IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT DAR ES SALAAM

REVISION NO. 829 OF 2019

BETWEEN

CHEMI AND COTEX INDUSTRIES LTD.....APPLICANT

AND

EDIA W. MWAKYOMA.....RESPONDENT

JUDGMENT

Date of Last Order: 30/09/2021

Date of Judgment: 08/10/2021

B. E. K. Mganga, J.

In 2001 the applicant employed the respondent as production assistance. In 2008 respondent was promoted to the position of machine operator. On 4th May 2018 the relationship between the two went sour as a result respondent was terminated from employment. Aggrieved by termination, on 15th May 2018 respondent referred Labour dispute No. CMA/DSM/KIN/R.524/18 on ground that her termination was unfair. On 27th September 2019, Alfred Massay, arbitrator issued an award in favour of the respondent that termination of her employment was unfair both for want of reasons and procedure. Arbitrator awarded respondent to be paid TZs 4,098,000/= as compensation. Applicant was aggrieved by the said award as a result she has filed this revision application.

The notice of application is supported by an affidavit sworn by Damian Victus. In his affidavit, the deponent has three grounds namely:-

1. 1. *That, the Honorable arbitrator erred in law and facts by failure to record and analyse properly evidence which was before him and jumped to a wrong conclusion contrary to evidence adduced by the parties to the dispute.*
2. 2. *The arbitrator erred in law and fact by entertaining the matter which was not proper before him.*
3. 3. *That the award does not reflect the proceedings of the case.*

The application was opposed by the respondent who filed a counter affidavit to that effect.

When the matter was called for hearing, Mr. Damian Victus advocate appeared and argued for and on behalf of the applicant while Joseph Basheka, the personal Representative of the respondent appeared and argued for and on behalf of the respondent.

Mr. Victus, counsel for the applicant abandoned ground number two and argued ground number one and three only. On ground number one, he submitted that arbitrator received CCTV footage as exhibit showing the respondent taking whitedent in a box from one area to the other. That the said box was later on untraceable. Counsel criticized the arbitrator for not considering that evidence. Counsel was of the view that, that evidence sufficiently proved that respondent's acts led to disappearance of the said box. Counsel went on that arbitrator's conclusion that there was no investigation done was not based on evidence and arbitrator based his

decision on absence of investigation report to decide in favour of the respondent. He concluded that, CCTV footage was sufficient to prove the allegations of misconduct of the respondent. On ground number three, Mr. Victus, counsel for applicant submitted that arbitrator did not take into consideration the evidence of Veronica Mbazingwa (DW1) and Mwanahamis Yusuph (DW2) especially what they testified relating to CCTV footage.

On the other hand, Mr. Basheka, the Personal representative of the respondent, on behalf of the respondent, submitted that arbitrator considered evidence of the parties. Mr. Basheka submitted that, Veronica Mbazibwa (DW1) admitted under cross examination that investigation was done but failed to tender the report thereof contrary to the requirement of Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007. When he was asked by the court to cite the Rule requiring an investigation report to be tendered, he readily conceded that there is no such a Rule. He however relied on the decision of this court in the case of ***Ezekia Samwel Ndehaki v. TanzaniaOne Mining Ltd, Revision No. 59 of 2013*** (unreported). He further cited another decision of this court in the case of ***Knight Support (T) Limited v. Chrisprinus S. Kaloli, Revision No. 35 of 2009*** (unreported) that it is

mandatory for employers to comply with the provisions of Rule 13 of GN. No. 42 of 2007 as the said Rule uses the word shall.

On the issue of CCTV footage, Mr. Basheka submitted that it was not tendered. Therefore, arbitrator cannot be faulted. He went on that the allegation that respondent was seen in the CCTV footage carrying a box to unknown place is not correct. He submitted that respondent shifted the whitedent rejects in a box from production to store. He went on that there is no regulation tendered by the applicant prescribing the procedure and persons responsible in moving reject whitedent from one place to the other. He argued further that, no policy was tendered prohibiting the respondent from taking the box from production area to store.

In rejoinder, Mr. Victus, counsel for the applicant submitted that it was not part of the respondent's duties to shift reject whitedent to the store according to her job description. On failure to tender investigation report, counsel for applicant submitted that the law only requires investigation be done.

I have carefully examined the complaints by the applicant, evidence of the parties, the award itself and their submissions and find that the central

issue all along has been whether, there were valid reasons for termination and whether procedure for termination was complied with.

Reasons for termination of employment of respondent was given by Veronica Mbazibwa (DW1) when she testified that on 21st April 2018 respondent was at work. That, at 3:00 hours, Innocent Kifumu and Gerald Mbauka were arrested in possession of 1000 pieces of whitedent. On interrogation, they stated that they colluded with the respondent. DW1 went on that CCTV camera showed that at 3:00 hours, the respondent, while wearing a black apron, was seen ***carrying a box to storage area which is not her duty***. That, CCTV camera show that applicant was talking with Innocent who was caught carrying whitedent inside his clothes. DW1 went on that it is not a procedure to carry whitedents at night. In corroborating that evidence, Mwanahamisi Yusuph (DW2) testified that, on the fateful date, she was at production area with the respondent who was a machine operator. She testified that respondent was not entrusted to carry white dent rejects from production to store.

On her side, respondent testified that she carried whitedent rejects in box to store and that she was shown CCTV footage that was showing her carrying the box to store and that Innocent was caught with stolen

whitedents. While on cross examination, respondent maintained that it is her duty to carry reject whitedents to store.

I should point out from the outset that the alleged CCTV footage was not tendered in evidence. The respondent does not dispute to have been shown the said CCTV footage. All witnesses testified that respondent took the box of reject whitedent to store. It is claimed that it was not the duty of the respondent to carry the reject whitedent to store as testified by both DW1 and DW2. But respondent (PW1), testified under cross examination that it was her duty. I agree with Mr. Basheka, the personal representative of the respondent, in his argument that a policy or regulation prohibiting the respondent from carrying the reject whitedent from production to store was supposed to be tendered. But it was no. Mr. Victus, counsel for the applicant argued that it was out of job description of the respondent to carry the reject whitedent from production to store. With due respect to him, the alleged job description was also not tendered hence she cannot be faulted for that.

From the submission of the parties and their evidence, termination of the respondent is based on misconduct. That being the case, in terms of Rule 12(1) of the Employment and Labour Relations (Code of Good

practice) Rules, 2007, G.N. No. 42 of 2007 I am supposed to consider whether the respondent contravened a rule or standard regulating conduct relating to employment; if yes, whether it is reasonable, clear and unambiguous; the employee was aware of it or could reasonably be expected to have been aware of it; it has been consistently applied by the employer; and termination is an appropriate sanction for contravening it. All these issues remain unanswered. Evidence of both DW1 and DW2 fall short to justify the decision taken. None of them testified that, respondent, in taking the box full of reject whitedent from production area to store, was against a policy or regulation. Worse still, no policy or regulation was tendered to show what was contravened by the respondent. As pointed out, even job description of the respondent was not tendered to enable both the arbitrator and this court to assess as to whether, respondent was aware or was reasonably expected to be aware that she was not supposed to take reject whitedent from production to store. I have also found that none of the witnesses claimed to have interrogated the said Innocent Kifumu and Gerald Mbauka and heard them implicating the respondent. In short, their evidence remains to be hearsay in relation to what is allegedly said by the said Innocent Kifumu and Gerald Mbauka. Therefore, the

allegation that Innocent Kifumu and Gerald Mbauka implicated the respondent cannot help the applicant as the same is hearsay.

It was testified by DW2 that the procedure is that whitedent rejects are transferred to store during the morning hours. This was strongly countered by the respondent who testified that there is no specific time of transferring the reject to store. No question during cross examination was put to the respondent to discredit what she testified. In my view, that was admission by the applicant that what respondent testified was nothing but the truth.

For the foregoing, I am of the strong view, based on evidence, applicant failed to prove that, there was valid reason for termination. I therefore uphold the decision of the arbitrator that termination of the respondent was unfair for want of reasons. Having so held, I see no need of labouring on the issue of procedure and the cases cited by the personal representative of the respondent.

The applicant has criticized the arbitrator for basing his decision on matters not submitted in evidence by the parties. In the award, the arbitrator stated that respondent was claiming TZS 10,000,000/= as compensation. This is neither reflected in evidence of the respondent nor

CMA Form 1 that was filed by the respondent at the time of referring the dispute to CMA. Complaint by applicant has merit on this point. But this does not affect the award as the amount awarded to the respondent is minimum in terms of section 40(1)(c) of the Employment and Labour Institutions Act [Cap. 366 R.E. 2019]. In the upshot, I hereby dismiss the application and uphold the CMA award.

It is so ordered.

B.E.K. Mganga
JUDGE
08/10/2021