ngoo & Another Vs. Kitinda Kimaro, Civil Appeal No. 25 of 2014 CAT at Arusha (unreported)** and **Richard Otieno @ Gullo Vs. Republic, Criminal Appeal No. 367 of 2018 (unreported)** in support thereof.

The applicant's counsel further submitted on the 4th ground, referring to the procedure used to terminate the respondent

that, the same was thoroughly adhered to. The respondent was availed a right to be heard, a right to cross examine the complainant and was satisfied with the impartiality of the whole procedure as there was no any element of biasness by the chairman as the Arbitrator observed in his Award. The aspect on biasness was raised by the Arbitrator on his own motion.

He added, although the disciplinary committee chairman called the fourth witness over the phone, the same did not prejudice either party. He was put on loud speaker and both parties had a right to ask him questions. Mr. Paul further argued, the respondent had raised several grounds in his appeal before the disciplinary body but it was disposed off on the ground that he was found intoxicated while on duty. There was no error in relying on one ground as found by the Arbitrator. In his settled mind this is a common procedure in our jurisprudence and the same is depicted in **Masoud Mgosi Vs. Republic, Criminal Appeal No. 195 of 2018 (unreported)**. That apart the learned counsel stated, the procedure in termination of employment is not meant to be applied in a checklist fashion, he cited and referred the court to the

decision in the case of **NBC Ltd Mwanza Vs. Justa .B. Kiyaruzi, Labour Revision No. 79 of 2009 (unreported)**.

As to the 5th ground, Mr. Paul argued, the CMA failed to thoroughly analyse the evidence advanced by the applicant's witnesses who were competent and reliable. He added, all witnesses elaborated there was no testing on the material day to warrant respondent's drunk status while on duty. He cited the case of **Hassan Said Chonga Vs. Yasini Mohamed Mnengela, Labour Revison No. 05 of 2016, HC at Mtwara (unreported)** and **Mkulima Mbagala Vs. Republic, Criminal Appeal No. 267 of 2006 (unreported)** to cement his argument that failure to analyse parties' evidence vitiates the proceedings.

It was Mr. Paul's further submission in respect of the 6th ground that, the applicant had a justifiable cause to terminate the respondent. He argued, the respondent admitted to have been drunk while on duty on the ground that he was doing online testing as a member of the sensory panel. The same was confirmed by the security officer who tested him when he was checking out from his shift on the morning of 18th March, 2015. However, there was no sensory panel testing

conducted on that particular night (17th March, 2015), hence, his defense was legless and the CMA erred in holding otherwise. The sensory panel testing is done during the day and not at night. Mr. Paul added, the fact that the testing instrument was not tendered as evidence at the CMA does not change the fact that, the respondent was found drunk while on duty. The respondent admitted on the same during the disciplinary hearing that, he was satisfied with the alcohol testing procedure done by the security guard which turned out positive. In that regard, the applicant had a valid and justifiable reason to terminate the respondent.

Lastly, Mr. Paul argued the reliefs granted were excessive and unreasonable, as the CMA ordered the applicant to reinstate the respondent without loss of remuneration. However, the Arbitrator added the respondent be paid Tshs. 28,000,000/= without further elaboration as to what was the money for. He argued the arbitrator ought to have considered the circumstances of the termination before ordering reinstatement and compensation at the same time contrary to **section 40 (1)(a) of the ELRA** and as was emphasised by the Court of Appeal in the case of **National Microfinance Bank V. Leila Mringo and 2 Others, Civil Appeal No. 30 of 2018**

CAT at Tanga (unreported). Further, the relief of reinstatement was practically impossible since the relationship between the parties had become interolable. He cited the case of **Ogoye Vs. Kenya National Trading Corporation (KNTC) [1995-1998] ZEA page 264 and the book by Prof. SR Van Jaqisveld**, et al, "Principles and practice of labour laws, Vol.1 paragraph 211" in support of his stance.

The foregoing notwithstanding the Tshs. 28,000,000/= ordered if assumed was compensation was an error on the part of the Arbitrator. Granting reinstatement and compensation in conjunction is contrary to the labour laws. In his settled opinion these should have been ordered disjunctively. In support thereof he cited the case of **National Microfinance Bank Vs. Leila Mringo & 2 Others, Civil Appeal No. 30 of 2018 (unreported)**. He finally prayed this Court revises the CMA's decision since the same is tainted with errors. There were fair reasons and all procedures were properly followed to the letter in termination of the respondent's employment.

In reply, Mr. Ngowo submitted in respect of the 1st ground that, DW1 stated at the CMA that, he had not appeared to testify but rather to give information and explanation

concerning the respondent. He added, DW1 explained, the respondent having been tested the instrument turned red, however, the security guards who tested him were not experts in alcohol testing and the said instrument does not have the gauge, it just turns red or green.

He argued, DW1 evidence was neither challenged during cross examination nor re-examination. DW1 failed to prove directly that the respondent committed the offence. In that regard, the CMA's findings that DW1 was not a competent witness was correct as he failed to discharge the applicant's duty which was to prove that termination was fair. He cited the case of **Tunakopesha Ltd Vs Moses Mwasiposya, Labour Revision No. 17 of 2011, (Labour Division – Shinyanga** where Rweyemamu, J. emphasized, in disputes of unfair termination, the employer is the one to shoulder the burden to prove that, termination was fair.

Responding to the 2nd ground, Mr. Ngowo submitted, during the hearing at the CMA the applicant's witnesses testified that, on the material day there was no online testing by the respondent. He argued that the company policy does not provide for procedure in testing the beer, all what is needed

is for the taster to ensure good quality of the beer to the consumers. More so the record shows, whenever there is beer production, online testing must be done by the taster on duty on the respective shift. Considering the fact that the applicant's witnesses did not testify which procedure and policy was breached by the respondent, those allegations remain baseless.

On the 3rd ground, Mr. Ngowo asserted, there were more than 100 workers on the night shift (on 17th March, 2015), however, only 5 workers including the respondent were tested while others were not. Surprisingly enough after the respondent was tested the exercise stopped. In that regard, the Arbitrator did not error in holding, the alcohol test was conducted with malice, hatred and witch-hunting.

Mr. Ngowo challenged the applicant's 4th ground that, the procedure followed in terminating the respondent was unfair. He argued, it is clear that the procedures were not at all followed as envisaged by law. The chairman who was supposed to be a neutral person was biased and totally in favour of the employer. Even though, the disciplinary committee did not tender the outcome of the appeal record

as required by law. To make matters worse he was terminated by the disciplinary committee and not the employer.

On the 5th ground, Mr. Ngowo expounded, the Arbitrator analysed all the witnesses' testimonies as well as the exhibits tendered. He properly evaluated all the evidence and came up with a fair decision that, the termination was unfair both substantively and procedurally. He added, there was no concrete and incriminating evidence to prove that the respondent was drunk to the extent to be terminated for breach of the SBL's Company Policies. To cement his argument, he cited the case of **Kilombero Sugar Co. Ltd Vs Peter Sulle, Labour Revision No. 19 of 2019, High Court Labour Division at Morigoro** in which the court was convinced the Arbitrator had properly analysed the evidence adduced and his findings were hence supported by the records.

Regarding the 6th ground, Mr. Ngowo submitted for termination to be considered fair, it should be based on valid reasons and fair procedures as provided under **section 37 of the ELRA**. He contended, the intention of the legislature requires employers to terminate employees only basing on

valid reasons and not their personal whims as provided for under **Article 4 of the International Labour Organisation Convention (ILO) 158 of 1982**. However, in the matter at hand no investigation was done to prove whether there was online beer testing on the night of 17th March, 2015 before disciplinary hearing was conducted. In that regard, the applicant's conclusion that the respondent's act was so serious to warrant his termination was not proved at the required standard, hence unfair termination.

Lastly, Mr. Ngowo submitted, the only granted relief was reinstatement without loss of remuneration. There was no compensation awarded, thus, the applicant has misconceived the CMA decision. The Tshs. 28,000,000/= written in the Award was the amount for the 12 months salaries which the applicant owes the respondent from 30th April, 2015 when he was terminated to 29th April, 2016. He finally prayed, this Court dismisses the application for want of merit.

In his brief rejoinder the applicant's counsel reiterated his earlier submission and insisted there was a valid reason and

proper procedures were followed in terminating the respondent hence the Arbitrator erred in holding otherwise.

Having gone through the parties' submissions and CMA records I will now proceed to determine each ground of revision as they appear. Starting with the 1st ground, the applicant challenges the CMA's decision in holding that DW1 was an incompetent witness as he stated he wasn't at the CMA to testify but rather to give explanations. From the outset, since DW1 was a mature adult who was sworn before giving his testimony, I join hands with the applicant that he was a competent witness and the CMA erred in holding otherwise even if he said he did not go to the CMA to testify. As the applicant's Human Resource Officer, DW1 testified under oath before the CMA as per the law and a decision was reached against the applicant to the effect the respondent had not contravened the applicant's company policy. The Arbitrator therefore erred in holding that he was an incompetent witness. This ground has merit and the same is allowed.

On the 2nd ground as to whether the respondent followed the right procedures as per the company's policy in testing the

beer, it is not disputed that, the respondent was a qualified taster as per Exhibit B1. On the night of 17th March, 2015, he admitted to have conducted an online testing so as to ensure the quality of the beer due to the big production. He would normally after the online testing prepare a report and the report samples were admitted as Exhibit B2.

The applicant argues that, since the respondent was a member of the sensory panel, he was therefore barred from testing beer as an individual (online testing) and there was no panel which tasted alcohol on that day. However, in the applicant's submission, no single code or policy was mentioned that the respondent breached. I took the liberty of perusing the CMA's records and it is seen the complainant's form, applicant's letter demanding explanation, respondent's explanation letter and disciplinary hearing report as admitted as Exhibit A1, A2, A3 and A4 respectively that, the respondent is alleged to have breached clause 8.4.8 of the SBL Disciplinary Policy and Procedure. But the same was neither tendered as exhibit nor clear explanation given as to what that clause entails before the CMA. As long as the respondent had the mandate all

along to prepare his report on the said testing, it brings this Court to only one conclusion as observed by the CMA that, he just wanted to ensure good quality of the beer on the night of production. This ground has no merit and the same is dismissed.

On the 3rd and 5th grounds on fairness of the reason for termination, the applicant challenged the CMA's Award in holding the alcohol test was conducted with reasonable apprehension of malice, hatred and witch-hunting and the applicant's evidence not considered. I do not differ with the Arbitrator's reasoning as found in the Arbitral Award. I have further perused the disciplinary committee record and found indeed the sitting chairman was impartial. He went out of his way to assist the complainant in answering and clarifying some of the questions. His actions were a clear gesture of his personal interest in the matter. The record further reveals, the chairperson was indeed biased and had malice since he tried to induce the fourth witness (one Musa Kabyemela) to say that which he wanted him to say. The witness had clearly stayed his position that he knew nothing.

I have also considered the evidence by the applicant, the security guard (the star witness) who conducted the test was neither an expert nor did she appear at the CMA to state the level of the respondent's alcohol. At the CMA, the applicant did not show to what extent should one be considered drunk. The record reveals the instrument that was used to test the respondent just turns green, yellow or red, and to know that one is drunk, it turns red as stated by the security guard but does not show the alcohol level or degree of the content. To make matters worse, the same was not in a good working condition once the gauge had no reading.

Neither the security officer nor any expert was summoned at the CMA to clear the assumptions that the quantity of beer the respondent admitted to have taken amounted to the level of intoxication to the extent one to conclude he was in breach of the applicant's policies. It is further noted the rest of witnesses on the applicant's side were not eye witnesses, they were relying on hearsay. However, I have further looked into the complaint that, the Arbitrator had relied on assumptions for holding the respondent was punished for his participation in a similar dispute of another employee before

the C.M.A. This was definitely wrong on the part of the Arbitrator but even so, this was not the only reason considered as already observed.

Section 37 (2) of the ELRA provides, in labour disputes it is the duty of the employer to prove that the termination was fair both substantively and procedurally. In the case **of Stamili .M. Emmanuel V. Omega Nitro (T) Ltd Lab. Div. DSM Revision No. 213 of 2014 LCCD 2015 page 17**, it was held *inter alia* that: -

> *"I have no doubt that the intention of the legislature is to require employers to terminate employee only basing on valid reasons and not their will or whims. This is also the position of the international Labour Organization Convention (ILO) 158 of 1982 Article 4. In that spirit employers are required to examine the concept of unfair termination on bases of employee's conduct, capacity, compatibility and operational requirement before terminating employment of their employees."*

In light of the above, it is my considered opinion that, the reason for applicant's termination was not justifiably fair. These grounds have no merit and are dismissed.

As to the 4th ground on procedure followed to terminate the respondent, I am in all fours with the Arbitrator the same was also not done. The law is clear on the procedures to be followed to effect termination of employment of service. These have been illustratively provided for under **Rule 13 (1) to (10) of the Employment and Labour Relation Act, 2007 (Code of Good Practice) G.N 42 of 2007** (the Code). In the case of **Leopard Tours Ltd V. Rashid Juma & Abdallah Shaban, (Labour Division) Revision No. 55 of 2013 LCCD 2014 at page 22**, it was held *inter alia* that: -

> *"Rule 13 of the Employment and Labour Relation Act (Code of Good Practice) G.N 42 of 2007 provided clearly the procedures of terminating employees."*

These procedures amongst others requires;

i. ***The investigation to be carried out.***
ii. *Employee to be given a reasonable time to prepare for the hearing.*

iii. *Right of representation by either trade union or by fellow employee of own choice.*

iv. *Hearing to be conducted and finalized within a reasonable time and*

v. *Hearing to be chaired by a sufficiently senior management representative who shall not have been involved in the circumstances giving rise to the case.*

vi. *In case the disciplinary hearing committee finds employee guilty of misconduct employee shall give his mitigation factor, and employer may make its decision and reasons for its decisions thereto, including explaining right of appeal to an employee. (Emphasis mine)*

Having gone through the record, I have observed some vital provisions of **rule 13(1) of the Code (Supra)** were not complied to be specific: -

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

The above is the first thing to be done before the disciplinary hearing is conducted. Without the investigation report on the allegations which call for termination, vitiates the whole procedure. According to the CMA records, the matter was initiated by the security guard who tested the respondent and found him drunk. From thereon the record is silent until when the disciplinary hearing was conducted. Had the investigation been conducted, the report would show conclusively what really happened on the material night and the alcohol level of the respondent so that proper sanctions are taken against him.

The foregoing notwithstanding, according to exhibit A4, the disciplinary committee was composed of the chairman, the complainant and the Human Resource officer, who also forms part and parcel of the applicant's management. The Human Resource Officer attended the hearing as a member of the committee and not as a witness, which was wrong as one cannot be a judge of his own cause. The Human Resources Officer is surprisingly seen before the CMA testifying as DW1. This in itself was unlawful and the highest degree of biasness. To cap it all, after the disciplinary

committee finalizing the hearing, proceeded to make a decision instead of the employer. The disciplinary committee stated: -

> "From the disciplinary code, contravention of the subsection 8.4.8 the alleged offender deserves Termination. Therefore the alleged offender is terminated from work with immediate effect."

The violation of the above procedures provided for under rule 13 and its sub-rules have been couched in mandatory terms with the word "**shall**" subscribed therein to mean the function so conferred must be performed even if not in a checklist fashion. In view thereof cannot be interpreted in any other way except full compliance. Failure to observe the same has completely vitiated the hearing conducted by the alleged disciplinary committee to such extent that the termination of employment sanctioned becomes redundant. This ground lacks merit and the same is dismissed.

Lastly is on the reliefs Awarded by the CMA, the applicant claim these were excessive. The order granting the relief as seen at page 8 of the Award reads;

*"**ORDER**:- The complainant should be REINSTATED into his employment position of Maintenance Planner with effect from 30/04/2012. He should be paid his remunerations from the date of unlawful termination to the date of reinstatement i.e. from 30/4/2015 to 29/04/2016; Tshs. 2,400,000 x 12 = Tshs. 28,000,000/=. The amount will increase depending on the period of delay in executing this order."*

This does not mean the applicant was ordered to reinstate the respondent and compensate him at the same time but rather the CMA quantified the remunerations loss and ordered the same be paid in full. This ground is thus misconceived.

Basing on the foregoing analysis, I am of the firm view, the reason and procedure used to terminate the respondent was unfair and I find no reason to fault the CMA's Award. However, the final order shows the respondent was to be reinstated and the amount of relief granted will increase depending on the period of delay in its execution. Taking into account that the respondent was employed on permanent

basis then the order of 29th April, 2016 by the CMA, will not be fair to the applicant.

First, it is highly improbable that the respondent's position will be vacant to the day the reinstatement order is executable. **Second**, considering the nature of the alleged misconduct against the respondent and the lapse of time therein between, there will be obviously personal feuds between the parties. For any stretch of imagination the allegation levelled against the respondent must have compromised his integrity. It is the settled view of the court, the reinstatement option could be an obstacle and hence not practicable. In the case of **Vedastus S. Ntulanyenka & 6 Others Vs. Mohamed Trans Ltd, Labour Revision No. 4 of 2014**, the Court observed;

> *"...the law abhors substantive unfairness more than procedural unfairness, and if compensation is for redressing a wrong done to the employee, the remedy for the former attracts heavier penalty than the latter...* ***the arbitrator is mandated not to order reinstatement where termination is unfair***

because the employer did not follow a fair procedure *[Emphasis mine]*

In the circumstances, considering the fact that the respondent was employed on permanent basis, I substitute the reinstatement order under **section 40 (3) of the ELRA** to the effect, the applicant is to provide the respondent the following: -

1. 24 months' salary compensation for unfair termination.
2. One month salary in lieu of Notice
3. Severance Pay
4. Clean Certificate of Service.

For the stated reasons above, I accordingly dismiss the application for revision with no orders to costs.

It is so orderèd.

B. R. MUTUNGI
JUDGE
28/09/2021

Judgment read this day of 28/9/2021 in presence of Mr. Tumaini Materu holding Mr. Nuhu Mkumbwa's brief for the Applicant and the Respondent in person.

B. R. MUTUNGI
JUDGE
28/9/2021

RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI
JUDGE
28/9/2021