IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

LABOUR DIVISION

AT ARUSHA

REVISION APPLICATION NO. 10 OF 2021

(Originating from Labour Dispute No. CMA/ARS/ARS/587/18/232/18)

TANZANIA BREWERIES LIMITED..APPLICANT

VERSUS

GIBSON NEVAVA...RESPONDENT

JUDGMENT

15/11/2022& 11/02/2022

GWAE, J

The applicant, Tanzania Breweries limited filed this application for revision with a view of challenging the award of the Commission for Mediation and Arbitration (CMA) which was procured on the 15th January 2021 in favour of the respondent, Gibson Nevava. The CMA's award to the effect that, the respondent's termination of employment was unfair in both substantive (absence of proof of the alleged misconducts) and procedural aspects (breach of principle natural justice-rule against bias and failure to give the respondent right to mitigate).

In his arbitral award, the learned arbitrator then ordered to applicant reinstate the respondent and pay him his monthly salaries without loss of his entitlements from the date of termination to date of reinstatement.

The brief factual background of the parties' dispute is as follows; that, the respondent was employed by the applicant since 1st June 2006 initially a salesman driver and was recruited in Moshi and he was by then holding a post of ware house supervisor from 1st October 2014 to the date of termination, his last work place was in Arusha Region. That, sometimes on the 6th September 2018, the respondent was issued with a notice for disciplinary hearing held on the 12th September 2018 based on the alleged Misconducts, namely; Dishonest and major breach of trust, causing loss to his employer now applicant through gross negligence (144 beer cases). An outcome of the disciplinary hearing was to the effect that, the respondent's employment to be terminated effectively from 2nd day of October 2018.

Feeling aggrieved by the award procured by CMA, the applicant has filed this application supported by a sworn affidavit of her counsel, Mr. Daniel Lyimo advancing the following grounds for the sought revision;

1. That, the arbitrator erred in law and facts for failing to analyze the evidence adduced before the Commission

2. That, the arbitrator erred in law and facts as he failed to distinguish between Geofrey Kimaro, Peter Kakuru and Felix Godfrey an act which led him to hold that the complainant presided the disciplinary hearing and therefore became the judge of his own case
3. That, the arbitrator erred in law and facts for holding the termination was unfair on the ground that investigation report was not tendered while not every misconduct requires investigation
4. That, the arbitrator erred in law and facts for ordering payment of salary arrears since the respondent did not claim for the same
5. That, the arbitrator erred in law and facts for ordering reinstatement whilst there was a clear breach of trust between the parties.
6. That, the arbitrator erred in law and fact for holding that the respondent was not afforded right to be heard since he entered his appearance during disciplinary hearing

At the hearing of this application, Mr. Daniel Danland Lyimo (adv) and Mr. Julius Ezra Mwaluko (adv) appeared representing the applicant and

respondent respectively. With consensus of the parties' advocates, hearing of the application was ordered to be by way of written submissions. I shall accordingly consider the parties' written submissions while determining each ground for the revision application.

> **In the 1st ground, that, the arbitrator erred in law and facts for failing to analyze the evidence adduced before the Commission**

It was the argument of the applicant's counsel that, the arbitrator wrongly rejected admission of some the documents on the context that the same were either secondary documents or they were sought to be tendered by incompetent persons or persons who were not makers of the same. He further argued that the arbitrator ought to have admitted the documents since the CMA is not hampered by the strict rules of common law. He therefore urged this court to make a reference to the decision in **DPP vs. Mirzai Pirbakhshi @ Hadji and 3 others**, Criminal Appeal No. 493 (Unreported) where the Court of Appeal of Tanzania held;

> "the test of tendering exhibits is whether the witness has knowledge and possesses the thing in question at some point in time, albeit shortly, so a possessor or custodian or an actual owner or alike are legally capable of tendering the intended exhibits in question provided that he has knowledge of the thing in question

According to Mr. Lyimo the arbitrator was to admit the exhibits and had it been so he would come with a finding that the respondent violated Clause 4 and 5 (d) of TBL's Managing Conducts and Relations at work place.

Responding to the 1st ground, the learned counsel for the respondent submitted that, the applicant's evidence was insufficient since he was unable to produce any documentary evidence taking into account that, the applicant testified that the respondent was working in shift basis. Thus, it was necessary for the applicant to prove that the respondent was in shift on the date on which loss is said to have been caused.

Going through the impugned award and typed proceedings, I have observed as correctly complained by the applicant's advocate that some of documents (stock taking & warning letter) were rejected on the ground that, they were in secondary and the one who sought leave to tender the same was not the author of the same. Nevertheless, upon my perusal, I have found that the arbitrator merely refused to admit the stock taking but gave leave to file the original one on the subsequent hearing (Page 6 of the typed proceedings). If the applicant's staff were serious, the original documents or author or custodian of the same would produce the same in the subsequent arbitration since the leave was given.

While I am in agreement with the applicant's counsel that, in the light of the decision in the case of **DPP vs. Mirzai Pirbakhshi @ Hadji and 3 others**, (supra) and other courts' decisions, the CMA would have received the documents provided that, the one who was to tender had knowledge of their existence and that the same were in original form short of that the applicant ought to issue a notice to produce secondary documents where she could furnish reasons for her failure to produce original documents as required by the law (See Law of evidence Act, Cap 6 Revised Edition, 2019). Basing in the above findings, the 1st ground is found to have been misplaced.

As to the 2nd ground, **that, the arbitrator erred in law and facts as he failed to distinguish between Geofrey Kimaro, Peter Kakuru and Felix Godfrey an act which led him to hold that the complainant presided the disciplinary hearing and therefore became the judge of his own case**

The learned counsel for the applicant pondered the arbitrator by stating that the arbitrator failed to analyze the evidence before as result he ended up wrongly holding that the DW2, Felix Godfrey was a complainant and a chairman of the Disciplinary Hearing Committee whereas the respondent's counsel did not respond in his submission.

Looking at the CMA's record and the award in question, it is as complained by the applicant that the said Godfrey Felex, DW2 was a chairperson of the Disciplinary Hearing but he was not the complainant as the evidence on record reveals that the complainant was Mr. Gefrey Kimaro who appeared during arbitration as DW3. Hence, it was wrong and misdirection of evidence on record for the arbitrator in holding that there was a breach of principle of natural justice since the chairperson of the Disciplinary was also a complainant. Without further ado, this ground is allowed. Determination of the 2nd ground equally answers the applicant's 6th ground for the revision in affirmative that is to say it was wrong for the arbitrator to hold that the respondent was denied right of being fairly heard on the basis the chairperson of the disciplinary hearing committee assumed both roles of complainant and adjudicator

> Now, coming to the 3rd ground, **that, the arbitrator erred in law and facts for holding the termination was unfair on the ground that investigation report was not tendered while not every misconduct requires investigation**

I am alive of the principle that, rules of procedures or guidelines provided under Code of Good Practice GN. 42 of 2007 or any other procedural law do not apply strictly except that it should be ascertained that the procedures necessary, in occasioning justice as far as fairing is

concerned, were mainly adhered to without considering them in a check list fashion. This position has consistently been stressed by our courts for example in **Tanzania International Conference Terminal Conference Ltd v. Shabani Kagere and Mutual Construction Co. Ltd PTY Ltd** (2010) 5 BLLR 513 LCAL where it was held;

> "Procedural Fairness guidelines should not be applied in what is called "mechanical checklist" that every guideline should be complied with employer"

In our instant dispute, I have considered the nature of the alleged misconducts, and considering the evidence as to the alleged loss as well as the fact that the respondent was not only person who was a ware house supervisor but there was also another staff known by the name of Emmanuel Uiso who is said to have reported on duty on 5/8/2018 from 15: 00 hrs to 22: 00 hrs, in that scenario, I think there was a requirement of conducting investigation which would certainly reveal whether, the respondent or the said Uiso was responsible for the loss or false report. Therefore, going through the parties' evidence, I find the guilt of the respondent to the alleged misconducts is highly questionable. It is in my view that, in a case where employees are working in shifts, there must be documentary evidence establishing quantity or a number of stocks handed over to an employee who is accused of misconducts and number of stocks

he had handed over to another employee in order to fairly incriminate an employee of theft or loss of property where he or she worked in shift.

I have further looked at the evidence adduced by DW2, disciplinary hearing committee chairperson and observed that even at the disciplinary hearing, there was no clear record to the Coram of the members of the Committee, that is fundamental error. It therefore not clear if there were members who participated in the Disciplinary Hearing (See S: Exhibit D2 imetaja majina ya wajumbe wa kikao, J: hakuna"). Similarly, the disciplinary hearing does not bear the signature of the respondent.

In the 4th ground, **that, the arbitrator erred in law and facts for ordering payment of salary arrears since the respondent did not claim for the same**

In his submission, the learned counsel for the applicant stated that it was wrong on the part of the arbitrator to order payment of salary arrears which were not claimed. He fortified his arguments by citing the case of **SDV Transami (T) Ltd vs. Faustine L. Mungwe**, Labour Revision No. 227 of 2016 where it was held that, failure to consider what had been prayed in the CMA Form No. 1 is an error which makes the award revisable

On his part, Mr. Mwaluko argued that, the award in this aspect was properly procured since the respondent through his Referral Form, claimed reinstatement that meant without loss of his salary arrears.

It is evident from the impugned award that the Commission ordered the applicant to pay the respondent arrears from the date of termination to the date of the compliance with the award.

It follows therefore no litigant can be given a relief that is not pleaded and proved. In **Lim v. Canden Health Authority** [1979] 2 All ER 910 and **Bonham v. Hyde Park Hotel Ltd** (1948) TLR 177, it was held that"

> "I am not unmindful of the general rule that a party is bound by his pleadings and should not be allowed to succeed on a case not made out in his pleadings, only departure from the pleading is allowed by way of an amendment as provided for under Order vi Rule 7 of Civil Procedure Code, Cap 33 R. E, 2002 reproduced herein below
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> "No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same"

However, in labour disputes there are rights that inevitably follow a decision favouring an employee or connected rights or in other words an award can be made of rights in which law follows the decision such as one-month salary in lieu of notice, severance pay, and issuance of certificate of service or repatriation to the place of recruitment if the same were not paid

during unfair termination as opposed to normal litigations. This position was at once stressed by this court (**Rweyemamu,** J) in **Eddy Martine Nyinyoo v. Real Security Group and Marine,** Revision Application No. 114 of 2011 (unreported) which I wholly subscribe, where it was stated;

> "In case of employment termination, an award of severance pays; notice, transport to the place of recruitment etc, may be made even not claimed that is because the said payments are payable as of right under section 41, 42 and 43 of the Part F of the Employment and Labour Relations Act No. 6/2004"

Nonetheless, the order made by the learned arbitrator directing the employer to pay salary arrears, in my considered view, does not go out side the ambit of the order of reinstatement except a matter of semantics due to an obvious reason that, an award reinstating an employee made under section 40 (1) (a) of the Employment and Labour Relations, Act No.6 of 2004 connotes that the employee shall be paid all his remuneration which he or she was entitled from the date of unfair termination to the date of full compliance. For easy of reference section 40 (1) (a) of the Act is reproduced herein under;

> "40 (1) Where an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer

> (a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or."

According to the above quoted provision of the law, an order of the reinstatement as one of the remedies for unfair termination, entails that an employee who is to be reinstated has to be paid his remuneration from the date of termination to the date of reinstatement as if he was not terminated or to the date of payment of his salaries and other entitlements from the date termination plus 12 months' compensation in the event the employer opts not to reinstate as per section 40 (3) of the Act. It follows that, the respondent's claim on reinstatement without loss of his income as exhibited in the referral form contains remedies correctly awarded by the Commission.

In the 5th ground, **the arbitrator erred in law and facts for ordering reinstatement whilst there was a clear breach of trust between the parties.**

In this ground, the applicant's counsel argued that, it was wrong for the Commission to order reinstatement as there were serious breaches of trust between the parties since the respondent exhibited not be trust and honesty. Thus, intolerable continuity of employment relationships. He then

urged me to make a reference to a decision in **G.4 Security Services (T) Ltd vs. Peter Mwakipesile,** Labour Digest No. 109 of 2011 where it held that type of employer's business and the importance of honest in the business.

According to section 40 of the Act, there are remedies namely; reinstatement, re-engagement and compensation awardable by either the Commission or labour court as the case may be. Nevertheless. the same are judiciously awarded depending on the gravity of unfair termination against an employee for example if the termination was unfair both substantively and procedurally (C**oca Cola Kwanza Limited v. Henry Sanga,** Labour Division at Mbeya reported in Labour Court Digest 2017 No. 14).

In our dispute, the termination of the respondent's employment was found to be unfair, both in terms of substantive and procedural aspect, the decision which I have no reason to default. It follows that, the order of the reinstatement was in favour of the respondent was, in the circumstances, justified as was rightly awarded by the Commission.

Before I conclude writing this judgment, I would wish to comment on the pertinent issue on a right to repatriation costs in favour of the

respondent, since it evidentially clear that the respondent was recruited Moshi and was in Arusha when was terminated, in law therefore, the respondent, if he was not paid his repatriation costs as seemingly the case, the applicant would not escape paying him his subsistence allowance which is equal to monthly salary from the date of termination to the date of repatriation notwithstanding if the termination was found to be fair or unfair. (See the decision of the Court of Appeal in **Attorney General vs. Ahmad R. Kakuti and two others**, Civil Appeal No. 49 of 2004 (unreported).

Basing on the foregoing deliberations above, this application is mainly without merit, the same is dismissed save ground 2 and 3 which, in my firm view, do not warrant this court to fault the CMA's award. The basis for computation is the respondent's monthly salary that he used to earn immediately before termination (Tshs.2, 768,883/=). This being a labour, I refrain from making an order as to costs.

It is so ordered.

M. R. GWAE
JUDGE
11/02/2022