IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 21 OF 2023

(Arising from an Award issued on 02/12/2022 by Hon. William, R, Arbitrator, in Labour dispute No. CMA/DSM/ILA/131/2020 at Ilala)

BARAKA ENOCK ..... APPLICANT

VERSUS

BOLLORE TRANSPORT & LOGISTICS TANZANIA LTD ..... RESPONDENT

JUDGMENT

Date of last Order: 20/03/2023
Date of Judgment: 28/4/2023

B. E. K. Mganga, J.

It is undisputed that on 1st February 2011, Bollore Transport & Logistics Tanzania Limited, the respondent, employed Baraka Enock, the applicant, as a Forklift Operator for unspecified period of employment. Applicant continued to work with the respondent until on 19th November 2019 when he was served with a suspension letter. It is said that applicant was suspended because it was reported that there was loss at the Heineken Warehouse where applicant was working as Forklift between 2017 and 2019. It is further said that the said Heineken Warehouse is

property of the respondent and that applicant was working thereat. In the said suspension letter, applicant was informed that he will be suspended on pay until conclusion of investigation. It happened that on 31st January 2020, respondent terminated employment of the applicant for two reasons namely, (i) collusion to steal company property or property belonging to any person at workplace and (ii) theft or attempted theft of company property or property belonging to any person at workplace.

Applicant was aggrieved with termination of his employment, as a result, on 28th February 2020, he filed Labour dispute No. CMA/DSM/ILA/131/2020 before the Commission for Mediation and Arbitration henceforth CMA at Ilala. In the Referral Form(CMA F1), applicant indicated that termination of his employment was not fair both substantively and procedurally. He therefore indicated in the said CMA F1 that, he was claiming to be reinstated without loss of remuneration.

On 2nd December 2022, Hon. William, R, Arbitrator, having heard evidence and submissions of the parties, issued an award that termination of the applicant was fair both substantively and procedurally. With those findings, the arbitrator dismissing all claims by the applicant.

Further aggrieved, applicant filed this application for Revision. In his affidavit in support of the Notice of Application, applicant raised two grounds namely:-

1. *That the Honourable Arbitrator erred in law and facts in holding that respondent had valid reason for termination of the applicant's employment.*
2. *That, Honourable Arbitrator erred in law and facts in holding that respondent followed procedures for termination of employment of the applicant.*

Respondent resisted the application by filing the Notice of Opposition and the Counter Affidavit sworn by Angeline Kavishe Mtulia, her Legal Manager.

When the application was called on for hearing, applicant was represented by Mr. Prosper Mrema, learned Advocate, while respondent was represented by Mr. Gilbert Mushi, learned Advocate.

Submitting in support of the 1st ground, Mr. Mrema, argued that there was no ground for termination. Counsel for the applicant submitted that the two reasons that were advanced by the respondent to terminate employment of the applicant were not proved or that were not valid. Counsel for the applicant submitted further that, the incidence relating to the alleged collusion, theft or attempt theft occurred in October 2018 but respondent did not take action until on 31st January 2019 when she suspended applicant from work. Counsel submitted further that, applicant

was made a scape goat for employees in the managerial post because investigation was conducted and the report was that disciplinary proceedings should be taken against all who participated. During submissions, counsel for the applicant conceded that the said report also mentioned the applicant. Counsel argued that no disciplinary proceedings were taken against the warehouse supervisor one Thabita Makuna who gave applicant instruction to load Heineken Carton in the vehicle, Imran Adinan who was the Chain Supply Manager and Alex Gabo. Counsel for the applicant strongly submitted that the whole issue was planned by the management and not the applicant.

Mr. Mrema submitted further that, applicant was not heard on the issue of collusion because all evidence centered on theft or attempted theft. Counsel was quick to submit that the charge of theft or attempted theft was also not proved. He submitted further that, there is no evidence showing that applicant was arrested stealing or attempting to steal. He added that, CCTV camera could have shown participants of the alleged misconduct but it was not tendered allegedly, based on evidence of DW1 who testified that the investigation report proved the misconduct. Counsel

for the applicant added that the watchman who was at the scene was also not called by the respondent as a witness.

Arguing in support of the 2nd ground relating to fairness of procedure of termination, counsel for the applicant submitted that Rule 32(3) of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007 was not complied with. Counsel for the applicant submitted further that the arbitrator did not record all key issues that transpired at CMA. He added that, evidence of the applicant (PW1) was not recorded clearly and that, the arbitrator did not record some of the questions asked by Counsel for the applicant. Counsel for the applicant went on that, in the disciplinary hearing, applicant was assisted by two members of the Trade Union but that is not reflected in the award.

Mr. Mrema submitted that, applicant was denied right to be heard on the charge of collusion contrary to Rule 13(5) of the Employment and Labour Relations(Code of Good Practice) Rules, GN. No. 42 of 2007. He added that, applicant was also denied right to put mitigation contrary to Rule 13(7) of GN. No. 42 of 2007(supra) and that he was not availed with the investigation report. Counsel for the applicant cited the case of ***Kiboberry Limited v. John Van Der Voort,*** Civil Appeal No. 248 of 2021

to support his submissions that failure to serve the investigation report denies the employee right to prepare a defence. Mr. Mrema cited Rule 4 of the Guidelines to GN. No. 42 of 2007 (supra) and submit that the Chairperson of the disciplinary hearing proceedings was not impartial. When probed by the court, counsel for the applicant readily conceded that in the CMA F1 that is pleading, applicant did not indicate that the Chairperson of the disciplinary hearing Committee was not impartial. Counsel for the applicant conceded further that, parties are not allowed to depart from their pleadings and that applicant did not raise the issue of impartiality before the disciplinary hearing committee.

Counsel for the applicant submitted further that, the award was delivered out of 30 days provided for under Section 88(ii) of the Employment and Labour Relations Act[Cap. 366 R.E. 2019] after closure of hearing. He initially prayed that CMA proceedings be nullified and set aside the award, but upon reflection, he prayed that the application be allowed and applicant be reinstated without loss of remuneration.

Resisting the application on behalf of the respondent, Mr. Mushi, learned counsel submitted that there was valid reason for termination of employment of the respondent as testified by Thabita Makuna (DW2), who,

was the supervisor of the applicant. Counsel for the respondent submitted further that, DW2 testified that applicant did not have permission to load Heineken Cartons in the Motor vehicle without her permission. Counsel for the respondent added that, applicant(PW1), testified that at the time of loading Heineken cartons he found 420 Cartons already loaded. Counsel raised an issue as to how applicant knew such a number if at all he was not involved in loading them from the beginning. Counsel for the respondent submitted further that, applicant (PW1) testified that he was no longer working at Heineken warehouse but exhibit D4 shows that he was only working at Heineken warehouse. Counsel went on that; it is not true that no action was taken against other people mentioned in the investigation report. He clarified that Imran Adnan was also terminated while Alex Gabo resigned prior disciplinary proceedings and that Thabita Makuna (DW2) is the one who noted the alleged misconducts.

On the period elapsed from the date of incidence to the date of disciplinary, Mr. Mushi submitted that, the incidence occurred in October 2018, but respondent got information on 13th March 2019 that there was theft. He clarified that, the alleged misconduct of stealing or attempt stealing happened in October 2018 and not in March 2019.

In his submissions, counsel for the respondent conceded that applicant was not served with the investigation report and argued that the reason for not serving the said report to the applicant was that the report involved several persons. He further conceded that the law does not provide that the investigation report involving other persons or department cannot be availed to the employee. Mr. Mushi was quick to submit that termination of the applicant was not only based on the investigation report but also on evidence of DW2.

Counsel for the respondent submitted that, exhibit D11 shows that applicant was afforded right to raise mitigation. He went on that, the issue of impartiality was neither raised in the disciplinary hearing, in the CMA F1 nor at CMA during hearing, hence cannot be raised at this stage.

Responding to the prayer to nullify CMA proceedings on ground that the award was issued out of 30 days, Mr. Mushi submitted that, the prayer is not correct because applicant has not stated how he was prejudiced by the award to be issued out of time. He added that the arbitrator gave reason for the delay to issue the award.

On failure to call the watchman, Counsel for the respondent submitted that, the watchman was hired and that did not belong to the

respondent. He added that, at the time of hearing, the said watchman was untraceable. On failure to tender CCTV camera, Mr. Mushi submitted that, the witness was not asked whether CCTV camera was functioning or not. He added that, in the investigation report, it was pointed out that CCTV camera should be put in place meaning that it was not functioning.

On the complaint that proceedings were not properly recorded, Mr. Mushi submitted that, there is no proof that what applicant alleges was not recorded, was raised at CMA. On the allegation that applicant was not heard on the 1st count, Counsel for the respondent submitted that, evidence that was adduced covered all counts because the two counts are related. He therefore concluded his submissions praying that the application be dismissed for want of merit.

In rejoinder, counsel for the applicant submitted that termination was based on the investigation report. He submitted further that; the watchman was at the respondent's place of work but respondent willfully failed to call him as a witness. In his submissions, counsel for the applicant submitted that, at CMA, respondent testified first and that applicant tried to call the said watchman as a witness but the watchman refused. When probed by the court, counsel for the applicant conceded that there is no

evidence in the CMA record showing that applicant called the said watchman as his witness and that the latter refused.

I have carefully examined evidence of the parties in the CMA record and considered submissions made by both counsel in this application and find that, the central issue is whether, evidence proved that termination was fair to support the findings of the arbitrator or not.

It was evidence of John Orauya(DW1) that, on 24th July 2019, he was contracted by the respondent to conduct investigation after Heineken has issued a demand note of One Billion Tanzanian Shillings on 13th March 2019 due to loss of her property in the warehouse of the respondent. It was evidence of DW1 that in October 2018, there was attempt of theft of 500 Heineken cases and that applicant loaded 420 cases in the motor vehicle without permission from his supervisor. In his evidence, DW1 testified that, in his investigation, he recorded statements of various witnesses including the applicant and that, those witnesses stated how the alleged misconduct was committed. In fact, DW1 tendered the investigation report as exhibit D1. In the said investigation report, DW1 attached statements of Shaban Khalfan Kimaro, the owner of the company that was contracted to transport goods from the said warehouse by the

respondent, Thabita Mwakuna(DW2) who was supervisor of the applicant, Abson Kabaka Mwaisumo, Yoha Msangia Orina and Baraka Enock, the applicant. I have read those statements and find that only Thabita Mwakuna(DW2) in her statement stated that in 2018 she found applicant loading Heineken cartons in the motor vehicle without her permission and that she stopped him. On the other hand, in his statement that is part of exhibit D1, applicant stated that, on the undisclosed date, he was called by his supervisor, namely; DW2 and that, he was ordered to load Heineken cartons in the motor vehicle. In the said statement, applicant stated that, he did not load the said Heineken cartons in the motor vehicle because, it was later found that there was attempt to steal the said Heineken cartons. He added that, he was called by DW2 to help one Alex Gabo who was loading the said Heineken cartons in the motor vehicle. It is my view that, the only evidence against the applicant in the said investigation report is that of DW2 because, others who recorded their statement were not present during the occurrence of the alleged incidence and in most cases, their statements are hearsay. I should point out that, the statement of Alex Gabo is not part of exhibit D1 and further that, the said Alex Gabo did not testify at CMA.

In her evidence, Thabita Mwakuna(DW2) testified that, in October 2018, she found applicant loading two pullets of Heineken in the Motor vehicle without her permission. DW2 testified that when she asked applicant as who gave him that permission or order, he replied that it was a representative of Shebby transporter. She testified further that, she reported to one Imran Dinan over the phone because the latter was not at the scene and further that, the said Imran Dinani issued an order of offloading the said motor vehicle. In her evidence, DW2 testified further that, after the said report she left the matter to the management.

In his evidence, Baraka Enock(PW1), the applicant maintained that, he was directed by DW2, his supervisor to load the said Heineken pullets in the motor vehicle but later, DW2 stopped him. In his own words, applicant(PW1) is recorded stating:-

> *"…Nilipigiwa simu na incharge wangu kuwa kuna gari limepakia mzigo nusu niende nikapakie. Baadaye supervisor Thabita Mwakuna(DW2) aliniambia nirudishe mzigo ndani kwani gari lilipakiwa kimakosa…"*

Evidence that applicant was ordered by DW2 is also corroborated by applicant's response to the charge (exhibit D7) dated 12th December 2019 that was tendered by the respondent.

I have painstakingly examined evidence adduced on behalf of the respondent including that of DW2 and considered circumstances of this application, namely, that the alleged misconduct occurred in October 2018. I am not convinced with the story that DW2 who was supervisor of the applicant knew the whole issue in October 2018 but no action was taken by the respondent until when respondent received a demand note of One Billion Tanzanian shilling from Heineken. It is my view that, if at all DW2 witnessed applicant committing the alleged misconduct in October 2018, what prevented both DW2 and the respondent to take action against the applicant at that time. In other words, there is no reason disclosed as to why respondent waited until Heineken raised a demand note and thereafter engage DW1 to conduct investigation. In my view, the evidence of DW2 that applicant committed the alleged misconduct in October 2018 as reflected in her statement she recorded on 10th September 2019, almost after one year, that is part of the investigation report(exhibit D1), leaves much to be desired. The delay by DW2 to report the alleged misconduct, if at all it happened, affected her reliability and credibility. In addition to that,

DW2 had interest to serve because she was the supervisor of the applicant in the warehouse where it was alleged that Heineken worth One Billion Tanzanian shillings was stolen. I am of that view because, applicant stated in his statement that is part of the investigation report(exhibit D1) that, he was directed by DW2 to assist Alex Gabo to load the said cartons of Heineken in the Motor vehicle but later, the said DW2 stopped him allegedly that there were mistakes.

It was submitted by counsel for the respondent that, respondent became aware on 13th March 2019 that there was theft. With due respect to counsel for the respondent, that submission is not supported by evidence of DW2 who testified that she found applicant committing the alleged misconduct in October 2018. In my view, evidence of DW2 is imaginary and not realistic. While DW2 testified that she found applicant committing the alleged misconduct, Edmund Mulokozi (DW3) testified that respondent did not charge applicant with the alleged misconduct in 2018 because respondent was not aware. According to DW3, respondent became aware that applicant committed the alleged misconduct after investigation that was conducted by DW1. Therefore, evidence of DW2 cannot be credible because it has been contradicted by evidence of DW3.

See the case of ***Nyakuboga Boniface vs Republic*** (Criminal Appeal 434 of 2016) [2019] TZCA 461. I therefore, agree with counsel for the applicant that there was no valid reason for termination of employment of the applicant.

It is my view that, submission by counsel for the respondent that termination of the applicant was not only based on the investigation report cannot be valid especially considering contradictory evidence of DW2 and D3 where the former, testified that she witnessed the incidence, but the latter, testified that respondent became aware only after the investigation report. In fact, while under re-examination, DW3 admitted that it is the investigation report(exhibit D1) that lead to termination of employment of the applicant. From what I have discussed hereinabove, I hold that respondent had no valid reason for termination of employment of the applicant. In short, termination was substantively unfair.

On fairness of procedure, it was submitted by counsel for the applicant that applicant was not served with the investigation report. In fact, counsel for the respondent, correctly in my view, conceded that applicant was not served with investigation report. In their evidence, while under cross examination, both DW1 and DW3 admitted that they did not

serve applicant with the investigation report (exhibit D1). Since applicant was not served with the investigation report that was the base of termination of his employment, then, applicant was not properly afforded a right to prepare his defence. Failure to serve the applicant with the investigation report, amounted to unfair termination procedurally as it was held by the Court of Appeal in the case of ***Kiboberry Limited vs John Van Der Voort*** (Civil Appeal 248 of 2021) [2022] TZCA 620. I therefore, hold that termination was unfair procedurally.

Having held that termination of the applicant was unfair both substantively and procedurally, then, the issue is what is the reliefs he is entitled to.

In the CMA F1, applicant prayed to be reinstated without loss of remuneration. Evidence shows that employment of the applicant was terminated with effect from 31st January 2020 and that, his monthly salary was TZS 1,268,000/=. I therefore order that, applicant be reinstated and be paid TZS 49,452,000/= being 39 months' salary compensation from the date of termination to the date of this judgment amounting. If respondent is unwilling to reinstate the applicant, then, in addition to the above TZS 49,452,000/= being 39 months' salary compensation, she shall pay the

applicant TZS 15,216,000/= being 12 months' compensation in terms of section 40(3) of the Employment and Labour Relations Act[Cap. 366 R.E.2019]. In short, if respondent is unwilling to reinstate the applicant, then, she shall pay a total of TZS 64,668,000/=.

Dated at Dar es Salaam on this 28th April 2023.

B. E. K. Mganga
JUDGE

Judgment delivered on this 28th April 2023 in chambers in the presence of Baraka Enock, the Applicant and Arnold Luoga, Advocate for the Respondent.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) (Labour Division) DIVISHENI YA MAHAKAMA YA KAZI

B. E. K. Mganga
JUDGE