IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION AT ARUSHA

REVISION APPLICATION NO. 82 OF 2021

(C/f Labour Dispute No. CMA/ARS/ARS/626/18/227/18)

RAJAB SAID.....APPLICANT

Vs

TANZANIA BREWERIES LTD (TBL).....RESPONDENT

JUDGMENT

Date of last Order:14-6-2022

Date of Ruling: 6-7-2022

B.K.PHILLIP,J

Aggrieved by the award of the Commission for Mediation and Arbitration, (Hereinafter to be referred to as " the CMA"), the applicant herein lodged this application to challenge the award in Labour Dispute No. CMA/ARS/ARS/626/18/227/18, made by Hon.A.K. Anosisye, Arbitrator. The applicant calls upon this Court to revise and set aside the whole of the award aforesaid on the grounds set forth in the affidavit in support of this application sworn by the learned Advocate Aggrey Kamazima , the applicant's advocate. The learned advocate John Mushi appeared for the respondent. He also filed a counter affidavit in opposition to the application.The hearing of this application was conducted by way of written submission. Both Advocates filed the written submission as ordered.

A brief background to this application is that ; The applicant was employed by the respondent as a warehouse man from September 2011 to October 2018 when his employment was terminated following the loss of 433 cases of beer which occurred at the respondent's business premises. After taking

steps which the respondent believed that are correct ones , it ended up terminating the employment of all of its employees who were on duty at the warehouse on the dates the alleged loss of 433 cases of beer occurred. Aggrieved by the decision of the respondent, the appellant lodged his complaint at the CMA, claiming that his termination was unfair.

At the CMA the respondent and the applicant brought two witnesses each. The main point of contention was whether the termination of the applicant was fair substantively and procedurally. After analysis of the evidence adduced by both sides, the Arbitrator ruled that the termination of the applicant's employment was fair. He dismissed the applicant's complaints. Consequently, the applicant lodged this application on the following grounds;

i) *That the respondent did not investigate the offence alleged to have been committed by the applicant.*

ii) *No evidence was tendered to prove that the applicant and his co-workers who were terminated from employment were the one who caused the said loss of 433 cases of beer. Despite the presence of CCTV cameras and security guards in the premises the respondent failed to indentify the culprits.*

iii) *The applicant was not accorded the right to be heard. Neither the minutes of the Disciplinary Committee hearing nor hearing form was tendered before the CMA. The applicant's fundamental right to be heard was violated.*

This application has been disposed of by way of written submissions. Mr. Kamazima's submission was as follows; That the offences which the applicant was charged with were; *a) Dishonesty and major breach of trust ,b) Occasioning loss to the employer through gross negligence.* He argued that the decision of the Disciplinary Committee did not mention the aforesaid two offences and no hearing form was produced to show that the applicant was heard in respect of the offence he was charged with.

Even the findings made by Arbitrator did not address the issue on the proof of the offences which were facing the appellant.

Mr. Kamazima contended that the respondent did not conduct any investigation before hearing of the matter by the disciplinary committee as required under Rule 13(1) of the Employment and Labour Relations (Code of good practice) Rules, G.N. No.42 of 2007 . He cited the case of **Nisile Mwaisaka Vs Dawasco, Revision No. 645 of 2018** (unreported) to cement his argument. He insisted that no investigation report was tendered at the alleged Disciplinary Committee hearing. The investigator was not brought before the CMA at least to prove that investigation was done. Mr. Kamazima was of the view that since the evidence adduced proved that at the ware house there were CCTV cameras as well as security guards, if investigation would have been conducted, the culprits would have been identified . The evidence in totality shows that the respondent did conduct any investigation that is why it failed to identify the culprits and opted to terminate six employees who were working at the ware house, contended Mr. kamazima. He faulted Arbitrator's for applying the doctrine of " team misconduct ". He distinguished the case of **True Blue Foods (PTY) Ltd T/A Kentucky Fried Chicken (KFC) Vs CCMA and others , Case No. D441/11 and Others** and the case of **The Foschini Group and Maidi Mabel and others , Case , No. JA12/08** (both unreported) from this case on the ground that the facts of the above cited cases are different from the facts of this case because in this case the employees who were terminated including the applicant were not the only one with access to the warehouse. DW1's testimony shows that there were 16 ware house men, 4 supervisors and 1 manager. Argued Mr. kamazima. He was of a strong view that in the case at hand it was possible to pin point the employee(s) who caused the loss because at the ware house there are security guards and CCTV cameras, but it appears that only 6 employees were targeted out of 16 employees who had access to the warehouse.

With regard to the procedures adopted in the termination of the applicant's employment, Mr. Kamazima faulted it. He contended that the applicant was not accorded the right to be heard. The respondent had a burden of proving that there was a fair hearing before the termination of the applicant's employment but failed to do so. He cited the section 39 of the Employment and Labour Relations Act (ELRA), to cement his arguments and went on submitting that despite being aware that there was a dispute on whether hearing was duly conducted or not, the respondent neither tendered the hearing form nor brought any witness who was a member of the Disciplinary Committee to substantiate that there was fair hearing. Mr. Kamazima insisted that the format of the hearing form is provided in part 1 to the schedule to the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007.

In addition to the above, Mr. Kamazima submitted that the right to work is enshrined in Article 22 of the Constitution of the United Republic of Tanzania, 1977. The respondent failed to prove that the applicant's termination was fair. Therefore the CMA's award has to be quashed and the applicant be granted the reliefs prayed in CMA Form No. 1.

In rebuttal, the learned advocate Mushi, started his submission by raising a preliminary concern that Mr. Kamazima did not file a notice of representation /engagement of advocates from Law Bridge (Law Firm) as required under Rule 43 (1) (a) and (b) of the Labour Court Rules, 2007, GN. No. 106 of 2007.He contended that the above cited provision of the law is couched in a mandatory way therefore this application deserves nothing than to be struck out since it is supported an affidavit sworn by Mr. kamazima, an advocate from Law Bridge whose law firm has not been appointed by the applicant to represent him in this matter. To cement his arguments he cited the case of **Joyce Mapunda and Another Vs Kioo Ltd , Misc Application No.16 of 2020** , (unreported).

With regard to the merit of the application, Mr. Mushi submitted as follows; That the investigation of the offence alleged to have been committed by

the applicant and his co –workers was conducted before the matter was placed before the Disciplinary Committee. He contended that section 35(5) of the ELRA and Rule 13(1) of the Code of Good Practice , G.N. No. 42 of 2007 , do not stipulate that upon investigation of a matter the employer must prepare a report as alleged by Mr. kamazima. Mr. Mushi was of the view that the law requires the employer to conduct an investigation just to ascertain whether there are good grounds for a disciplinary hearing to take place and that is what the respondent herein did.

Furthermore, Mr. Mushi submitted as follows; That in this case, DW1 tendered in evidence Turn Around Time Form (TAT) and daily stock taking and various reports , (Exhibits D3 and D7 respectively) which prove that the respondent conducted investigation before the disciplinary hearing was conducted. It is in record that the applicant did not fill in the said Exhibit D3 properly. Mr. Kamazima has not challenged Exhibits D3 and D7 collectively, but insisted on the existence and use of the CCTV Cameras. There is no dispute that the loss of 433 cases of beer occurred between 1st – 15th of August 2018 and during that time the applicant was a Forklift Operator with access to load and unload cases of beer both for full and empties as per Exhibit D2 collectively.Mr. Mushi pointed out that in terms of Rule 9(3) of the Code of Good Practice , the proof of the reason for termination in labour dispute is on balance of probability. He cited the case of **Amina Ramadhani Vs Staywell Apratment Ltd , Revision No. 461 of 2017,** (unreported) to cement his argument. He maintained that the evidence available in record proves the offence charged against the applicant on balance of probabilities. The absence of CCTV footage does not mean that respondent did not conduct investigation.

With regard to Mr. kamazima's contention that disciplinary hearing was not conducted, Mr. Mushi submitted that the same is erroneous. Exhibit D6 collectively proves that disciplinary hearing was conducted. The applicant was served with the charge and notification to attend the disciplinary hearing and upon receipt of the outcome of the disciplinary hearing the applicant lodged his appeal to the respondent's senior management (

Exhibit P1). In his appeal aforesaid the applicant did not state that he was not accorded the right to be heard because he was heard, instead he was only challenging the merit of the decision made by the Disciplinary Committee. The failure to tender the hearing form by the respondent is not a prove that disciplinary hearing was not conducted.

Mr. Mushi was in one with the Arbitrator regarding the application of the doctrine of "team misconduct". He submitted that the case laws cited by the Arbitrator were properly applied in this case taking into consideration that our ELRA is *in pari materia* with the South Africa Labour laws. He contended that the same was correctly applied in the case in hand because all employees at the respondent's ware house were terminated.

In rejoinder, Mr. kamazima conceded that no notice of representation was filed by Bridge Law Firm or by himself personally. However, he contended that being an advocate of the High Court of Tanzania and Courts subordinate thereto, as per the provision of section 40 of the Advocates Act, Cap 341, R.E 2019, the requirement to file notice of representation does not bind him. He argued that the same is purposely for controlling people who are not Advocates because our labour laws allow personal representatives who are not advocates to represent parties in labour matters. Moreover, he distinguished the case of **Joyce Mapunda** (supra) from this application on the ground that the same involved a personal representative who did not represent the applicant at the CMA and was not an advocate .

In addition, Mr. Kamazima argued that even if this Court finds that he was supposed to file a notice of representation ,that defect is curable because the respondent has not been prejudiced in anyway by the his failure to file the notice of representation. The same does not go to the root of the dispute between the parties. He reminded this Court that the labour Court is a Court of equity. He contended that having that fact in mind coupled with the principle of overriding objective, there is no any reason to strike out this application as suggested by Mr. Mushi.He cited

the provision of Rule 3(1) of the Labour Court Rules, G.N. No.106 of 2007, section 3A (1) (2) and 3B (1) (a) (b) and (c) of the Civil Procedure Code , Cap 33, R.E. 2019 and the case of **Magoiga Gichere Vs Penihan Yusuph , Civil Appeal No.55 of 2017**, (unreported).

With regard to other arguments on the merit of the application, Mr. Kamazima reiterated his submission in chief. He insisted that investigation of the offence alleged to have been committed by the respondent was not conducted. He contended that Exhibit D3 is a document which is used to measure the time taken for ware house men to complete their tasks. Basically, the same measures efficiency and could be used in investigation but on its own not a proof that investigation was conducted. He also argued that , the fact that the applicant did not state in his appeal to the respondent's senior management that he was not accorded the right to be heard does not mean that he was heard. The applicant being a layman did not know that he had to state that he was denied his right to be heard.

Moreover, he pointed out that in his submission Mr. Mushi contended that the applicant caused a loss of 433 cases by failure to fill in properly Exhibit D3 and yet he subscribed to the Arbitrator's decision to apply the principle of "team misconduct". Mr. kamazima was of the view that Mr. Mushi's arguments are contradictory.

Having analyzed the submission made by the learned Advocates as well perused the Court's records, let me embark on the determination of issues raised. Starting with the preliminary concern raised by Mr. Mushi on the absence of the notice of representation, I am inclined to agree with Mr. Kamazima that the case **Joyce Mapunda** (supra) referred to this Court by Mr. Mushi is distinguishable from the facts of this application since the same involved a personal representative who was not an advocate. In this case the Mr. Kamazima who swore the affidavit in support of this application and appeared for the applicant is an advocate of the High Court of Tanzania and Court's subordinate thereto. By virtue of being an

advocate Mr. kamazima has a right to appear and represent parties in this Court, whereas the personal representative does not have a right to appear in Court to represent parties unless there is a notice of representation filed in Court authorizing him/her to a represent a party in a case. It is my settled opinion that the failure of an advocate to file a notice of representation is not fatal. In addition, It is my settled view that this point of preliminary objection has been raised as an afterthought since the respondent's advocate has been receiving pleadings which clearly indicate that they are from Law bridge (law firm) and did not raise any concern. In short have not seen any prejudice caused to the applicant to move this Court to strike out this application .

With regard to the merit of the application, I have noted that the respondent tendered before the Arbitrator a number of Exhibits (Exhibits D1, D2, D3, D4, D5, D6 and D7).Starting with the issue on whether the applicant was heard, the evidence adduced shows that the applicant was notified of the hearing date and thereafter he was served with the decision made by the Disciplinary Committee which he signed it and that same was also signed by the chairman of the Disciplinary Committee (Exhibit D6 collectively).No explanations were provided by Mr. kamazima to challenge exhibits D6 collectively, in particular the decision the Disciplinary Committee which was signed by the applicant. Mr. kamazima's argument was to the effect that no hearing was conducted at all. I am of a settled opinion that under normal circumstances if the applicant was not heard as argued by Mr. kamazima he would not have accepted to sign that decision. No any convincing explanations were given by the applicant why did he sign exhibit D6 (the decision of the disciplinary Committee) if at all he was not heard. It is noteworthy that documentary evidence takes precedence over oral evidence. In addition, in his appeal to the respondent's senior management the applicant did not state that he was not heard. This makes his assertion doubtful. With due respect to Mr. Kamazima, the fact that the applicant is a layman cannot be justification for the non-inclusion of the allegation that he was not heard in his

appeal to the respondent's senior management. The fact that no member of the disciplinary Committee appeared before CMA to testify does not necessarily mean that there was no hearing conducted by the disciplinary Committee. Likewise, fact that no hearing form was tendered before the CMA does not mean that hearing was not conducted. The evidence adduced by respondent in its totality shows that disciplinary hearing was conducted and the applicant was heard.

Coming to issue on whether investigation was conducted, according to the evidence adduced by both sides, there is no dispute that there was a loss of 433 cases of beer which occurred between 5th -18th August 2018.The main argument made by Mr. Kamazima in respect of this issue was that if the respondent would have conducted investigation it would have managed to identify the culprits. In my opinion , the mere fact that the respondent managed to realize the loss it incurred and the dates in which the alleged loss occurred shows that investigation was conducted, otherwise how could the respondent know the loss of 433 cases of beer without conducting any investigation. In his testimony the applicant tried to defend himself by showing that he was not involved in the loss incurred by the respondent. Looking at the evidence adduced in this case,(exhibits D3 and D7 collectively) it is not realistic to rule that there was no any investigation conducted whereas both sides accept that there was a loss of 433 cases of beer. In my opinion the failure to tend the investigation report is not fatal if the evidence adduced show clearly that investigation was conducted as it is in the application in hand.

In addition to the above, Mr. Kamazima's concern that the respondent was supposed to use the CCTV camera and Security Guards to identify the culprits is not a prove that investigation was not conducted.In fact , what Mr. kamazima was trying to show is that a proper investigation would have involved the use CCTV cameras which would have enabled the respondent to identify the culprits. With due respect to him, those are his opinion and I think it is not proper to fault the respondent for not using the CCTV cameras. The bottom line here is that the respondent conducted

investigation in respect of the loss which occurred at its warehouse in a way it found appropriate. After all, the type of investigation depends on the nature of the issue in question.

With regard to the application of the principle of " team misconduct" , as I have alluded herein above, the loss of the 433 cases of beer is not in dispute. But it is also true that the respondent was not able to single out any employee (s) among the six employees who were terminated to be solely responsible for the loss. Under the circumstances ,I am of the opinion that the principle of " team misconduct" was properly applied by the Arbitrator in this case, since the evidence adduced shows all employees who were on duty on the dates the loss occurred were terminated and the applicant does not dispute that he was working at the warehouse.

In the upshot, it is the finding of this Court that the there was a valid reason for the termination of the applicant. The procedure for the termination of his employment was proper and fair. Consequently, this application is dismissed.

Dated this 6th day of July 2022

B.K.PHILLIP

JUDGE