IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT MWANZA

LABOUR REVISION NO. 23 OF 2021

(Originating from Labour Dispute No. CMA/MZ/ILE/150/2020/64/2020)

TANZANIA BREWERIES LTD ..... APPLICANT

VERSUS

CAMPBELL MWANGA ..... RESPONDENT

JUDGMENT

8/3/2022 & 20/6/2022

ROBERT, J:-

The applicant, Tanzania Breweries LTD, seek to revise the arbitration award issued by the Commission for Mediation and Arbitration (CMA) for Mwanza in Labour Dispute No. CMA/MZ/ILEM/150/2020/64/2020. The application is made at the instance of Galati Law Chambers, counsel for the applicant and supported by an affidavit affirmed by Dorah Constantine Nyambalya, principal officer of the Applicant.

Facts relevant to this application reveals that, the Respondent was an employee of the Applicant from 1st June, 2007 until 23rd April, 2020 when his services were terminated on grounds of negligence and breach of the employer's code of good practice known as the Managing Conduct and

Relationships at Work place (Code of Good Practice) of Tanzania Breweries Limited. Aggrieved by the termination, the Respondent lodged a dispute at the CMA alleging unfair termination. The CMA delivered its award on 20th April, 2021 declaring the Respondent's termination substantially and procedurally unfair. As a consequence, the CMA ordered the Applicant to pay compensation of 24 months remuneration to the Respondent, 10 years' severance pay, one year annual leave pay, notice pay due and issue a prescribed certificate of service to the Respondent. Aggrieved, the Applicant preferred this application armed with five grounds stated in paragraph 7 of the affidavit in support of this application. The grounds read as follows:

(i) *That the Arbitrator was in err by her findings that the procedure which was adopted in terminating the respondent's contract of employment was not a fair procedure where there was evidence that the termination followed all the steps required by law.*

(ii) *That the Arbitrator was in err by her decision as she failed to make a decision on the point that was raised before the commencement of hearing and in the final submissions that Form CMA F1 had no sufficient facts which could reveal the nature of his dispute against the Applicant.*

(iii) *The Arbitrator was also in err in her wrong interpretation of the allegations and the offence which was committed by the respondent which led to termination of his employment contract.*

(iv) *That the arbitrator was in err by her position that the applicant (employer) was supposed to impose the same punishment to other employees who committed the offence which the respondent was charged with.*

(v) *That the Arbitrator was in err by her order for payment of 10 years severance allowance.*

When this matter came up for hearing the Applicant was represented by Mr. Galati Mwantembe, learned counsel whereas the Respondent was represented by Moses Mvuoni, TUICO Assistant Secretary.

Highlighting on the five grounds raised in support of this application, Mr. Mwantembe opted to start from the second ground. However, in the course of his submissions he decided to drop the fifth ground and proceeded to argue the remaining grounds.

Starting with the second ground, Mr. Mwantembe faulted the Arbitrator for what he termed as failure to determine that CMA F1 used by the Respondent to lodge his complaint at the CMA had no sufficient facts to reveal the nature of the dispute against the Applicant herein. He maintained that CMA F1 stands in the place of pleadings which are

required to have sufficient facts to enable the other party to realize what the complainant is all about.

He elaborated that, in the 4th item at page 5 of the CMA F1, the Applicant indicated simply that the Employer did not follow the required procedures in disciplinary meeting whereas in item 4(b) of the said form he indicated that there was no sufficient reason to terminate employment. In his opinion, this information does not provide enough details to enable the employer to know specific procedures alleged by the employee to have been violated by the employer or give regard to the principle of fair trial.

Submitting further, he argued that in labour cases the employer is the one who starts to present his case at the CMA, therefore, the employee's failure to indicate properly the nature of his complaint in the CMA F1 puts the employer in a difficult situation on how to present his case. The employer is supposed to know clearly what the applicant/employee is complaining about.

Responding to this ground, Mr. Mvuoni maintained that, CMA F1 was properly filled by the Respondent. He argued that, CMA F1 is not

exhaustive in determining reliefs sought by a complainant in a labour dispute. He clarified that, apart from the CMA F1, parties are given opportunity for opening statements, to tender exhibits and final written submissions which helps to inform parties on the nature of the dispute. That said, he implored the Court to make a finding that this ground has no merit.

In his rejoinder submissions, Mr. Mwantembe reiterated that, information provided in the CMA F1 was not sufficient to allow fair hearing of the case. He argued further that, the Respondent's opening statement at the CMA did not provide any information on the nature of the claim. He explained that the Respondent did not explain why he thinks the termination procedures were violated, that investigation was not conducted or that there was no loss of properties. He maintained that this information would help the employer who was required to prove his case first to contest allegations brought at the CMA.

Having heard the submissions and examined the records of this matter in respect of this ground, it appears that the question for determination by this Court is whether the CMA F1 used by the

Respondent to initiate this dispute at the CMA failed to reveal the nature of dispute against the Applicant for want of sufficient facts.

The law requires a party to a labour dispute who intends to refer his dispute to the CMA in terms of section 86 (1) of the Employment and Labour Relations Act to complete and file a prescribed form (CMA F1) which is made under Regulation 34(1) of the Employment and Labour Relations General Regulations, 2017. If the dispute concerns termination of employment, as it is in this case, the complainant is required to complete part B of the said form which requires details on the fairness of the alleged termination. The concern of the counsel for the Applicant is that, information provided by the Respondent at item 4 (a) and (b) of Part B of the said form is not sufficient to determine the nature of the dispute against the Applicant.

Information required in part B, item 4 of the said form is related to fairness/unfairness of termination. The complainant is given a limited space to provide information on why he feels the termination was either procedurally or substantively unfair or both. In the present case, I take the liberty to reproduce the reasons provided by the employee in CMA F1 as follows:

(a) In respect of procedural fairness:

"MWAJIRI HAKUZINGATIA UTARATIBU WA KIKAO CHA KINIDHAMU KATIKA KUENDESHA KIKAO CHA KINIDHAMU NA ALIFANYA MAAMUZI BILA KUZINGATIA TARATIBU HUSIKA"
(LITERALLY MEANING: EMPLOYER DID NOT FOLLOW THE REQUIRED PROCEDURE IN CONDUCTING DISCIPLINARY HEARING AND HE MADE DECISIONS WITHOUT REGARD TO THE REQUIRED PROCEDURE)

(b) In respect of substantive issues:

"HAKUKUWA NA SABABU YOYOTE YA MSINGI YA MWAJIRI KUSITISHA AJIRA YANGU WALA HAKUNA UTHIBITISHO WOWOTE ULE"
(LITERALLY MEANING: THERE WAS NO SUBSTANTIVE REASON TO TERMINATE EMPLOYMENT AND THERE IS NO ANY PROOF)

Considering that in proceedings concerning unfair termination of an employee by an employer what the employer is required to do in terms of section 39 of the Employment and Labour Relations Act is to prove that termination is fair, this Court finds the reasons given by the employee in CMA F1 sufficient to establish the nature of the dispute against the Applicant. What the employer was required to do was to prove that termination was both procedurally and substantively fair as required by the law which, judging from the CMA proceedings, the

employer tried to prove but the Arbitrator was not convinced with the fairness of the said termination for the reasons stated in the award.

Further to that, Rule 22 to 27 of the Labour Institutions (Madiation and Arbitration Guidelines) Rules, 2007 G.N. No. 67/2007 provides a detailed process involving five stages in the arbitration of disputes through which parties have an opportunity to argue and be alerted on issues relevant to the dispute which makes it possible for parties to understand the nature of the dispute and narrow down the issues in dispute. The stages involves introduction, opening statement and narrowing of issues, evidence, argument and award. Having examined the records of this matter, it is clear that the nature of the dispute was well known to the parties. For example, the employer provided a concise opening statement containing a statement of the issues in dispute which the Arbitrator considered as the main issues for determination of this dispute. It is therefore clear that the Applicant knew the nature of the dispute filed against her. That said, I find no merit in this ground.

Coming to the first ground, Mr. Mwantembe argued that, without prejudice to the second ground above, the Arbitrator was mistaken by

deciding that termination was not fair while there was evidence indicating that the employer followed all the required procedure to terminate the Respondent.

He argued that, the procedure for termination of an employee is provided for under Rule 13 (1) to (12) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007, GN. No. 42 of 2007. He maintained that, exhibits D5 to D11 shows clearly how the procedure laid down under Rule 13(1) to (12) of G.N. No. 42 of 2007 was followed.

He recounted in detail how the Applicant followed the requisite procedures in the termination of the Respondent. He stated that, after investigation of the offence, the Respondent was given notice of hearing (exhibit D6). The notice explained the nature of offence against the respondent (see para 3(a) and (b) of exhibit D6) and the right of the respondent in the hearing process (page 2 of exhibit D6 at paragraph 4).

He explained further that, the notice (exhibit D6) was served to the Respondent on 30/3/2020 informing the Respondent about the

hearing which was scheduled to take place on 2/4/2020. Hearing took place as indicated in the minutes (exhibit D7) and the Committee recommended Respondent's termination but gave him the right to appeal. The Respondent exercised his right to appeal as indicated in exhibit D9 which was denied as shown in exhibit D10. After that the Respondent was terminated as shown in exhibit D11. Hence, he maintained that the Applicant followed all the required procedures under the law.

He faulted the Arbitrator's findings at page 26 of the impugned award that the Employer did not conduct investigation and argued that, exhibit D5 and D6 and the testimony of DW1 shows that the offences against the Respondent were filed after investigation.

He also faulted the CMA's findings at page 28 of the impugned award that the employer's purported letter of disciplinary hearing which was served to the respondent indicated that the Respondent was called for investigation not disciplinary hearing which denied the Respondent an opportunity to prepare properly for the disciplinary hearing. He argued that, it was not proper for the Arbitrator to pick one word from the notice of

hearing and conclude that the Respondent was called for investigation while the notice was for disciplinary hearing.

Responding to the first ground, Mr. Mvuoni submitted that, the termination of an employee is said to be unfair if the employer fails to prove that the employee was terminated in accordance with a fair procedure as required under section 37(2)(c) of the Employment and Labour Relations Act, 2004. He cited the case of **Access Bank (T) Ltd vs Amos Lukube,** Revision No. 50 of 2018, HC Labour Division at Shinyanga (unreported) where this Court held that, termination is unfair if procedure for termination is not followed.

He maintained further that, the employer is required to observe fairness of the procedure as required under Rule 13 of the G.N. No. 42 of 2007 which means, in the present case, the employer was required to conduct investigation on the loss of the 154 crates of beer. The investigation was required to be done by involving the employee and prior to the disciplinary hearing so that the investigation report may form part of the disciplinary hearing. However, in this case the investigation report was not tendered as exhibit during the disciplinary hearing. To bolster his argument, he cited the case of **Moshi**

University College of Cooperative and Business Studies vs Patrick John Nguila (2015) LCCD 61 and the case of **Bugando Medical Centre vs Dr. Salvatory Mtibika,** Revision Application No. 10 of 2015, HC Labour Division, Mwanza (unreported) where the Court held that the employer did not follow the requisite procedure as the investigation report was not brought to the CMA to prove that investigation was conducted.

Further to that, he submitted that, the person who filed allegations against the employee was the same person who chaired disciplinary committee proceedings and issued termination letter. He argued that, according to Guidelines No. 4(2) of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures (Schedule to the G.N. No. 42/2007), the Chairperson of the hearing should be impartial and should not, if possible, have been involved in the issues giving rise to the hearing. To support his argument, he referred the Court to the case of **Geita Gold Mine Ltd vs Amri Mrishibi, Labour Revision No. 65/2019** where the Court held that no one should be a judge on his own case (Rule against bias). On that basis, he submitted that the termination procedure was not fair.

In his rejoinder, Mr. Mwantembe submitted that, at page 5 of the impugned award, the CMA quoted DW1 in a manner showing that investigation was conducted. He argued that although in the cases cited by the Respondent the Courts have required that investigation report needs to be tendered as exhibit that is not a requirement of the law. He argued that, in the present case the respondent did not deny that investigation was conducted. Hence, he submitted that this Court is not bound to follow decisions cited by the Respondent because in the circumstances of this case there is no contention that investigation was conducted.

With regards to the contention that the person who prepared the complaint letter is the same person who presided over the disciplinary hearing, he submitted that, this argument is not accurate because the complainant was Rosemary Rwiza, the Warehouse Manager and the person who presided over the disciplinary hearing was Godbless Baluhya who also signed the minutes of the disciplinary hearing.

The question for determination here is whether the employee was terminated in accordance with the fair procedure. As rightly argued by the parties, fairness of the procedure is determined by considering

whether the employer followed the procedure under Rule 13 of the G.N. No. 42 of 2007. The Respondent maintained that the applicant did not conduct investigation as required under Rule 13(1) of the G.N. No. 42/2007 as the investigation report was not brought to the CMA to prove that investigation was conducted. On the other hand, counsel for the Applicant maintained that tendering of investigation report is not a requirement of the law.

It should be noted that, an investigation conducted by the employer in a disciplinary process is necessary in order to determine whether there are any grounds for disciplinary hearing to be conducted. The role of investigation is not to reach to a conclusion about the employee's conduct based on the findings of the investigation. That is the role of the disciplinary hearing committee. Therefore, it is important for the investigation report to be tendered before the disciplinary hearing committee which has the responsibility of assessing evidence gathered and recommending a proper action to be taken in order to provide them with facts needed to determine the appropriate recommendation to be given. In the present case, the investigation report was important in revealing how and what the

investigation uncovered in terms of the Respondent's involvement in the commission of the alleged offences. However, the investigation report was not tendered during the hearing and none of the witnesses addressed the Committee on the alleged investigation or findings thereof. Similarly, should the employee's termination be challenged at the CMA, it is always important that documents evidencing fairness of the termination procedure in terms of Rule 13(1) of the G.N. No. 42/2007 should be tendered before the Arbitrator in order to determine the alleged fairness of the procedure. Unfortunately, in the absence of the investigation report it is difficult to determine if Rule 13(1) of the G.N. No. 42/2007 was complied with in the present case.

This Court is also in agreement with the Respondent that, for the Chairperson of the disciplinary hearing to appear impartial he should not, where possible, be involved in the issues giving rise to the hearing in terms of Guideline No. 4(2) of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures (Schedule to the G.N. No. 42/2007). However, in the present case, the Chairman of the disciplinary hearing, Mr. Godbless Baluhya, is the one who signed notification of a disciplinary hearing (Hearing form) which required the

Respondent to attend the disciplinary hearing and then chaired the disciplinary hearing which seems to go against the spirit of Guideline No. 4(2) cited above.

Therefore, although the Applicant seemed to observe most of the requirements under Rule 13 of G.N. No. 42/2007, this Court finds the termination procedure to be unfair for reasons stated above.

Coming to the third ground, counsel for the Applicant submitted that, the Arbitrator was wrong in interpreting allegations and offences committed by the Respondent which led to his termination. He argued that, it was wrong for the Arbitrator at page 24 of the impugned award to interpret that the Respondent was charged with stealing. He clarified that the offence against the Respondent was negligence which was connected to his failure to inform the employer on the loss of items. Therefore, the Arbitrator's decision that the Respondent couldn't have stolen 154 crates of beer was a misconception of the charges facing the Respondent. He maintained that, charges of negligence facing the Respondent were proved and the Respondent admitted to that as seen at page 20 of the impugned award.

Responding to the third ground, Mr. Mvuoni submitted that according to exhibit D11, the Respondent's employment was terminated on two grounds, that is, causing loss of properties and negligence. He maintained that, the employer was required to prove that these allegations are valid failure of which termination is considered unfair in terms of section 37(2) of the Employment and Labour Relations Act, (Cap. 366 R.E.2019).

He maintained that, the employer did not prove that there was loss of properties. Exhibit D1 did not show that there was loss of properties. Further to that, the handover book (exhibit P2) also showed that there was no loss of properties as it indicated that there was a difference of zero meaning there was no loss. To support his argument, he cited the cases of **Lucy Kessy vs National Microfinance Bank PLC Ltd** (2015) LCCD 16 and **Mohamed R. Mwenda and 5 others vs Ultimate Security, Labour Revision** No. 440/2013, LCCD No. 113 where the Court decided that, reasons for termination must be valid and proved.

In a brief a rejoinder on this point, Mr. Mwantembe submitted that, there was negligence on the part of the Respondent in this

matter. He argued that, according to DW3, exhibit D1 was not signed because he discovered that there was a loss. That means the reason for termination was proved. He maintained that, the standard of proof in labour cases is on balance of probabilities which was established in this case.

According to the notification of disciplinary hearing (exhibit D6), the charges against the Respondent were two namely, (a) causing loss of employer's property and (b) negligence. Both charges were preferred under clause 9(8) and 9(3) respectively of the General Offences and Breaches in the schedule to the Employment and Labour Relations (Code of Good Practice) Rules, 2007 (G.N. No. 42 of 2007) read together with clause 11(xxi) and clause 2.2 (annexure (H)) respectively of the Managing Conduct and Relationships at Work Place (Code of Good Practice) of 2009.

In its verdict, the disciplinary committee found the Respondent guilty of both offences. In respect of the first offence, the committee observed that, two pallets went missing on the Respondent's watch and under negligence circumstances whereas in the second offence the hearing Committee found the Respondent guilty and stated in its

verdict that the Respondent left work before time or completing his handover and the balancing probabilities.

Having examined evidence adduced as per the hearing minutes (exhibit D7), this Court finds that there was no evidence to establish that the Respondent caused the alleged loss of employer's property. However, evidence adduced shows that, on the day in question the Respondent left the plant at 0616HRS according to gate control records, instead of 0700HRS after handover with packaging team leader at 0608HRS. It was established further that, on his next shift the Respondent was informed about the alleged loss but he did not report about it. In the circumstances, this Court finds that while there was no evidence to establish the first offence against the employee, the employer managed to establish the offence of negligence against the employee. I have noted that the employee was charged under the provisions creating offences which may constitute serious misconduct leading to termination of an employee. I therefore find the reason for termination to be fair.

The fourth ground will not detain me. Counsel for the Applicant faulted the Arbitrator for observing that the employer was required to give similar punishment to all employees who committed the same offence as the respondent. He argued that, the said principle applies where more than one employee are charged with the same offence and found guilty of that offence by the disciplinary committee. Having examined the CMA award, this Court is in agreement with Mr. Mvuoni that, since in the present case the Respondent was charged alone what the Arbitrator did at page 25 and 26 of the impugned award was to comment that the principle of same offence same punishment would be applicable if the alleged offences were proved against the other employees who committed the same misconduct. Since there was only one person charged with the alleged misconduct, the Court finds that the comment did not form part of the CMA conclusion on this matter. I therefore find no merit in this ground.

Having decided that the reason for the Respondent's termination was valid but his termination was procedurally unfair, this application partly succeeds to the extent stated herein. Consequently, on the relief to the parties, this Court upholds the relief granted by the CMA but

substitutes an order for payment of compensation from twenty four (24) months remuneration to twelve (12) months remuneration only.

It is so ordered.

K.N.ROBERT
JUDGE
20/6/2022