IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MWANZA

AT MWANZA

LABOUR REVISION NO. 52 OF 2022

(Arising from the Labour Dispute No. CMA/MZA/ILEM/57/2021/39/2021 by Hon. D. Wandiba, Arbitrator dated 28th of February, 2022.)

SICPA TANZANIA LIMITED ..... APPLICANT

VERSUS

PAUL JUMA IHOYELO..... RESPONDENT

JUDGMENT

4th July & 18th August, 2023.

ITEMBA, J.

On the 8th of March 2019, the respondent herein was employed by the applicant as a field service technician until 4th of April 2021 when his employment was terminated for gross misconduct. It was alleged that he stole 14 bottles filled with Balimi beer, the property of Tanzania Breweries Limited, Mwanza plant. That, on the day of the incident, the respondent went to his workplace although he was not on duty. He stayed for few hours repairing some machines. When he was living the premises with his car, the guard at the gate named Erick Damian Malulu (SU3) searched him and found 14 bottles of beer in the respondent's bag which was in his car.

The respondent, believing that the termination was unfair, he referred the dispute to the Commission for Mediation and Arbitration (CMA) where a decision was issued in his favour. The CMA held that the respondent's termination was unfair and he was awarded a twelve months salary compensation.

The applicant is aggrieved and has filed this revision application armed with five grounds as follows.

i. *That, the Honourable Arbitrator erred in law and fact by placing the balance of proof to that of beyond reasonable doubt (Criminal Cases) rather than requiring the Applicant to prove based on the balance of probability (Labour Complainants/Civil Cases).*

ii. *That, the Honourable Arbitrator erred in law and fact in failing to analyze and appraise the evidence given by the Applicant and thereby reached an erroneous conclusion that the Respondent's termination was unfair.*

iii. *That, the Honourable Arbitrator erred in law and fact by failing to address the issues that were presented during the hearing of the complaint.*

iv. *That, the Honourable Arbitrator erred in law and fact by failure to substantiate the requirement for having mitigation as a requirement during the hearing at Disciplinary hearing.*

v. *That, the Arbitrator erred in law and fact in deciding that the reasons for termination were valid but not fair.*

At the hearing, both parties had the services of legal counsels, Mr. William Muyumbu and Joseph Kinango for the applicant and respondent respectively. Arguing for the application, Mr. William Muyumbu, learned counsel, first informed the court that he will drop the 3rd and 5th grounds. In respect of the first ground, he submitted that, at the hearing before CMA, the standard of proof was supposed to be on a balance of probability and not beyond reasonable doubt and that, it was the duty of the employer to prove that termination was fair and the procedure for termination was followed. That, the employer had to comply with Rule 12(1) of the Employment and Labour Relations Act (ELRA GN 42/2007. He referred to page 12 of the typed proceedings complaining that, instead of the CMA looking for valid reasons for termination, it went further and look for criminal liability. He also cited the case of **Dew drops Co. Ltd v Ibrahim Simwanze** Civil Appeal No. 244/2020 Court of Appeal of Tanzania at

Mbeya page 7 which decided *inter alia* that, the court need to look for valid and fair reasons and procedural compliance and not criminal liability. The learned counsel agreed that before termination of the employment, there must be compliance with the fair procedure under Regulation 13. However, he cited the case of **Mantra Tanzania Limited v Daniel Kosoka** High Court Labour Division (DMS) Revision Application No. 267 of 2019, on pages 7 and 8 held that procedures for termination shouldn't be in checklist fashion and therefore, it was not necessary to follow all the details as long as the respondent was given a right to be heard.

In the 2nd ground, he argued that, the arbitrator did not look at the evidence collectively but he relied on evidence by **SU4** and disregarded the rest of the evidence by other witnesses. That, although the security officer did not testify in the Disciplinary hearing, SU1 testified according to the minutes (DW10) and that SU4 was an investigation officer and had a chance to question him on the alleged offence which he committed. Generally, the respondent agreed that the alleged bottles were found in his car but they were planted.

He stated that in respect of the investigation report, it was given to the respondent through emails, produced as DW7 and DW8. He added that, in terms of the decision in **Ngorongoro Conservation Area Authority v Daniel Ole Moti** High Court Labour Division (Arusha) Revision Application No.116 of 2018 even though the report was received, it is not a requirement if the rest of the evidence is satisfactory in proving the case.

As regards to the contradiction of the plate numbers of the respondent's car, he stated that, regardless of the contradictions there is no dispute that the bottles of beer were found in the respondent's car. That, although the respondent claim to have left the car at the office overnight there is no evidence where respondent denies to have entered the office with a bag.

On the denial of the right to mitigation as claimed by the respondent, he stated that, **SU6** testified that the respondent was given an opportunity to say something and that was enough for showing that there was a room for mitigation even in the absence of the word 'mitigation'. He finalized by stating that the respondent was given a right to be heard, a

right to representation and to defend himself before termination. That, that there were fair reasons for termination and procedures were adhered to.

In reply, Mr. Kinango counsel for the respondent submitted that he will group his reply in two, substantive and procedural fairness. He started by explaining that the basis of termination was on investigation report by DW4. This report was based on CCTV footage but the footage itself was never produced before the CMA and even before the High Court. The witness who claims to arrest the respondent with the bottle of beer was the key witness but he was never summoned to a Disciplinary meeting and no reason in assigned for such omission and even the other guards were never summoned.

He argued further that, when the respondent was issued with a letter to defend himself, he was clear that he had a dispute with a guard named Erick Daniel Malula and the said guard warned him '*atamfanyia kitu kibaya'* meaning he will do something bad to him. That, under the circumstances, there is a possibility that the bears were planted and **Erick D. Malulu** as a key witness, was to be called to clarify the said allegation.

In respect of the standard of proof relied by CMA, he argued that the counsel for the applicant chose to rely only on page 12 of the proceedings but reading through the reasoning in totality, the CMA standard was the balance of probability.

He added that, the bottles of beer were claimed to be stolen at TBL but there was no evidence or report of theft from TBL to clear the doubt that the bottles of beer were planted. Under the circumstances, the offence of stealing was not proved.

In respect of procedural fairness, the counsel for the respondent argued that neither the respondent nor his representative were given an opportunity to question any witness. That, according to DW5 and DW6 and the minutes, the one who decided to terminate the respondents' employment was the disciplinary committee instead of the employer. And that there was a serious network problem which caused the meeting to stop sometimes a situation which makes the hearing unfair.

Having gone through the claims in the CMA form No. 1, records and submission by both parties, the issues to be resolved are:

i. *Whether there was a valid reason for terminating the respondent's employment.*

ii. *Whether the procedures for termination were adhered.*

iii. *What are the reliefs to parties?*

Starting with the first issue, The Employment and Labour Relations Act, No. 6 of 2004 herein the ELRA, defines unfair termination under Section 37(2) as follows:

> *'(1) It shall be unlawful for an employer to terminate the employment of the employee unfairly*
>
> *(2) A termination of employment by an employer is unfair* ***if the employer fails to prove-***
>
> *(a) That the* ***reasons for termination is valid;***
>
> *(b) That the reason is a fair reason-*
>
> *(i) Related to the employee's* ***conduct****,* ***capacity*** *or* ***compatibility****; or*
>
> *(ii) N/A*
>
> *(c) That the employer was terminated according to* ***a fair procedure****.'* Emphasis supplied.
>
> *(3) N/A*
>
> *(4) In deciding whether a termination by an employer is fair, an employer, arbitrator or Labour Court shall take into*

account any Code of Good Practice published under section 99.

(5) No disciplinary action in form of penalty, termination or dismissal shall lie upon an employee who has been charged with a criminal offence which is substantially the same until final determination by the Court and any appeal thereto.

Reasoning from these provisions, first, it is the duty of the employer to prove that termination was lawful.

Looking at the reasons for the decision by CMA on page 12 of the award, the arbitrator states that the respondent's offence was clear that he was charged with theft. On page 11 of the award, the CMA concluded that there was enough evidence to show that the respondent has stolen the bottles of beer which is misconduct and hence violated Regulations 11, 12 and 13 of GN 42/2007. This means there were valid reasons for termination. I agree with the arbitrator considering the evidence at hand. The first issue is answered in affirmative.

Regarding the second issue, the CMA arbitrator doubted if Regulation 13(5) was complied with. If I can paraphrase her five points of reasoning featured on pages 12, 13 and 14 of the proceedings, she expounded the

following: - **One** the evidence against the respondent was not brought at the hearing and the respondent was not given an opportunity to question witnesses. That, the disciplinary meeting relied on the report by Dunia Kema (SU4) which was hearsay instead of relying on eyewitnesses. **Two,** that, the said SU4 watched the CCTV footage in the absence of the respondent. **Three,** there is a contradiction on the plate number of the car used by the respondent. **Four,** it is not clear if the respondent was given an investigation report and **Five,** the respondent was not given his right of mitigation and if given, he would have understood the value of mitigation and pleaded for a lesser punishment.

I have considered these reasons by CMA vis-a-vis Regulation 13 of GN. 42 OF 2007 and I have the following observation: -

Starting with the first ground, the key evidence which ought to be submitted at the disciplinary meeting was that, the respondent was guilty because he was found leaving the clients' premises with 14 bottles of beer. Apart from the investigation report which CMA terms as hearsay going through the minutes of the disciplinary meeting one Dunia Mwenhawndege produced a statement of Erick Damian Malulu (SU3) who could not attend

the meeting for having a family emergency. SU3 was the arresting officer and an eyewitness for that purpose. The CCTV footage was played. (see 4th page of unnumbered minutes). If that is not enough, the respondent himself does not dispute being found in possession of bottles of beer in his car. He only claims to be framed. Therefore, this non-adherence did not occasion injustice to the respondent because what did he expect the applicant to prove? What was the extra evidence apart from his own admission? I have also noted that there is a confession note written by the respondent which was admitted without any objection at CMA. The CMA has not talked about its value in respect of this case but I think it supports the applicant's case. The allegation that the respondent was beaten and forced to write, is not supported by evidence because as correctly observed by the disciplinary committee, there is a photo of the respondent which shows no signs of him being beaten or intimidated.

In respect of the 2nd and 3rd grounds, the CCTV footage was produced before CMA but was not played for the court to appreciate the contents. In respect of this serious irregularity, the evidence from CCTV footage (exhibit DW3) is expunged from the records and legally, it cannot refer the evidence therein. See also **Robinson Mwanjisi and Three**

Others v. The Republic [2003] T.L.R. 218 and **Evarist Nyamtemba v. R** Criminal Appeal No. 196 of 2020, CAT at Kigoma. Additionally, the discrepancy of the registration number of the respondent's car is minor, considering that, he does not dispute being found in his car with bottlers of beer.

In the 4th ground, that the respondent was not given an investigation report, much as that is not a mandatory requirement under Rule 13, he does not complain anywhere in his defence. This argument appears to come from the bench. The minutes shows that, the charge sheet were read and the respondent understood the charges against him and on the balance of probability, that was an important aspect to make it a fair procedure. And, as correctly argued by the applicant's counsel, the procedure under Rule 13 of GN 42 of 2007 is not meant to be followed in a check list fashion. The employer may dispense with some of the requirement depending on the circumstances. That the important aspect is to ensure that the act to terminate is not reached arbitrarily. This principle was set in a landmark case in **Metal Product Ltd v. Mohamed Mwerangi & 7 others** Revision no. 148/2008, by (Hon. Rweyemamu, J as she then was).

Lastly, on the issue mitigation, I have gone through the Disciplinary meeting proceedings, the minutes show that, the meeting was held on 28 January, 2021 and after the respondent was convicted and given reasons for conviction and the meeting was adjourned up to 1st February for 'sanctioning'. On 1st of February, the respondent was asked if he had anything to add on that decision and he said he wasn't the owner of the car seen in the CCTV footage and he made an admission because he was forced. To me, this is nothing short of mitigation made by the respondent. That, being said, the procedure for termination was fair. The second issue is answered in affirmative.

In the end, the application for revision in allowed. The CMA award is hereby set aside.

This being a labour application, I give no order as to costs.

Right to appeal explained.

DATED at MWANZA this 18th Day of August 2023.

L. J. ITEMBA
JUDGE
18.08.2023