IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT MWANZA

LABOUR REVISION NO. 63 OF 2022

BETWEEN

MOHAMED SAHABANI CHIGURU..... APPLICANT

AND

SAYONA DRINKING LIMITED..... RESPONDENT

JUDGMENT

Date of last order: 24/02/2023
Date of Judgment: 05/04/2023

M. MNYUKWA, J.

This Judgment is in respect of the application for Revision in Labour Revision filed by the applicant (an employee) against the respondent (an employer) who is aggrieved by the Award of the Commission for Arbitration and Mediation (CMA) delivered on 31st January 2022. The application is made under the enabling provisions of sections 91(1)(a), 91(2)(c), 94(1)(b)(i) of the Employment and Labour Relations Act [Cap 366 RE 2019] (herein to be referred as the Act) and Rule 24(1), 24(2)(a)(b)(c)(d)(e) and (f), 24(3)(a)(b)(c)(d) and

28(1)(c)(d) and (e) of the Labour Court Rules, GN No.106 of 2007 (herein to be referred as the GN No. 106 of 2007). The applicant prayed before this Court for the following Orders:

1. *That this Honourable Court be pleased to call for and examine the record and proceedings of Commission for Mediation and Arbitration on Labour Dispute No. CMA/MZ/ILEM/229/2021/107/2021, to satisfy itself as to its legality, propriety, correctness and regularity of the award delivered on 31st January 2022 and to set aside the Award issued by Hon, Msuwakolo, S.*
2. *Upon examining the said record of proceedings, the Honourable Court be pleased to order the applicant to be paid compensation as prayed in the CMA Form 1 in the Commission for Mediation and Arbitration on Labour Dispute No. CMA/MZ/ILEM/229/2021/107/2021 for unfair termination of the applicant's contract of employment*
3. *Any other relief(s) this Honourable Court may deem fit and just to grant*

In his affidavit, the applicant raised six legal issues for the consideration and determination by this Court, The issues are;

i. *Whether it was proper for the Hon. Arbitrator to admit that the cause of the accident was due to failure of the brake system as per the exhibit tendered and to admit the respondent's evidence that there was a*

loss of 500 cartons of different drinks while its specification was not stated.

ii. *Whether it was proper for the arbitrator to rule out that the applicant was fairly terminated for the loss of 500 cartons of drink while he was only a driver and not the seller*

iii. *Whether it was proper for the arbitrator to rule out that the applicant was fairly terminated for the loss of 500 cartons while it was not known how many cartons were loaded to the applicant's motor vehicle and how many were saved after the accident.*

iv. *Whether it was proper for the Commission to dismiss the entire applicant's claim without considering that the accident might be a cause of loss of carton if they were at all there.*

v. *Whether it was proper for the commission to admit and to consider the exhibit tendered by the respondent while the same was forged applicant name and signature.*

vi. *Whether it was proper for the Commission to dismiss the applicant's claim without considering that some of the cartons were given to the citizens who came to the scene where the accident happened.*

The present application is supported by the affidavit sworn in by the applicant. The respondent challenged the application through the counter affidavit of Paul Mmasi, the Principal Officer of the respondent.

When eventually, the Revision was coming for hearing, considering the prayer and by the leave of the court, the hearing was done by way of written submissions.

In order to appreciate the context in which the labour dispute arose and later this Revision, I find it apposite to briefly explain the material facts of the matter as gleaned from the available court record. It goes thus: the applicant was employed on a yearly contract basis whereby his contract was renewed effective from 1st June 2021 to 30th May 2022 as evidenced on exhibit AB-1. That, in the middle of the contract, almost after two months, sometime on 13th August 2021, the applicant was served with a letter terminating his employment contract with effect from 13th August 2021, on the reason of gross misconduct due to loss of 500 cartons and second-time car accident due to laziness.

The applicant was aggrieved by the action of the respondent to terminate his employment contract and filed a labour dispute at the CMA. In his CMA Form No 1, the applicant prayed to be paid 10 months' salary as a remained amount for breach of contract, food expenses allowance, and one month's salary in lieu of notice and leave.

In determining the dispute brought before it, the CMA dismiss the entire claim on the reason that, the applicant's misconduct on the loss of

500 cartons of drinks was proved. Thus, the arbitrator was of the view that, the termination of the applicant's contract of employment was fair in terms of reason and procedures.

Dissatisfied with the Award of the CMA, the applicant lodged the present Revision and advanced his grounds as reproduced above in this Application.

In arguing the Revision, both parties enjoyed representation. The applicant was represented by Mr. Yuda Kavugushi, learned counsel while the respondent was represented by Mr. Andrew Luhigo, learned counsel too.

The counsel of the applicant argued that, it was the duty of the respondent to prove that there was a valid and justifiable reason to terminate the applicant's employment and that the procedures were followed in terminating the employment. He supported his argument by referring to Rule 12(1)(a)(b)(2) and (3) of the Code of Good Practice, GN No. 42/2007 which provides the circumstances for the Arbitrator or Judge to satisfy that the termination was due to gross misconduct.

He went on that, CMA formed the view that, the accident was not caused by the applicant's negligence, but rather the mechanical defects on the truck as was evidenced in Exhibit AB-3, AB-4 and AB-5.

Therefore, the applicant's negligence was not proved. He added that, when DW1 testified before the CMA, he tried to justify that the applicant is a person of bad behavior and a person who is undisciplined, but this was not proved before the CMA. He was of the view that, the respondent failed to prove that before this accident the applicant got another accident as he failed to bring police forms No. 90,100 ad 115 to show that the accident was caused by the driver's negligence instead he brought the warning letter which is doubtful.

He added that, even if it was proved that the applicant fought with his fellow staff and got accident before this one which resulted him being warned, still the respondent was not entitled to terminate the applicant's employment by considering the previous conduct because the applicant was already punished for those offences. He went on that, the respondent punished the applicant twice for the previous misconduct while the applicant's termination of employment was not supposed to be related to his previous misconduct.

The counsel for the applicant submitted that, on Exhibit SD-5, the applicant's employment was terminated because of the frequent accident and loss of 500 cartons of drinks while these offences were not proved on the balance of probability as DWI failed to bring the stock list

document to show the quantity of the drinks that were loaded and saved by the respondent after the accident. He went on to submit that, drinks are among the goods which can be easily perished as they are perishable goods and that can be easily taken when an accident occurred. He added that, since the respondent's officer, one Deepack gave out two cartoons of drinks, the respondent was duty-bound to state how many cartoons remained thereafter.

He retires his submission by stating that, since the offence of theft was not proved in the police, it is obvious that the respondent failed to prove the loss of 500 cartons of drinks as alleged by the respondent. He, therefore, prays the CMA Awards to be quashed and set aside, and the claim prayed in the CMA Form No 1 to be granted.

Responding, the counsel for the respondent attacked the applicant's counsel submission by averring that, in his submissions, the learned counsel for the applicant raised new issues that were not raised in the applicant's affidavit and therefore takes the respondent by surprise. He gave an example of the new legal issues raised during the submission to be the assertion that the applicant's previous misconduct that was not proved but used to convict the applicant on guilty of misconduct;

That, the respondent did not prove which Rules of the respondent's company were breached by the applicant which resulted in to his termination of employment contract and that the applicant was not found guilty of the offence of stealing 500 cartons of drinks. He, therefore, argued that, the raising of new issues not only takes the respondent by surprise but also denied him the right to be heard because the law requires parties to submit on the legal issues raised because parties are bound by their pleadings.

The counsel for the respondent averred that, although the applicant raised new issues, he will still submit on it. On the issue of the applicant being terminated on the previous misconduct, he was of the view that, the above argument lacks merit because the Arbitrator did not consider the applicant's previous misconduct to rule out that the respondent had a valid reason to terminate the applicant's employment. On the issue of breaching the respondent's laws, the counsel was of the view that, loss of the respondent's property is one of the disciplinary offences as stated under Rule 12(3)(d) of Employment and Labour Relations (Code of Good Practice) GN No. 42 of 2007. On the issue of the applicant not to be convicted for the offence of stealing in the police, he was of the opinion that the same lacks merit because the police is

not the justice machinery which determines the guilty of the accused and also criminal proceedings is not a basis of declaring a person a winner in the civil case which originates from the criminal case. He referred to the case of **Charles Christopher Humphrey Richard v Kinondoni Municipal Council,** Civil Appeal No 25 of 2016.

When submitting to the legal issues raised in the applicant's affidavit, the counsel for the respondent stated that, the argument that the respondent failed to prove the loss of 500 cartons of work lacks merit because in the CMA Award, the Arbitrator considered the exhibits tendered by the respondent including the Minutes of the Disciplinary hearing.

He went further by stating that, after the CMA formed the view that the accident was not caused by driver negligence, it went further to find the applicant guilty of misconduct for the loss of 500 cartons of drinks which is one of the offences among the three-offences charged to the applicant and proved before the disciplinary hearing. He, therefore, concludes that, the CMA correctly held that the respondent had a valid reason to terminate the applicant's employment.

On the issue that the respondent tendered a forged document, he submitted that, the CMA Award clearly states as to why it considered the exhibit tendered after satisfying that the same was not forged.

In rejoinder, the applicant mainly reiterates what he had submitted in chief.

I have gone through the available record both from the CMA and this Court and considered the submissions of both parties with eyes of caution. The main issues for consideration and determination are: -

(i) Whether there was a valid reason for the termination of the applicant's contract of employment

(ii) Whether the fair procedure was followed in terminating the applicant's employment and

(iii) What relief(s) if any, are the parties entitled to.

Ahead of determining the merits of Revision, I enjoined to state on the issue of the forged documents tendered by the respondent and considered by the CMA to find the applicant guilty of misconduct whereby at the end, CMA ruled out that the respondent had a valid reason to terminate the applicant's employment.

It goes without say that, the law places a burden of proof upon a person who derives a court to believe his assertion. That the one who alleges must prove his allegation. The allegation that the document are forged must be strictly proved as it was stated in the case of **Ratilal Gordanbahi Patel v Lalji Makanji** (1957) EA 314 that:

> *"Allegation of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt. Something more than a mere balance of probabilities is required."*

The applicant alleged that the respondent forged the exhibit tendered because his name was different and the signature is not his. As rightly observed by the arbitrator that the objection raised was not merited because even some of the document that was submitted by the applicant has two names Mohamed S. Shaban and since the applicant was the one who alleged that his signature was forged, the law under section 110 (1) of the Evidence Act, Cap 6 R.E 2019 places a legal and evidential burden of proof upon a person who alleges and who desires a court to give judgment on his favour. Now, the failure of the applicant to prove the same is doubtful if what he alleges was nothing but the truth. Therefore, this Court will consider all the exhibits tendered before the

CMA, being the valid exhibits to be considered in determining the Revision.

Again, I feel compelled to state that, it is a settled position of the law that parties are bound by their pleadings. See the case of **Barclays Bank (T) Ltd v Jacob Muro**, Civil Appeal No. 357 of 2019.

Thus, if there is a new issue which any party wished to raise, the same will be argued if the leave of the court is granted. It is also a trite position of the law that submissions are not evidence. In our case at hand, the applicant raised the legal issues as shown on paragraph 12 (a)– (f) of his affidavit. Surprisingly, during the submissions, he raised new issues like it was erroneous for the CMA to consider the previous conduct of the applicant and found him guilty of misconduct in the present case, that the respondent did not prove which company's Rule was breached and that the applicant was not found guilty of the offence of theft in the police.

As it was rightly submitted by the learned counsel of the respondent that parties are bound by their pleadings. Therefore, this Court will not entertain issues that were raised by the party *suo moto* during the submissions.

Turning now to the merit of the Revision Application, it is an established principle of lawthat termination of an employment contract must base on a valid reason and fair procedure as it is provided by the law, otherwise, that termination will be regarded as unfair.

The law under section 37 of the Act provides that:

> *"37(1) It shall be unlawful for an employer to terminate the employment of an employee unfairly.*
> *(2) 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 requirement of the employer*
> *(c) That the employment was terminated in accordance with a fair procedure.*

In our case at hand, the applicant was terminated from his employment because of his conduct. Conduct simply means a behavior. Misconduct is unjustifiable behavior which is not accepted and expected to be done by a worker in the course of doing his work and sometimes even outside of the work depending on the profession. In a workplace, some of the acts may be considered as serious misconduct such as

dishonesty, theft, loss of, damage to or misuse of the employer's property.

In this case, the CMA rule out that the applicant committed misconduct due to the loss of 500 cartons of drinks and therefore on the reason the respondent was justified to terminate his employment contract. On his part, the applicant through his counsel strongly disputed on the above findings on the reason that, if the CMA found that the applicant was not negligent on the accident, it was not proper to rule out that he committed misconduct due to the loss of the alleged 500 cartons because the loss had the direct proportional with the accident as the nature of the products are easy to be taken. He also argued that, the respondent did not prove through the documentary evidence, (stock list document) that 500 cartons were lost after the accident because some of the cartons were saved and 2 other cartons were given to citizens by one Deepack. He went further to state that, the respondent failed to prove how many cartons were loaded in the truck driven by the applicant.

On his part, the respondent counsel submitted that, a loss of 500 cartons of drinks was proved in the disciplinary hearing as deliberated by the CMA in its Award.

From the submission of the parties and the CMA proceedings, it is undisputed that the misconduct which found the applicant guilty is the loss of 500 cartons of drinks. It is also undisputed that one of the accusations in which the applicant was charged with, was a loss of 500 cartons of drink as evidenced in Exhibit SD-3. The records show that, the applicant was entrusted with the cartons of drinks. Parties are also in agreement that, the truck driven by the applicant was involved in the accident. The evidence also revealed that some cartons of drink were lost. I hold that view because in the Minutes of the disciplinary hearing Exhibit SD-4 proves the applicant's admission since he stated that after the accident, citizens invaded the place where the accident occurred and took 500 cartons of drinks. This evidence is corroborated with the evidence of the applicant when he was cross-examined as reflected on page 15 of the CMA proceedings which reads as hereunder as I quote: -

"S. *Wakati unaenda Mbogwe ulikuwa umbeba nini wakati unapata ajali*

J. Nilikuwa nimebeba mzigo wa vinywaji napeleka mauzo

S. Ulifikisha mzigo mauzo

J. Haukufika nilipata ajali

S. Vinywaji vilienda wapi

J. Vinywaji vingine vilichukuliwa na raia niliyobaki nilifaulishwa na supervisor nikarudi kiwandani

S. Kwa uthibitisho gani raia alichukua na uliripoti wapi

J. Niliripoti polisi

S. Wapi polisi imeeleza mzigo uliibiwa na ripoti ya mzigo kuibiwa upo wapi

J. Haipo

In the re-examination, which aimed to rebuild the evidence that was destroyed in the cross-examination, the applicant say nothing about reporting the matter to the police and what happened that he was not given a loss report as the police usually do when someone reports the loss of an item.

Furthermore, the Minutes of the Disciplinary hearing revealed more that the applicant was entrusted with cartons of drinks and to send them to the selling point. In the disciplinary hearing, one of the witnesses who was Dennis stated that, he handed over to the applicant and to the leader 1320 cartons and after the accident, he received 692 cartons and 628 cartons were never returned. On the other hand, Lameck Marco, who was the sale representative stated that, he entrusted the applicant with the duty of selling products and receiving money and that he was communicating with him when he was on the way. He also stated that, the applicant told him that he sold 93 cartons before the accident and that it is the company's practice that if the sales

officer is absent, the driver took the responsibility to sell the product. Ejino Habibu who was the mechanic stated that, he went to the area where the accident occurred and that they offloaded some of the cartons with the help of some of the children and that they were given two cartons of the drinks as an appreciation.

With due respect from the applicant's counsel, the evidence available on records shake his assertion that it is not known how many cartons were loaded in the truck and how many remained. When referring to Exhibit SD-5 that doubt is cleared. It is the respondent's assertion that the applicant is responsible for the loss of 500 cartons of drinks, and it is the evidence of the applicant that, the said cartons were lost because they were taken by the citizens who came in the area where the accident occurred.

Admittedly, it is true that the respondent failed to establish if it is exactly 500 cartons of drinks that were lost because if the cartons issued in the store were 1320, and 692 were returned, and 93 cartons were sold, it means the cartons that were lost was 533 and not 500. However, it is my firm that, that the above differences do not deny the fact that the cartons of drinks were issued and entrusted to the applicants and a

reasonable number of it lost. Whether it was lost before the accident or after the accident, the records are silent.

As correctly argued by the Arbitrator, if the applicant managed to report the accident to the police who gave him a report as shown in Exhibit AB-3, AB-4 and the drawings in AB-5, how come to the same police did not issue the loss report if the cartons were lost after being taken by the citizens as alleged by the applicant. The applicant failed to prove indeed the cartons were lost as nothing was tendered in the court to exhibit the same. Failure to report to the police and to prove that some of the cartons were lost in the accident, this Court draws an inference that, he committed one of the serious offences to his employer on the loss of property belonged to the respondent. It is without doubt that, the applicant committed misconduct as it is provided for under Rule 12(1)(a) and (b)(iii) of the Employment and Labour Relation (Code of Good Practice) GN. No. 42 of 2007. The Rules provides that: -

12.-(1) Any employer, arbitrator or judge who is required to decide as to termination for misconduct is unfair shall consider-

(a) whether or not the employee contravened a rule or standard regulating conduct relating to employment;

Additionally, Rule 12 (I) b (iii) provides that:-

If the rule or standard was contravened, whether or not the employee was aware of it, or could reasonably be expected to have been aware of it;

To put it clear, to my understanding, the rule or standard regulating conduct of a driver is that the driver carrying the stock in his vehicle is held liable for that stock. If the stock is lost, obvious the driver will be liable. To mitigate the loss, the driver is expected to report it to the police and then when reporting the loss to his employer, his explanation has to be supported by the loss report.

As I have earlier on indicated, in his profession as a driver, it was expected the loss of the cartons of drinks to be reported as the accident was reported. Therefore, I agree with the arbitrator that the respondent was justified to terminate the applicant's employment on the loss of cartons of drinks, and thus he had a valid reason to do so.

On the second issue as to whether the procedure for termination was followed, the parties did not submit much on the same though briefly the applicant's counsel touched this issue in his submissions and in paragraph 11 of the applicant's affidavit, he averred that, CMA was satisfied that, there was a valid reason and the procedures were followed to terminate the applicant's employment.

Upon being moved by the said submissions, paragraph II and the prayer by the applicant to set aside the CMA Award as well as section 37(2)(c) of the Act, I will determine this issue. It is settled position of the law that, the termination of employment is unfair if the employer fails to prove that, the termination of the contract of an employee is based on a fair procedure, I also feel compelled to determine if the procedure was followed before terminating the applicant's employment because the valid reason of termination is one that goes perpendicular with the fair procedure before one is terminated.

Additionally, Rule 8(1)(c) and (d) of the Employment and Labour Relation (Code of Good Practice) GN. No. 42 of 2007 provides clearly the procedures to be followed before one is terminated from the contract of employment. The Rule provides that;

> 8.-*1. An employer may terminate the employment of an employee if he*
>
> *(c) follows a fair procedure before terminating the contract; and*
>
> *(d) has a fair reason to do so as defined in section 37(2) of the Act.*

What constitutes a fair procedure of termination is governed by Rule 13 of the Employment and Labour Relation (Code of Good Practice)

GN. No. 42 of 2007. The Rule prescribed the foremost procedure is to conduct an investigation to ascertain whether there was a ground for a hearing to be held. Rules 13 provides that;

(1) The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held.

(2) Where a hearing is to be held; the employer shall notify the employee of the allegations using a form and language that the employees can reasonably understand.

(3) The employee shall be entitled to a reasonable time to prepare for the hearing and to be assisted at the hearing by a trade union representative or fellow employee, what constitute a reasonable time shall depend on the circumstances and complexity of the case. But it shall not be less than 48 hours

(4) The hearing shall be held and finalized within a reasonable time and chaired by a sufficiently senior management representative who shall not have been involved in the circumstances giving rise to the case

(5) Evidence in support of the allegation against the employee shall be presented at the hearing, the employee shall be given a proper opportunity at the hearing to respond to the allegations, question any witness called by the employer and to call witness if necessary

(6) Where an employee unreasonably refuses to attend the hearing the employer may proceed with the hearing in the absence of the employee.

(7) Where the hearing results in the employee been found guilty of the allegation under consideration, employee shall be given the opportunity to put forward mitigating factors before a decision is made on the sanction to be imposed.

(8) After the hearing the employer shall communicate the decision taken and preferably furnish the employee with written notification of the decision together with brief reasons.

(9) A trade union official shall be entitled to represent a trade union representative or an employee who is an office-bearer or official of a registered trade union, at a hearing

(10) Where employment is terminated the employee shall be given the reasons for termination and reminded of any rights to refer a dispute concerning the fairness of the termination under a collective agreement or to the Commission for Mediation and arbitration under the Act.

(11) In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with them. An employer would not have to convene a hearing if action is taken with the consent of the employee concerned.

(12) Employer shall keep records for each employee specifying the nature of any disciplinary transgressions. The action taken by the employer and the reason for actions.

(13) In case of collective misconduct. It is not unfair to hold a collective hearing.

After a thorough perusal of the available records, I didn't see if the investigation was carried out before resorting to conduct a disciplinary hearing to the applicant. The Court of Appeal in the case of **Paschal Bandiho v Arusha Urban Water Supply & Sewarage Authority (AUWASA),** Civil Appeal no 4 of 2020 quoted with approval the case of **Severo Mutegeki and Another v Mamlaka ya Maji Safi na Usafi wa Mazingira Dodoma (DUWASA)**, Civil Appeal No 343 of 2019 *where it was stated that:*

> *"In terms of sub-rule (1) what entails an investigation to ascertain whether there are grounds of the hearing includes as well, exhausting the prescribed internal measures in the Employment Institution regulating the operational; aspects which are binding on both the employees and employer."*

(See also the case of **Kiboberry Limited v John Van Der Voort,** Civil Appeal No 248 of 2021.)

As I have earlier on noted, the records show that, the applicant was called in the disciplinary hearing and the disciplinary hearing was conducted and the applicant attended. But, what triggers the calling of

disciplinary hearing the records are silent. As the cited Rule requires the employer to conduct an investigation to ascertain whether there are grounds for a hearing to be held, the omission to have that report in the first place is a serious irregularity because that report was required to be shared to the applicant. For that, reason, I find that the applicant was unfairly terminated in terms of procedures.

Again, as the proceedings of the disciplinary hearing was not presented, it is not certain whether the applicant was given an opportunity to question the witnesses as it is provided under Rule 13(5) of the Employment and Labour Relation (Code of Good Practice) GN No. 42 of 2007. This is another aspect where the procedure might be contravened.

As to what relief the applicant is entitled to, since the applicant was fairly terminated in terms of a valid reason and unfairly terminated in terms of procedure, the applicant cannot be paid the full amount of his unexpired term of contract because to my view he committed serious misconduct as I explained above. Therefore, I use my discretionary power to order the respondent to be paid five (5) months' salary. This Court will not order the payments of one month's salary in lieu of notice because he was already paid. Likewise, the applicant is not entitled to

any allowances because the allowances are paid when an employee is on duty station.

Under the circumstances, I hereby revise the CMA Award by awarding the applicant five (5) months' salary as he was unfairly terminated in terms of procedure.

Since this is a labour matter, I make no order as to costs. It is so ordered. It is s ordered.

M. MNYUKWA

JUDGE

05/04/2023

Right of appeal explained.

M. MNYUKWA

JUDGE

05/04/2023

Court: Judgement delivered in absence of parties.

M. MNYUKWA

JUDGE

05/04/2023