IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAAM

REVISION NO. 784 OF 2018

BETWEEN

COCACOLA KWANZA LTD .....APPLICANT

VERSUS

ROGERT KINGAZI ..... RESPONDENT

JUDGMENT

Date of Last Order: 05/06/2020
Date of Judgment: 15/07/2020

Z.G. MURUKE, J.

Aggrieved by the award of the Commission for Mediation and Arbitration (CMA) dated 30th June,2017 the applicant **COCACOLA KWANZA LTD** has filed this application under the provisions of Sections 91(1)(a), (2)(b)(c) and 94(1)(b)(i) of the Employment and Labour Relations Act No. 6 of 2004 CAP 366 (RE 2019) and Rules 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d) and 28(1)(c)(d)(e) of the Labour Court Rules, 2007 GN No. 106 of 2007 praying for the following orders:-

(i). This Honourable Court be pleased to revise and set aside the award of the Commission for Mediation and Arbitration dated 30th June, 2017 in *Labour Dispute No. CMA/DSM/R.429/15/740*

(ii). Any other relief this Honourable Court may deem fit, just and equitable to grant.

The application is supported by a sworn affidavit of Ms. Scholastica Augustine, the applicant's Human Resources Manager, the respondent swore a counter affidavit challenging the application. The applicant enjoyed the service of Advocates from Law front Advocates, while the respondent was served by representatives from Tanzania Union of Industrial and Commercial workers (TUICO). Hearing was by way of written submission.

The brief facts of the case are that the respondent was the applicant's employee as a Section Controller Warehouse. On 28th June, 2015 he was terminated on misconducts, namely **one**; major breach of trust and gross dishonest, **two;** gross negligence and **three**; causing loss to the applicant. It was alleged that in unknown period the respondent being the Section Controller, negligently failed to perform his duties and caused a loss of 6262 empty bottles valued sixty two million six hundred and twenty thousand shillings(62,620,000/=). The respondent being disatisfied with the termination, knocked at CMA's door claiming to have been unfairly terminated both substantively and procedurally.

CMA decided on his favour and ordered the applicant to reinstate the respondent. The applicant was dissatisfied with the decision, thus filed present application.

The applicant's counsel submitted on the 1st ground that arbitrator failed to properly analyze the evidence adduced by the applicant's side. The reason for the respondent's termination was stated by DW1 that, the loss was a long time loss, because respondent was a long time employee and head of department, therefore responsible for the loss. And DW4 evidenced that the respondent was filling incorrect stock in the reports and

system so as to hide the actual loss. The arbitrator misdirected himself by holding that the terminated because he was mentioned by co employee.

On the 2nd and 3rd grounds, it was submitted that the arbitrator failed to consider that , what was disputed was not the loss and value of the loss rather it was who was responsible for the loss, when the loss occurred since the respondent was on leave. The respondent in his show cause letter (exhibit CK3) raised the defense that he was in annual leave when the loss occurred and all his report before leave were clean as it did not show any loss. Therefore it was not true as DW4 testified that loss occurred for a long time and the respondent was feeding incorrect data of the stock in order to hide the loss. That the evidence was very clear that, on 16th March, 2015 the applicant conducted an abrupt stock count in order to compare the physical stock and the reports of the respondent's department and ascertain its correctness. The result showed a big difference on the physical stock verification and report. That the respondent being the Section Controller was directly responsible for the loss.

It was further submitted on the 4th and 6th ground that, the arbitrator erred in law and fact by ignoring the DW4's evidence on how the respondent was directly responsible for such loss. That DW4 testified on how the respondent being the Section controller and supervisor was hiding the loss of empty cases. He explained that the respondent was arranging the empty cases by leaving the space in between and how he was recording in the report in order to hide the loss.

On the 5th, 7th, and 8th grounds the applicant's counsel submitted that it was the arbitrator's holding that the applicant failed to show who conducted the investigation, for how long and what were the findings and the investigation report was not tendered before CMA as evidence.

That Rule 13 (1-5) of Employment and Labour Relation (Code of Good Conduct) Rules, GN 42/2007 requires the employer to investigate the offence, but what amounts to investigation is a question of facts and not of law. That is why the law does not provide for how it should be conducted and report to be documented. In this case investigation was counting physical stock and compare it with the report and the respondent's department was involved.

Regarding the 9th ground, it was submitted that the respondent was found guilty of the offence he was charged with as per the charge, the disciplinary hearing minutes and the termination letter. The respondent as the Section Controller clearly knew his duties but he negligently executed the same and cause loss to the applicant. Hence the arbitrator ignored the applicant's evidence and held that termination based on hearsay evidence without justification.

On the 11th ground it was submitted that, the arbitrator erred in law and fact by deciding issues which were neither raised nor disputed before CMA. He failed to determine the dispute which was before the commission basing on the facts and evidence adduced by the parties. He prayed for the court to determine the matter in a manner it considers fit.

In reply to the applicants averment the respondent's counsel prayed to adopt the respondents counter affidavit to form part of his submission.

On the 1st ground it was submitted that, it was not true that the arbitrator held that the reason for termination was that the respondent was a long time employee and he was just mentioned by his co-wokers. The arbitrator's point of determination based on DW1's evidence that investigation was conducted while he was on his annual leave. That in absence of the respondent's reports to show the short falls, the respondents involvement was due to being pointed out by his fellow workers and being a long time employee. That was not sufficient to prove that he committed the said offence referring Section 112 of the Evidence Act Cap 6 RE 2019 and the case of **Abdul Karim Haji v Raymond Nchimbi Alois and Joseph Sita Joseph** [2006] TLR 420 where it was held that he who alleges must prove his allegations.

On the 2nd and 3rd grounds, it was contended that, the respondent never admitted on the loss whatsoever, even exhibit CK3 the respondent denied to know anything regarding the claims. The respondent insisted that he never caused any loss, they only relied on hearsay evidence. There was no report which were tendered during the disciplinary hearing and CMA to prove their allegations.

Regarding the 4th and 6th grounds, the respondent reiterated what has been stated in ground 3. On the 5th, 7th and 8th grounds, it was stated that the applicant's assertion that investigation is a matter of fact and not law is a misconception. The law is very clear that the employer shall conduct investigation to ascertain the facts. And there must be a report of investigation in order to substantiate the allegations, referring Rule 13(1) of GN 42 and the case of **Tanzania Revenue Authority v Elias Joseph Huruma**, Rev. No. 572 of 2016.

On the 9th and 10th grounds it was argued that the respondent was found guilty basing on unproved offences since there was no sufficient evidence to prove their claims. Lastly on the 11th ground the respondent's counsel submitted that the applicant aimed at misleading the court. The arbitrator decided issues according to evidence adduced. The applicant had not valid reason for termination as required under Section 37(2) of GN 42. Also the procedure for termination was not fair on the ground that nothing was advanced to fault the arbitrator's holding on page 9 to 11 of the impugned award. He thus prayed for dismissal of the application.

In rejoinder, the applicant reiterated his submission in chief, and prayed for revision of the award.

Having gone through the rival submissions of the parties, I find this court has to determine the following issues;

i. **Whether the applicant had valid reason for terminating the respondent.**
ii. **Whether the procedure for terminating the respondent were adhered.**
iii. **Reliefs entitled to the parties.**

Staring with the 1st issue for determination. It is a principle of law that termination of employment must be on valid and fair reasons and procedure. For termination to be considered fair, it should be based on valid reasons and fair procedures. There must be substantive and procedural fairness of termination of employment as provided for in **Section 37(2) of the Employment and Labour Relations Act, No. 6 of 2004** which states that:-

"Section 37 (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 requirements of the employer, and
*(c) that the employment was **terminated in accordance with a fair procedure."***
[Emphasis is mine].

In the case of **Tanzania Revenue Authority Vs. Andrew Mapunda**, Labour Rev. No. 104 of 2014, Aboud J. held that:-

"(i) It is the established principle that, for the termination of employment to be considered fair it should be based on valid reason and fair procedure. In other words there must be substantive fairness and procedural fairness of termination of employment, Section 37(2) of the Act.

(iii) I have no doubt that the intention of the legislature is to require employers to terminate employees only basing on valid reasons and not their will or whims."

It is from records that the respondent was terminated due to the misconducts namely gross dishonest ,major breach of trust and causing loss to the applicant as it can be observed in exhibit CK13(termination letter).

The applicant is not certain as to when the said loss has occurred since it has been stated by the applicant that it is a long time loss. It is undisputed that the respondent submitted daily, monthly and annually report in cause of performing his duties. There is no evidence to dispute

the reports submitted by the respondent before he went on his annual leave, considering that all the time the stock counting was also done by accounts department and nothing found in contrary to the same. It could have been different if there was proof that the said loss occurred when the respondent was at the office. Therefore relying on DW4's and other employees testimony that, the respondent was filling incorrect stock in the reports and system so as to hide the actual loss was not sufficient to substantiate the offences against the respondent.

The applicant had the burden of proving the validity of the reason for termination of the respondent as per Section 39 of Employment and Labour Relations Act, Cap 366 RE 2019 which provides that:-

> "In any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair."

It is an elementary principle that he who alleges is the one responsible to prove his allegations. This was insisted in various decisions including the case of **Abdul Karim Haji V. Raymond Nchimbi Alois and Joseph Sita Joseph** [2006] TLR 419. As the burden of proof is expected to be more than on balance of probabilities, the applicant's evidence is insufficient to prove the allegations against the respondent. I thus find no need to fault the arbitrator's finding that the applicant had no valid reason to terminate the respondent.

In regard to the second issue of procedure for termination, Rule 13 of the Code, provides for procedure for termination of an employees. Which amongst others, it requires investigation to be carried out, hearing to be conducted and finalized within a reasonable time and chaired by a

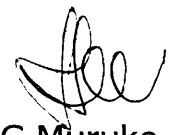
sufficiently senior management representative who shall have been involved in the circumstances giving rise to the case. If the Disciplinary Committee finds the employee guilty, he shall give his mitigation factor, employer may make its decision, reasons thereto and explain the right of appeal to the employee.

It was the arbitrators finding that procedure for termination was procedurally unfair, since investigation was not conducted. The applicant's counsel argued that investigation was done by counting the physical stock and comparing to the respondent's report. I agree with the applicant's counsel that the law is silence on how to conduct investigation in labour issues.

However, the circumstances of the matter at hand, investigation was very vital since it could have answered when did the loss occurred, who was responsible for that loss, why did the accounts department failed to notice the said loss. Even the said physical counting was conducted while the applicant was on leave and there is no proof of that comparison between the physical stock and the respondent's report. It is also my view that the procedures of terminating the respondent were not properly observed. The arbitrator fairly analyzed the evidence of both parties to arrive to the finding that the respondent was unfairly terminated.

Regarding the reliefs of the parties, the respondent prayed for reinstatement. Since it is also the finding of this court that termination was unfair both substantively and procedurally, I find no need to fault the arbitrators order regarding the same.

In view of the above, I hereby dismiss the application for lack of merit.

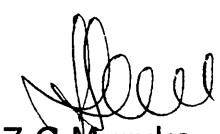


Z.G.Muruke

JUDGE

15/07/2020

Judgment delivered in the presence of Linda Mafuru for the applicant and respondent in person.



Z.G.Muruke

JUDGE

15/07/2020