IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE SUB-REGISTRY OF MWANZA

AT MWANZA

LABOUR REVISION NO. 03 OF 2023

(Arising from CMA.102/2022/27/2022)

SOPHIA ABDI NKYA ----------APPLICANT

VERSUS

QUALITY BEVERAGE (T) LTD----------RESPONDENT

JUDGMENT

10th October, & 1st December, 2023.

ITEMBA, J

The applicant herein, **Sofia Abdi Nkya** was employed by the respondent, **Quality Beverage Company**, as a sales person in 2019 in Moshi. She was then transferred to Mwanza on a date not disclosed in the records. On 30/3/2022 her employment was terminated on grounds of misconduct. She referred her dispute to the Commission for Mediation and Arbitration (CMA) stating that the termination was unfair. The CMA awarded the applicant a compensation of one month salary because the applicant had denied herself a right to be heard for not attending the disciplinary meeting and the respondent could not prove that disciplinary meeting took place.

The applicant was aggrieved by the said decision hence this revision application. The grounds for application according to the affidavit, are summarily that, the CMA erred in its decision because, termination of her employment was unfair substantially and procedurally.

When the application was scheduled for hearing, the applicant was represented by Steven Kaswahili while the respondent had the services of Milembe Lameck both learned counsels. Arguing in support of the application, Mr. Kaswahili told the court that they have 8 grounds of application, that the applicant did not attend the Disciplinary meeting and the said nonattendance does not empower the Respondent to terminate the applicant's employment. He cited the case **of KIBOBERRY Ltd v. John Van Der Voort** Civil Appeal No. 248/2021 stating that the respondent should have proceeded with meeting *exparte*. He added that, the charges against the applicant were clearly made in the notice to attend the disciplinary meeting (**exhibit D.3)** but the offence of non-attendance was not part of offences. He complained that the CMA blessed such a mistake, without considering that the applicant was not prepared to that offence.

He argued further that, there was no substantive grounds for terminating the applicant. That, in the letter (Exhibit D3) there were 3 offences namely, poor performance, poor communication skills with employer and poor record keeping however, there was no evidence to support any of the offences. He gave an example that DW1 said they had delivered a consignment of drinks with different values; including different boxes Azuma and Vodka which had a total value of between TZS 72,000,000 and TZS 75,000,000 yet, it is not clear how the said value was reached. He added that, if the respondent claims that the applicant paid to the respondent only TZS 46,346,000/= the difference missing payment remains unknown and therefore the offence was not proved. That, the employer could not bring exhibits to show in which bank account the remaining money was supposed to be deposited. That, the delivery note [exhibit D1] issued by DW1 is not sufficient to prove that the applicant misused his employer's money which would amount to dishonest.

He went further that, as the charges were not proved, the respondent failed to discharge the burden in terms of section 78 (2) (a) of **ELRA** which provides for fair reason. He cited the case of **Nolasco Kalongola v. PROMASIDOR (T) PTY Ltd**, Rev. No. 354/2019.

On procedural irregularity, he argued that investigation was not done as required in Rule 13(1) ELRA Code of Good Practice GN 42/2007. He added that, neither of the respondent's witnesses testified on the investigation and that failure to conduct investigation renders the termination unfair. In this, he relied in **ENZA ZADEN AFRICA Ltd v. Edwin Kasena** Civil Appeal No. 427/2021. He added that there is no evidence of disciplinary meeting itself and DW1 said the meeting was on 29.03.2023 but he could not produce any minutes of the said meeting. That, in terms of **Nolasco Kalongola (supra)** failure to conducting a meeting denies the applicant right to be heard. That, even the CMA acknowledged there were no minutes of the said meeting. He finalized by stating that the CMA ought to have remedied the applicant based on the salary amounting to TZS 800,000/= and not TZS 400,000/=. He cited the case of **Flavio Ndesanjo v. Seregeti Breweries Ltd** Civil App. No. 357/2020 arguing that, as the termination was unfair both procedurally and substantively the compensation should be awarded at a minimum of 12 months' salary in terms of section 40(1)c of ELRA. He added that, the applicant prayed for 36 months' salary and that she did not ignore the

disciplinary meeting but she asked for transportation and her employer did not give her.

In reply, Ms. Milembe started by clarifying that, non-attendance at disciplinary meeting was not the only ground for termination. That, the applicant denied herself the right to be heard and did not care. That, the disciplinary meeting was done and reached the decision of terminating the applicant. That, the cited case of **KIBOBERRY Ltd v John Van Der Voort (supra)**, is distinguished.

On the reasons for termination, she told the court that DW1 and DW2 explained the offences against the applicant but the applicant herself did not mention anything about the offences, that she knew what she did that's why she did not mention anything. She insisted that the grounds for termination were clear in the notice of attending disciplinary meeting and the termination letter.

On procedural fairness, she argued that investigation was done and even the applicant admits to that because DW2 came to Mwanza and the applicant avoided him. That, the aim of Rule 13(1), is for the employee to know what was the offence and she knew. That, the CMA proceedings and award shows that the meeting was done and the applicant did not attend.

Therefore, the procedure was lawful although there might be 'little slip' and the CMA ruled out that procedures are minimum standard of fairness and non-compliance is not fatal. She also cited the case of **Raphael P. Bwire v. TRIACHEM (T) LTD.** Labour Revision No. 11 of 2022 in support of her argument. She supported the decision of CMA in awarding the applicant the compensation of one month salary, stating that the CMA decision was based on the fact that there was no evidence of disciplinary meeting but not on procedural unfairness. She also cited the case of **Felician Mwanza v. World Vision TZ** Civil Appeal No. 213/2019 [2021] TZCA.

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 valid reason for terminating the applicant's employment.*
ii. *Whether the procedures for termination were adhered to.*
iii. *What are the reliefs to parties?*

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 discplinary 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.

Construing from these provisions, first, termination of employment should be lawful in that, there should be valid reasons and fair procedures. Second, it is the duty of the employer to prove that termination was lawful. According to records, reasons for termination were poor performance, poor communication

skills with employer, poor record keeping and failure to attend Disciplinary Hearing on 29/3/2022. See notice of Disciplinary Hearing (**Exhibit D2**) and (Termination letter (**Exhibit D4**). The CMA when concluding that there were valid reasons, it referred to the testimony of DW1 that the applicant was not responding to phone calls and when they sent a person in Mwanza to meet the applicant, she disappeared. At page 3 and 4 of the typed proceedings, the CMA also relied on the grounds listed in the notice to disciplinary meeting to justify the said reasons, which, I find, it was a wrong move. The reasons should come from the conduct of the applicant and not from the notice of Disciplinary Hearing. I am reluctant to rely on the contents of the WhatsApp messages because although the print out of these messages are in the CMA file, proceedings do not show if they were admitted as part of evidence.

However, there is evidence from DW1 that the applicant was not sending him any reports. That, he decided to send one Sagar Reddy, DW2, to verify on what is in the store and the applicant avoided DW2. This evidence is corroborated by DW2 himself that when he came to Mwanza, for about three times, he asked the applicant to show him the warehouse and the customers but the applicant kept on saying 'wait'. The applicant did not have much to cross examine or challenge this testimony and I tend to believe it. Conduct of

the employee is one of the reasons which may justify termination by the employer. This is according to **Rule 9 of The Employment and Labour Relation (Code of Good Practice) Rules,** GN. 42 of 2007. I find that the applicant's conduct was gross insubordination because she was deliberately, not being cooperative to her employer by not giving him reports of sales and even when the employer sent DW2 to the applicant, she rejected to show the location of the warehouse and the details of the customers. Therefore, the first issue is answered in affirmative that, the respondent had valid reasons for termination.

In respect of the second issue, the applicant has complained on several procedural irregularities as explained hereinabove. The CMA was of the view that and I will quote:

> *'Kwa misingi hiyo ni dhahiri kabisa utaratibu wa kumuachisha kazi mlalamikaji ulifuatwa* ***japo haukukamilika katika kufikia ukomo*** *wa ajira ya mlalamikaji ijapokuwa shahidi wa mwajiri ameshindwa kuwasilisha mbele ya Tume Ushahidi wa mwenendo mzima wa kikao cha nidhamu'*

Meaning that, the procedure was incomplete but fair despite the fact that the respondent could not prove that there was any hearing conducted. The respondent claimed that following the applicant rejecting to attend the

disciplinary meeting, they proceed to terminate her. Contrary to what the CMA is stating, there is nowhere DW1 is mentioning that there was a hearing conducted. At page 6 of the typed proceedings DW1 only states:

'I waited for the hearing she disappears (sic) then I terminated her'

There is no witness testifying about conducting disciplinary hearing. If that is not enough, reading through the termination letter **(Exhibit D4)** part of it states that:

'TERMINATION LETTER

Reference is made to the above captioned matter,

That We Quality Beverages (T) Ltd Who are your employer being unsatisfied with your work as a sales girl. Have presented that below named allegation to the committee for disciplinary which ***shall seat*** *to discuss. (sic)*

That the following are ***the allegations that will be discussed*** *at the disciplinary hearing.*

1. *Poor Performance at your work station.' (emphasis supplied)*

The wording of this letter simply implies the termination letter was drafted while the employer was intending to convene the disciplinary hearing. Therefore, the applicant's employment was terminated even before the disciplinary hearing was done.

There was no evidence of the disciplinary meeting being conducted the respondent could not produce even the minutes of the said meeting. Reading Rule 13 of GN 42 of 2007, as a whole disciplinary hearing is an important part of procedure before terminating the employee. That is where the employment is given a right to be heard and defend herself. I agree with the applicant's counsel that Disciplinary Hearing would have *proceed ex parte* according to the ELRA and the cited case of **KIBOBERRY Ltd v John Van Der Voort (supra)**. It is noted that the CMA did not give its position on the status of the procedure by the respondent by mentioning that the procedure was fair but incomplete. The procedure has to be either fair or unfair and nothing in between. There is nothing like '*incomplete but fair*'. Therefore, for not holding any disciplinary meeting, and satisfy themselves on the grounds for termination, the respondent acted unlawfully. That said, the second issue is answered in the negative that the termination procedures were not adhered to.

The last issue is on the parties' reliefs. In her CMA form no. 1, the applicant has prayed for a total of TZS 31,261,538/= which includes '*compensation of thirty-six (36) months salaries, unpaid leave, one month salary in lieu of notice, subsistence allowance from termination to*

repatriation date, repatriation, severance pay, certificate of service and general damages'. As mentioned above, the CMA awarded her a compensation of one month salary. First, there was an issue of what was the applicant's salary, was it TZS 400,000 or TZ 800,000/=? It is noted that, the applicant did not tender any employment contract and the terms of her employment were made orally. In the typed proceedings, DW1 was very clear that the applicant salary was TZS 400,000 and she had an allowance of another TZS 400,000/=. Salary is different from allowance. The applicant herself did not mention the amount of her salary in her testimony. Therefore, I agree with the respondent's counsel that the salary was TZS 400,000/= only. According to section 40(1)(c) of the Employment and Labour Relations Act, when termination is found to be unfair, the remedies are for the employee to be either reinstated, re engaged or paid compensation of not less than 12 months remuneration. I do not think that reinstatement is a proper remedy because the respondent appears to have lost trust with the applicant. Further, if I understood DW2, had already covered the applicant's position. Therefore, compensation is the appropriate remedy. I will also mention, in the event of unfair termination, be it procedurally or substantially, the law does not empower the arbitrator

or Labour Court to issue compensation of less than 12 months. The arbitrator erred in law in awarding a compensation of one-month salary. See also the case of **Tanzania National Parks v Hais Kolo Mndulu**, Labour Div. ARS Rev. 73 of 2015 [LCCD] 1 and **Nolasco Kalongola v PROMASIDO T(PTY) LTD** (Supra). Therefore, I hereby order for the applicant to be compensated for 12 months remuneration at the rate of TZS 400,000/=.

In respect of severance pay, notice and certificate of service, it is undisputed that the applicant has worked with the respondent for at least 2 years. Therefore, severance pay, notice pay and certificate of service are her statutory rights as per section 41(5) and 42 and 44(2) of the **ELRA.** Therefore, the applicant should be paid notice and severance allowance as claimed in their CMA Form No. 1.

There is also no dispute that the applicant was recruited in Arusha, before being transferred to Mwanza. Therefore, she deserves transport allowance equal to at least a bus fare to the bus station nearest to the place of recruitment in terms of section 43(2) of the ELRA.

There is no evidence in re aspect of any other claims made by the applicant and therefore this court cannot proceed to grant the same.

In the final analysis, the applicant should be remedied as follows:

i. Compensation of twelve (12) months salaries at the rate of TZS 400,000/=,

ii. Notice pay and severance allowance.

iii. Transportation allowance equal to at least a bus fare to the bus station nearest to the place of recruitment and

iv. Certificate of service.

In conclusion, the application for Revision is partly allowed and the Commission for Mediation and Arbitration's award is revised to the extent stated. No orders as to costs.

It is ordered.

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L. J. ITEMBA

JUDGE

1.12.2023

Judgement delivered this 1st Day of December 2023, in the presence of Advocate Steven Kaswahili for the applicant also holding brief for Advocate Milembe Lameck for the respondent and Ms. Glady Mnjari, RMA.

L. J. ITEMBA

JUDGE