IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT MBEYA

LABOUR REVISION NO. 25 OF 2021
(Arising from Labour Dispute No. CMA/MBY/115/2019/AR. 67)

BETWEEN
MBEYA CEMENT COMPANY LIMITED.....APPLICANT

AND

PHILIPO KIPINGU.....RESPONDENT

JUDGMENT

Date of last Order: 16.03.2022

Date of Judgment: 20.05.2022

Ebrahim, J.

The applicant MBEYA CEMENT COMPANY LIMITED being aggrieved with the award of the Commission for Mediation and Arbitration at Mbeya in Labour Dispute no. CMA/ MBY/115/2019/AR.67 dated 20/08/2021, filed the instant application seeking to revise and set aside of the award. The application was preferred under **sections 91 (1) (a) (b), (2) (a) (b) (c) and 94 (1) (b) (i) of the Employment and Labour Relations Act No. 6 of 2004 (ELRA), read together with Rule 24 (2) (a) – (f), (3) (a)**

– (d) and **28 (1) (c), (d) and (e) of the Labour Courts Rules, 2007 (GN No. 106 of 2007)**. The application was supported by an affidavit sworn by Mr. Emmanuel Salla, principal officer of the applicant.

The brief facts leading to the present application is that, the applicant was the employer of the respondent since 2008. The respondent was employed at the capacity of Health Safety and Environmental Department and later was promoted to the position of Logistic Coordinator. On 6/9/2019 the applicant terminated the respondent from the office for the offence of negligence resulting in damage, theft or loss to the company property. Dissatisfied, the respondent instituted a labour dispute to the Commission for Mediation and Arbitration claiming to be unfairly terminated. He prayed for reinstatement without loss of remuneration or be paid a sum of Tshs. 208,046,268.69 as severance payment and compensation of 25 months' salary.

The CMA heard the matter on merits, at the end it pronounced the award in favour of the respondent. The CMA decided that the termination was unfair both substantively and procedurally. It thus, ordered the reinstatement of the respondent without loss of

remuneration. Aggrieved, the applicant preferred the instant application.

The grounds for the application as contained in paragraph 8 (a- d) of the affidavit are as follows:

a) That the trial Arbitrator erred in law and fact by failure to assess and analyse properly the evidence tendered before her hence reached a wrong conclusion that the respondent's termination was substantive and procedural unfair.

b) The trial Arbitrator abdicated her judicial duty by being impartial thus relying heavily on the testimony of the respondent which was neither collaborated by another witness nor documentary evidence hence reaching in unfair decision.

c) That, granted the finding that there was on going recovering of the missing consignments of cement, the trial Arbitrator erred in law and fact in holding that the offence of negligence and loss of company property was not established.

d) That the Arbitrator Award is illogical, irrational thus illegal as the same ordered the respondent to be reinstated without considering the fact that employer-employee relationships between the parties was irreparable damaged.

Owing to the above grounds for revision, the applicant prayed for this court to grant the application.

The respondent objected the application through a counter affidavit sworn by Mr. Benedic Sahwi, learned advocate for the respondent. In essence, the counter affidavit stated that, the CMA rightly made the impugned award since there was no valid reason for termination and a serious violation of procedures. He thus, prayed for this court to dismiss the application for lack of merits.

The application was heard by way of written submissions. The applicant was advocated for by Mr. Ndanu Emmanuel, learned advocate from Law Associates Advocates whereas the respondent was represented by Mr. Benedict Sahwi, learned advocate from C/O UF Attorneys.

Submitting in support of the application, as to ground one of the application, advocate Ndanu argued that the respondent

being Logistic Coordinator was responsible for discrepancies found in Kasanga and Mwanjelwa depots. He contended that the respondent was charged before the disciplinary committee for negligence resulting in damage, theft or loss of the company property contrary to clause 7.3.1 of the Company Disciplinary Policy and Procedure. According to Mr. Ndanu, the respondent, as Logistic Coordinator had the responsibilities of making sure that the consignment was transported and reached to the intended depot. However, the respondent failed to take proper care insuring that the consignment after being loaded in the tracks reaches the destination i.e the depot.

Mr. Ndanu also argued that the respondent's denial that he refused to take over the responsibilities of Logistic Manager and Distribution Controller was not proved by any document. According to Mr. Ndanu, the respondent testified before the CMA that the duties of making sure that consignment from the plant to the customers (depot) were his.

Mr. Ndanu further contended that had the arbitrator properly assessed and analysed the evidence both oral and documentary tendered by the applicant witnesses as exhibits R-1

and R-2, minutes of disciplinary meeting and Depot Analysis Report respectively she would have not reached to the conclusion as she did. Mr. Ndanu also faulted the CMA in holding that there was no investigation while exhibit R-2 was the investigation report and not sales report as alleged by the respondent.

Mr. Ndanu continued to argue that the applicant followed all the procedures provided by the labour laws for conducting disciplinary hearing. He forcefully challenged the allegation by the respondent that the procedures were not followed since he was availed with letters for suspension and for resuming to work on the same day i.e 29/7/2019 and that the chairman of the disciplinary committee involved in asking questions. Mr. Ndanu was of the view that the allegations were not proved and the chairman of the committee is not barred from asking questions for clarification.

Arguing as to grounds 2 and 3 of the application, Mr. Ndanu submitted that, the arbitrator was unfair since she mainly relied on the testimony of the respondent which was neither collaborated by another witness nor documentary evidence. He gave an example of the respondent's claim that he refused the

responsibilities of the logistic manager and distribution controller was not proved but the arbitrator relied on it in her decision. According to the applicant's counsel, the testimony by the respondent and the analysis by the arbitrator was different. He gave an example of the CMA decision that the role of making sure the consignment reached to Kasanga depot was not of the respondent but of the Distribution Controller, the position which was at that time inexistence. Mr. Ndanu referred this court at Pages 7 and 18 of the award on the contradictions.

The applicant's counsel further complained that the arbitrator was biased when she held that the respondent was not responsible with 160 bags at Mwanjelwa depot which was delivered to the customer without payment. According to him the arbitrator decided that the applicant did not challenge the evidence of the respondent that the responsible person was one John Gondwe. Counsel for the applicant contested that the applicant could not contest that evidence as she was the one who commenced to testify. That when she adduced evidence the respondent did not cross-examine hence the arbitrator was not fair to hold that it was not contested.

Mr. Ndanu for the applicant further contended that there was no proof of the assertion by the respondent that DW2 testified that clause 7.3.1 under which the respondent was charged had no relevance. According to him the fact that the losses were recovered does not exonerate the respondent from the offence of negligence. Mr. Ndanu also challenged the reason by the arbitrator that the respondent was charged with another person one Gerge Kilembe and he was given a warning a fact that was not proved.

As to ground 4 of the application, Mr. Ndanu contended that the CMA was illogical and irrational by making the order for reinstatement of the respondent while it was in evidence that the two had already in serious misunderstanding. He argued that it is always a case that when the employee found guilty of negligence the available remedy is termination. To support his argument, he cited the decision in the case of **International Container Terminal Service (TICTS) LTD vs Shabani Kagere, Misc. Application No. 188 of 2013 (unreported).** According to him the circumstances in that case are akin to the present case where the applicant has lost trust over the respondent and the order for

reinstatement is impracticable. Mr. Ndanu thus, prayed for this court to revise and set aside the impugned award.

In reply, Mr. Sahwi submitted regarding ground one of the application that, generally the arbitrator properly analysed the evidence of both sides. That the charge faced the respondent was incompatible, since the arbitrator found that the offence of negligence was not proved before the disciplinary committee as there was no any loss or damage that was proved. That DW1 and DW2 failed to establish and prove that the duty of making sure the consignment reached to the respective depots was of the respondent. And that the duty of making sure that payment should be made before releasing consignment was under one John Gondwe and not the respondent since he was not a sales person.

Counsel for the respondent further argued that, the applicant failed to prove any loss that she incurred as it was in evidence that allegedly loss of Tshs. 2,160,000/= at Mwanjelwa depot was recovered by the respondent, and the loss at Kasanga depot i.e 251 tons were paid by the transporter one Rainer Likarah who was also called to testify before the disciplinary committee.

Mr. Sahwi also maintained that investigation was not conducted which is a mandatory requirement of Rue 13 (1) of the Employment and Labour Relations Code of Good Conduct, GN. No. 42 of 2007. According to him exhibit R-2 was not an investigation report but a mere monthly sales report or deport analysis report. He was of the view that the same to constitute the report was supposed to be titled as "Investigation Report on loss of 251 tons destined to Kasanga depot and Investigation report on loss of 160 Bags of cement at Mwanjelwa deport" respectively. To support the requirement of investigation he cited the cases of **Tanzania International Container Terminal Service (TICTS) vs Fulgence Steven Kalikumtima and Others,** Revision No. 471 of 2016 HC Labour Division at Dar es Salaam and **Knight Support (T) Limited vs Chrispinus S. Kaloli,** Labour Revision No. 35 of 2009 HC at Dar es Salaam (both unreported).

Submitting regarding ground 2 and 3 of the application, Mr. Sahwi supported the findings of the arbitrator that she was not biased since it was proved by the respondent that one John Gondwe was responsible for sales at Mwanjelwa depot. He also contended that the respondent did not in any way testify that he

assumed the roles and duties of Logistic Manager and Distribution Controller. That he forcefully denied the same. That the respondent noted at the bottom of the report that he was forced to sign exhibit R-2 (Depot Analysis Report/Monthly Sales Report). Counsel also contended that the applicant failed to prove that the respondent had job description one of them being taking care of the said two depots.

Furthermore, counsel for the respondent argued that since the duty of proving fairness in termination lays in the employer (the applicant) as per section 39 of the ELRA, the CMA was fair when it decided that the applicant failed to discharge her duty. Whereas, the respondent's evidence was heavier than that of the applicant.

With regard to ground 4 of the application, Mr. Sahwi submitted that the CMA was correct when it ordered for reinstatement of the respondent. This is because, the law i.e section 40 (1) (a) of Cap. 366 allows such remedy. He argued that since the Arbitrator assigned reasons to her decision of making the order of reinstatement, the same cannot be faulted as it was proved that the applicant terminated the respondent unfairly. Mr.

Sahwi therefore, urged this court to dismiss the application and uphold the Arbitral Award.

I have considered the submissions by counsel for the parties, what stands for determination by this court in the light of what has been submitted is whether or not the revision is meritorious. Upon going through the proceedings of the CMA and written submissions by counsel for the parties I am of the concerted view that the central issue for the determination of the matter lies on how the CMA evaluated the evidence and the remedy it ordered i.e reinstatement. Nonetheless, I am of the opinion that no need does to go through all the grounds of application that have been listed by the applicant. I shall therefore, restrict to two issues as follows:

i) Whether the CMA properly evaluated the evidence and thus reached to the just decision.

ii) If the answer in i) above is in affirmative, then what is the remedy parties are entitled to.

In resolving the first issue above, I will step into shoes of the CMA and evaluate afresh the evidence by the parties. However, I shall confine myself on specific complaints raised by the

applicant. I have categorised those complaints in the following order.

a) The complaint that the respondent's duties included making sure that the consignment reaches to the destination i.e the depot and the same was distributed from the depot to the customers after making payment and payment voucher issued.

b) The complaint that termination was fair both substantively and procedurally.

Regarding complaint (a) to the first issue the applicant faulted the CMA in deciding that the respondent had no duty or responsibility of making sure that the consignment of 251 tons of cement was to be transported to its destination at Kasanga. He also faulted it on the decision that the respondent was not responsible for the distribution of 160 bags of cement from Mwanjelwa depot. The respondent's counsel maintained that the CMA was correct in its decision since the applicant did not prove that the respondent was handled over with the duties after the position of the Distribution Controller and Logistic Manager ceased.

The respondent in his testimony told the CMA that he was not responsible with the destination of the consignment. That his responsibility ended on the weigh bridge. The evidence by the applicant before the CMA as adduced by the DW2 one Gerald Masalu, Internal Controller and Tax Manager was to the effect that the respondent's duties among others were to make sure the consignment from the industry reaches the destination at Kasanga depot. To make his responsibility possible the respondent was provided with GPS for conformation that the consignment reaches the destination without fail and as per the plan. DW2 also testified that it was the respondent's responsibility to make sure that the consignment in the warehouse is taken out after the customer pays for it or a tax invoice is issued.

The respondent testified that his main responsibility was to make sure the consignment is taken out from the plant (industry) to the customer (depot); see at page 25 of the typed proceedings. The respondent also confirmed that the responsibilities of the distribution controller and logistic manager were transferred to him. He however, qualified that statement that he pressed some prayers to the applicant including the letter

confirming the new position and physical stock counting and preparation of the hand over report. The respondent thus, told the CMA that he did not assume those new responsibilities due to the fact that those two prayers were not fulfilled by the applicant.

Having revisited the evidence of both parties as summarised above, I am of the opinion that the respondent was responsible with all the duties as specified by the applicant. This is because, the respondent himself confirmed in his testimony that previously his office was held by four personnel i.e Logistic Manager, Logistic Planner, Logistic Coordinator and Distribution Controller. Each had his specific duties but collectively were responsible of making sure the consignment reaches to the depots. In addition to that the respondent admitted that as the logistic coordinator, he was responsible of proving that the consignment was loaded and transported from the industry (plant) to the customer (depot).

The fact that after the resignation of two posts of Distribution Controller and Logistic Manager the posts remained vacant without any personnel to attend the duties are not convincing. This is due to the reason that, the respondent did not state what was the purpose of having the GPS if he was not responsible of

making sure that the consignment reached to the intended destination. In that regard, I am also persuaded by the argument of Mr. Ndanu that the respondent did not prove that he refused to assume the responsibilities of the logistic manager and distribution controller while he admitted that the applicant had shifted those responsibilities to him. I therefore allow this segment of complaint.

It is now for complaint (b) to the first issue. I am aware of the law that the termination of employment by an employer will be unfair if the employer fails to prove, as provided under section 37 (2) of the ELRA. I also wish to refer the decision of the court in **Issas Maulid Mangara & Salehe Kitapwa vs. Tanzania Railways LTD** [2015] LCCD 57 where the court observed that:

> *"...procedural justice and substantive justice are two inseparable wings which fly together into which the absence of the other makes the other meaningless. Procedural justice acts as a complement to substantive justice; it gives life to substantive justice hence procedural justice cannot be overlapped under the umbrella of substantive justice."*

Also, section 39 of the ELRA the employer owes a burden of proof on whether the termination of the respondent's employment was fairly done. The said section provides that:

> *"In any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair."*

See also the decision by the Court of Appeal of Tanzania in **Elia Kasalile and 20 Others v. The Institute of Social Work**, Civil Appeal No. 145 of 2016 (unreported).

In the matter at hand, the learned arbitrator in her decision found that the reason for termination was not fair since the respondent was not responsible with the duties which resulted to the charge under which the respondent was charged, found guilty and finally terminated. That piece of reasoning I have already faulted in my findings in (a) above that the respondent was responsible.

I have thus, to consider another reasoning of the learned arbitrator. She found termination substantively unfair on the reason that the applicant did not prove any loss.

Having gone through the evidence, I noted that there was no dispute that 251 tons of cement which was loaded for being transported to Kasanga depot were diverted. This means that the consignment did not reach to the intended destination. It was also not disputed that the applicant had no prior information on the diversion nor there was any report on why there was diversion until when the audit/investigation was made and found that there was a loss or missing of the said tons of cement. After the audit and the inquiry to the respondent, it was when he revealed that the same was taken in the warehouse of the transporter one Reinar in Sumbawanga. Thereafter, the evidence reveals that there was a discussion among the applicant, the respondent and the transporter (Reinar) it was when the said Reinar decided to pay that consignment.

Under those chain of events, I am of the view that the property of the applicant was at loss. The fact that the loss was mitigated and finally recovered does not omit the truth that the loss occurred. The applicant planed and loaded the consignment for being transported to Kasanga depot. The consignment was diverted to the warehouse of the transporter without knowledge

of the applicant. The respondent who was responsible for making sure that the same reaches to the depot knew that the consignment was not delivered to Kasanga Depot as per the plan. The auditing was done and found some tons missing. It was until the inquiry was made when it was revealed by the respondent that the missing tons were in the other's warehouse. In that circumstance it cannot be said that the applicant did not suffer any loss. It was during recovering measures when the applicant was paid the lost consignment.

This is also why in the disciplinary hearing the respondent was convicted of the offence of negligence on the reason that internal control procedure was not followed. The respondent's defence that the consignment was off-loaded to the warehouse of the transporter waiting for the Kasanga depot to have a chance was supposed to be known to the applicant. It was not supposed to be told after the audit and discover that there was a loss or a missing consignment. The fact that the Warehouse supervisor was the one to report, also does not exonerate the respondent from his responsibility that he was the one to make sure that the same consignment has reached to the intended

depot. It was his duty to communicate with the Warehouse supervisor on whether or not the consignment has been off-loaded.

It is undisputed that the offence of negligence under the applicant disciplinary policy and procedure per clause 7.3.1 related to the business key values, **namely accountability, integrity, trust and responsibility.** Thus, once one of these values is lost the two parties (employee & employer) could no longer sustainably work together for the benefit of one another. Considering all those circumstances, it is my view that the reason for termination was valid/fair.

The issue left is whether the applicant applied fair procedures before terminating the respondent. It is on the record (exhibit R.1) that the respondent was availed with a charge six days before commencement of disciplinary hearing i.e on 1/8/2019. The hearing was held in six sessions i.e on 6/8/2019, 20/8/2019, 23/8/2019, 26/8/2019, 27/8/2019 and 28/8/2019. The respondent was allowed to call his witnesses. The applicant also called her witnesses. The disciplinary committee found the respondent guilty of the offence charged, it convicted him. The

respondent was availed an opportunity to appeal against the decision of the committee. He exercised his right of appeal but in vain.

The CMA was of the view that the procedure was unfair since the chairman of the committee was biased that he stepped into the applicant's shoes by asking questions and he had applicant's documents before the commencement of the hearing. In my perusal of exhibit R-1 (minutes of disciplinary hearing) I did not find any apparent irregularity said by the CMA. On the issue that the chairman was questioning the witnesses of the applicant but did not do so for the witnesses of the respondent the same has no bases, this is because, it is not mandatory that when one side is asked should also ask the other side, it depends on what the question intended to justify. It is also not true that asking question means that the chairman of the disciplinary committee stepped into shoes of the applicant. Hence the reasoning of the arbitrator was misconceived thus, led to a wrong decision.

Additionally, before the CMA there was a complaint that there was no any investigation report. Counsel for the respondent

in this application has submitted that the so-called investigation report i.e exhibit R-2 is a mere sales report. He firmly argued that to constitute the investigation report it was supposed to be titled so. The applicant maintained that exhibit R-2 is the investigation report since it was the one which revealed the loss and was the bases of the charge.

I concur with the respondent's counsel that G.N No. 42 mandatorily requires the employer to conduct an investigation. Rule 13 (1) of the G.N No. 42 provides that: "*The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held*". Nevertheless, the same does not provide for the format of the report. In my opinion, the necessity of the investigation is for the employer to establish that there is a violation made by the transgressor worth for him/her to be forwarded to the disciplinary committee for hearing.

In the matter at hand, the depot analysis report (exhibit R-2) was the foundation of the charge served to the respondent. The respondent was clearly notified that, he should prepare his statement of defence on why there were discrepancies in the Kasanga and Mwanjelwa Depots. In his defence before the

disciplinary committee, the respondent showed that he was aware of the discrepancies but denied to be responsible for the same. That being the case, I am of the concerted view that the respondent was availed with enough opportunity to be heard. And the hearing was fair.

Before resting this discussion on procedural fairness, there was another reason by the CMA that the procedure was unfair since the respondent was charged with another person by the name of George Kilembe. That he was found guilty but was given last warning. This kind of evidence was adduced by the respondent during hearing before the CMA. Nevertheless, when he was cross-examined if he had any proof, the respondent replied that he had none. I have also made a trouble to find any document or proceeding which suggested that the respondent was charged together with another employee, unfortunately I did not find any. I thus, fault the CMA in its decision that the respondent was unfairly delt with since his co-transgressor was given last warning whilst the respondent was terminated. In all fours, I have noticed nothing suggesting that the applicant violated procedures for termination.

Owing to the above findings, complaint (b) to the first issue is upheld that, indeed the applicant's termination of the employment of the respondent was fair both substantively and procedurally. In the final result the first issue of whether the CMA properly evaluated the evidence is negatively answered.

Having negatively determined the first issue posed above, the second issue has been rendered insignificant. This is because, the same depended on the affirmative answer to the first issue. I will thus, not resolve it. Nonetheless, the respondent will be entitled to the terminal benefits available to a fairly terminated employee.

As above said, the application is granted. The CMA award dated 20th August, 2021 is hereby revised and set aside. Being a labour matter, I make no order as to costs.

Ordered accordingly.

R.A. Ebrahim

JUDGE

Mbeya

20.05.2022

Date: 20.05.2022.

Coram: Hon. P.A. Scout, Ag -DR.

Applicant:

For the Applicant: Present.

Respondent:

B/C: Patrick Nundwe.

Ms. Gatuna, Advocate holding brief for both advocates.

The matter is coning on for judgement we are ready to proceed.

Court: Judgement is delivered in the presence of Ms. Gatuna, Advocate and C/C in Chamber Court on 20/05/2022.

A.P. Scout

Ag-Deputy Registrar

20/05/2022

DEPUTY REGISTRAR
HIGH COURT OF TANZANIA
MBEYA