IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

REVISION APPLICATION NO. 20 OF 2019

(Arising from Labour Dispute FR/CMA/MOR/217/2015, Decision and Award of Hon. Z. Kiobya Arbitrator, dated on 31st October, 2017)

KILOMBERO SUGAR COMPANY LIMITED ..... APPLICANT

VERSUS

MICHAEL NGOROTO ..... RESPONDENT

RULING

28th October, 2022

CHABA, J.

This is a ruling in respect of the revision application against the Award issued on 31st October, 2017, by Hon. Z. Kiobya (Arbitrator) of the Commission for Mediation and Arbitration at Morogoro (the CMA) in Labour Dispute FR/CMA/MOR/217/2015. Basically, the applicant KILOMBERO SUGAR COMPANY LIMITED, aims to challenge the decision of the CMA under the provision of section 91 (1) (a) & section 91 (1) (b), section 91 (2) (b), section 91 (2) (c) and section 94 (1) (b) (i) of the Employment and Labour Relations Act, No. 6 of 2004 as amended by the Written Laws (Miscellaneous Amendment) Act No. 3 of 2010, Rule 24 (1); Rule 24 (2), (a), (b), (c) (d) (e), (f); Rule 24 (3) (a), (b), (c), (d)

and Rule 28 (1), (c), (d) and (e) of the Labour Court Rules, GN No. 106 of 2007.

The application has been preferred by way of chamber summons and notice of application supported by an affidavit of Grace Shao, Principal officer of the applicant dully authorised to act on its behalf and signed by herself.

The applicant is praying this court to call, revise the proceedings and set aside the award made by the Commission for Mediation and Arbitration at Morogoro registered as RF/CMA/MOR/217/2015 delivered on 31/10/2017.

On his part, the respondent Michael Ngotoro filed a counter affidavit deponed by himself and notice of representation.

The background of the labour dispute in brief is that, the respondent was employed by the applicant in the capacity of a truck driver from 1/10/2000 to 4/2/2015 where his employment contract was terminated and resulted to the present dispute.

It is on record that, the applicant terminated the respondent's employment due to what she called gross misconduct, and dishonest conduct with intention to steal company's property. It was alleged that; the respondent was caught with 24 pieces of round bars concealed

under the cabin seat of the vehicle. At the conclusion of investigation, the disciplinary hearing was conducted, and after having satisfied that the misconduct was proved, the applicant terminated the respondent's employment on disciplinary grounds with effect from 22/12/2014.

Dissatisfied by disciplinary proceedings and termination from his employment, the applicant filed Labour Dispute No. RF/CMA/MOR/217/2015 on 2/3/2015 at the CMA complaining that he was terminated from his employment, and therefore he was claiming his terminal benefits and compensation. In essence, the respondent's claim was based on procedural issues to the effect that he was terminated without being duly and properly informed about the reasons for termination and that the procedures adopted to terminate his employment was unfair.

The respondent successfully challenged the termination of his employment by the applicant, as the CMA delivered its award ordering the applicant to compensate the respondent by paying severance pay, leave allowance, salary for the months worked for, and 12 months' salary compensation, amounting to Tanzanian Shillings Four Million, Five Hundred Forty Six Thousands, Nine Hundred Twenty Three Only (Say, Tsh. 4,546,923.00).

As hinted above, the applicant was aggrieved by the decision of the CMA and preferred this revision asking this court to call and revise the ruling associated with Labour Dispute No. RF/CMA/MOR/217/2015. After such revision, the applicant wishes this court to quash the ruling issued by the CMA relying on the following grounds: -

1. *That, the Honorable Arbitrator disregarded the applicant's witness testimonies and delivered the award without considering the evidence and testimonies of DW3 together with the exhibits tendered by the Applicant in the Commission for Mediation and Arbitration.*

2. *That, the Hon. Arbitrator erroneously misguided herself by not considering the applicant's evidences on the reason that lead to termination of the Respondent's employment and hence arrived at unfair award. Also, the arbitrator relied on the contradictions of the respondent's evidence and that of his witness. The respondent was caught red-handed.*

When the matter was called on for hearing, the applicant was represented by Mr. Dastan Kaijage, learned advocate, whereas Kitua Kinja, learned advocate from Tanzania Plantation and Agricultural Workers Union (TPAWU) represented the respondent.

By the parties' consensus, this application for revision was disposed of by way of written submissions. This Court scheduled that the applicant's submission in chief be filed on 30th June, 2022 and respondent's reply to the applicant's submission in chief be filed on or before 14th July, 2022 and rejoinder (if any) be filed on 21th July, 2022. Both parties adhered to the court's scheduled orders.

Submitting in support of the first ground, Mr. Kaijage argued that the Hon. Arbitrator disregarded the applicant's witness testimonies and delivered the award without considering the evidence and testimonies of DW3 together with the exhibits tendered by the applicant in the CMA contrary to the Rule 28 (3) (d) of GN. No. 67 of 2007, and that the award was procured with material irregularity as well as misconduct on part of the arbitrator. He therefore prayed that this revision be allowed.

On the second ground, Mr. Kaijage accentuated that the testimonies adduced by DW1 and DW2 proved on the required standard that the respondent was caught red handed in possession of 24 round bars being the properties of the applicant without any explanation. He submitted further that there was material evidence on the records sufficiently to convince the Hon. Arbitrator that the respondent conducted a serious misconduct of stealing the applicant's property. He

rounded up by stating that, it was unfair to award the respondent on the ground that his termination of employment was unfair.

On the basis of his submission, Mr. Kaijage prayed this court to revise the arbitral award and declare that, the respondent's termination was fair and justifiable.

In reply to the applicant's submission, Mr. Kinja started by praying the court to adopt his counter affidavit and form part and parcel of his submission. Thus, he went on arguing in respect of the first ground, but briefly that, the evidence of DW3 was properly recorded and analyzed by the trial arbitrator. He further submitted that, the arbitrator complied with all requirements of Rule 27 of the GN No. 67 of 2007.

As to the 2nd ground, Mr. Kinja highlighted that, all evidence tendered before the CMA by the applicant were insufficient to convince the CMA that the termination was fair. He therefore, prayed this court to dismiss the application and declare that the respondent was unfairly terminated by the applicant without valid reasons and relevant procedures laid down under the Labour Laws.

To rejoin, Mr. Kaijage reiterated mostly what he submitted in chief. He insisted that, the evidences adduced by DW3 was not analyzed and considered. He underlined further that the evidences adduced by

the applicant was strong and material to prove the offence against the respondent. He concluded by requested the court to allow the orders sought by the applicant for a reason that it has merits.

Having considered the rival submissions advanced by both parties in relations to the two grounds for revision raised by the applicant, the main issues for consideration and determination are as follows: -

i. *Whether the CMA recorded and evaluated the evidence of DW3 in determining the matter;*

ii. *Whether there was valid reason for holding that the termination was unfair;*

In answering the first issue, I have carefully gone through the records of the CMA and find out that during the hearing, the applicant summoned three (3) witnesses, to wit; Enosi Majige who testified on 15th October, 2015 as DW1; Seif Omary Mkwalhu who testified on 16th December, 2015 as DW2 and Leonard Kasembe who also testified on 27th September, 2016 as DW3. The records further shows clearly that DW1 was a security officer at the applicant's Factory/Company and the employee from KK Security who immediately responded from the control room on the material day. The record shows that DW2 was a Research Manager under the Agricultural Sectoral Department who suspected the

respondent for the alleged misconduct and DW3 was a Principal Human Resources officer in the Company.

At page 3 of the typed arbitral award of the CMA, Hon. Arbitrator mentioned these applicant's witnesses accordingly as DW1, DW2 and DW3. At page 12 of the impugned award, the Hon. Arbitrator made an analysis of the evidences of DW3 and exhibits that were tendered during the hearing of the matter which included Exhibits MKW4, MKW5, MKW7 and MKW9 when answering the second issue. Page 3 of the award reads: -

> *"Katika kujibu hoja hii ni kwamba ilielezwa na DW3 kuwa baada ya kujiridhisha kwamba mlalamikaji alitenda kosa alipewa barua ya mashtaka na kumtaka ajieleze kwa maandishi, kielelezo* ***MKW4*** *na* ***MKW5*** *vimezingatiwa, baada ya kujibiwa kwa barua hiyo aliteuliwa mwenyekiti wa kusimamia shauri ambapo shauri la kinidhamu lilisikilizwa,* ***kielelezo MKW7*** *kimezingatiwa ndani ya jalada. Pia alieleza kwamba baada ya kikao cha nidhamu mlalamikaji alipewa barua ya kuachishwa kazi naye akakata rufaa kwa kielelezo kilichopokelewa na Tume kama* ***MKW9".***

From the wording of the judgment of the CMA, it is clear that DW1 and DW2 focused on the incrimination of the respondent to the alleged misconduct of intending to steal 24 round bars. Both DW1 and DW2 interrogated and inspected the respondent on the material date / day of 24th September, 2014 around 12:20 pm. But the DW3 only described and analyzed in his evidences a detailed legal procedure that was taken by the applicant to terminate the respondent's employment. In few words, the evidence and testimony of DW3 was irrelevant in proving the first issue at the CMA (whether there were sufficient reasons to terminate the respondent's employment contract) and it was correctly applied by the Hon. Arbitrator in answering the second issue which was based on the procedures which were followed in the termination process.

With due respect to the learned counsel for the applicant, I am unable to join hands with his contention for a reason that his stance does not support holding submission, if I may quote, "***only evidences of DW1 and DW2 were analyzed while DW3 evidences were not analyzed at all, see page 3 to 6 of the award***". [Bold is mine].

It is my considered opinion that Rule 27 (3) (d) of Labour Institutions (Mediation and Arbitration Guidelines) GN. No. 67 of 2007 were complied with the Hon. Arbitrator Z. Kiobya hence, the applicant's

first ground of revision is devoid of merit and accordingly, it is hereby dismissed.

Coming to the 2nd ground as to whether there was valid reason for holding that the termination of employment of the respondent was unfair, at the outset, I wish to point out that for termination of employment to be fair it should be based on a valid reason(s) and fair procedures as well. In other words, there must be substantive fairness and procedural fairness on the termination of employment.

The provisions of the law under section 37 (2) of the Employment and Labour Relations Act, No. 6 of 2004 provides that: -

"A termination of employment by an employer is unfair if the employer fails to prove: -

(a) *That, the reason for the termination is valid;*

(b) *That, the reason is a fair reason: -*

(i) *Related to the employee's conduct capacity or compatibility; or*

(ii) *Based on the operational requirements of the employer, and*

(c) *That, the employment was terminated in accordance with a fair procedure".*

Guided by the above provisions of the law, it is clear that the legislature intends to require employers to terminate employees only on the basis of a valid reason(s) and not their will or whims. This is also the position of the International Labour Organization Convention 158 of 1982 as stipulated under Article 4. In that spirit, employers are required to examine the concept of unfair termination based on employee's conduct, capacity, compatibility, and operations requirement(s) before the sack of employment of their employees.

As alluded to above, in this case the reasons put forward by the applicant to justify the sacking of the employee were based on accusation of gross misconduct, namely; fraud, theft and unauthorized possession of company's properties. However, the question which arises here is, whether or not the applicant did adduce evidence sufficiently to prove that the allegations levelled against the respondent falls within and pursuant to the above-mentioned provisions of the law.

Having gone through the records in particular on the proceedings of the CMA, I hasten to join hands with the respondent in that, in proving fair reasons for his termination, a lot had been left out by the applicant to justly and fairly justify a holding that, there were fair reasons for the termination.

Looking at the nature of the allegations charged against the respondent, in my considered opinion, the same are / were nothing but serious offences by their nature which needs strict proof than that of a balance of probability. The respondent was charged with gross misconduct as hinted above. In proving allegations involving fraud or theft, the standard of proof is a bit higher than other misconducts as it was correctly emphasized by the Court of Appeal of Tanzania when it faced a similar situation in the case of **City Coffee Ltd v. The Registered Trustee of Holo Coffee Group,** Civil Appeal No. 94 of 2018 (Unreported). In this case, the Court held inter-alia that: -

> *"It is clear that regarding allegations of fraud in civil cases, the particulars of fraud, being a very serious allegation, must be specifically pleaded and the burden of proof thereof, although not that which is required in criminal cases; of proving a case beyond reasonable doubt, it is heavier than a balance of probabilities generally applied in civil cases."*

Placing reliance and guided by the afore stated principle of law in relation to the matter at hand, it is vividly clear that, the applicant's evidences are insufficiently to rely on and hold that there were fair and

justifiable reasons for the sacking of the employee (respondent). I have the reasons: One; the records of the CMA shows that when the respondent was arrested with the said 24 round bars, the applicant brought workshop officers to identify whether or not the said round bars did belong to the applicant. The record reveals that, on arrival and after the inspection was conducted, they opinioned that the 24 round bars were not properties of the applicant. This piece of evidence has remained unshaken in the CMA proceedings as well as in the instant application.

Two; in this case, all the exhibits ***(MKW1 and MKW2)*** that were meant to prove that the round bars were found with the respondent were tendered at the CMA and not during proceedings of the disciplinary hearing. In view of the above, it is my findings that in the eyes of the law, it was improper because the basis of the applicant's termination, found its way from the CMA's proceedings and not from or during the proceedings of the disciplinary hearing where the fate of the employee's employment contract was determined. In my unfeigned opinion, every proof to substantiate termination of the respondent had to commence or take place before the employer's disciplinary hearing and the respective witnesses were duty bound to appear before it and adduce their testimonies so as to connect the respondent with the alleged allegations.

Failure of which, as gleaned from the records, it is hard to intervene the findings and decision of the CMA.

Basing on the above analysis, it is my concurrent finding that the termination of employment of the respondent was unfair with no valid reason(s). I therefore, confirm the award in Labour Dispute FR/CMA/MOR/217/2015, delivered by Hon. A. by Hon. Z. Kiobya (Arbitrator), dated 31st day of October, 2017.

In the final event, this application has no merit and it is hereby dismissed with no order as to costs. **It is so ordered.**

DATED at **MOROGORO** this 28th day of October, 2022.

M. J. CHABA

JUDGE

28/10/2022