THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(LABOUR DIVISION)
AT MBEYA
LABOUR REVISION NO. 40 OF 2017

(Originate from Complaint No. CMA/MBY/170/2016)

COCA – COLA KWANZA LTD.....APPLICANT
VERSUS
WILLIAM MHANDO.....RESPONDENT

JUDGMENT

Date of last order: *31/01/2020*
Date of Judgment: *23/03/2020*

NDUNGURU, J.

This is an application for revision of Commission for Mediation and Arbitration (CMA) award dated 15/09/2017. It was moved into this Court by Notice of application under Section 91 (1) (a) & 91 (2)(a) (b) and (c) of the Employment and Labour Relations Act, 2004 Act No. 6 of 2004 (as amended) and Rules 24 (1), (2), (3) and Rule 28 (1), (c) (d) & (e) of the Labour Court Rules 2007 of GN. 106/2007 and Chamber Summons made under Section 91(1) (a) & 91(2) (b) of Employment and Labour Relations Act, 2004 Act No. 6 of 2004 and Rule 24(1), (2) and (3) and

28(1) (d) of the Labour Court Rules, (G.N 106 of 2007). The Chamber Summons is supported by the affidavit sworn by Mika Thadayo Mbise the advocate of the applicant. The application is opposed by the respondent by his counter affidavit.

Briefly, the respondent who was the complainant before the Commission for Mediation and Arbitration was challenging termination done by the applicant that it was unfair and claimed for reliefs as set forth in the CMAT.1 which referred the dispute. The record reveals that the respondent was employed as syrup maker up to 22/9/2016. The respondent's duties involved preparation and manufacturing syrup when his employment was terminated for the reason of gross negligence act.

Briefly, the facts are as follows that the respondent being a syrup maker of the applicant, on 12/9/2016 while on duty was ordered to prepare syrup of Fanta passion 32 units and coca cola 64 units but the syrup was mixed up that necessitated it to be disposed of thus the respondent was charged for gross negligence and ultimately was terminated upon being found guilty thereof.

Before the Commission the issues of determination were;

1. Whether the respondent was terminated in accordance with a fair procedure

2. Whether there was valid reasons for terminating the respondent's employment and;

3. Reliefs to which parties are entitled.

The CMA having heard the evidence from both parties was of the conclusion that the respondent's termination was based on valid reasons. The applicant was faulted for not adhering to some /part of the procedure. That the applicant did not consider mitigating factors of the respondent before issuing termination penalty and that in issuing termination sanction the applicant was not consistent with the cases which involved disposing of the syrup wrongly mixed up. It was on that fault basis the commission awarded the respondent compensation under Section 40(1) of the Employment and Labour Relations Act No 6 of 2004 and ordered he be paid terminal benefits stipulated under Sections 41- 44 of the Act which in total amounts to Tshs. 12,389,146/=.

The applicant dissatisfied with the CMA award filed the present revision. The facts giving rise to this revision are contained in the affidavit of the applicant. The grounds for this revision are set forth at paragraph 11 of the applicant's affidavit. The grounds are the following:

(a) Whether the learned Arbitrator having held Respondent's termination was for fair and valid reasons and that a fair

procedure was followed could properly hold the same Applicant is faulted for not following proper procedure.

(b) Whether on totality of the evidence on record, the learned Arbitrator was justified to hold Respondent's mitigation was not considered before he was terminated from his employment with the Applicant.

(c) Whether on the evidence on record, the learned Arbitrator was justified to hold the Respondent was wrongly terminated from his employment following his proper conviction on a charge of gross negligence and Consequences of his misconduct.

(d) Whether the amount of **Tshs. 12,389,149/=** awarded to Respondent is fair and just in the circumstances of the case.

(e) Whether the Award was properly procured.

Reliefs the applicant is seeking for in this application are:-

(a) This honourable Court call for the record of proceedings of the Commission for Mediation and Arbitration Mbeya in Complaint **No. CMA/MBY/170/2016** and revise the decision of **Hon. Geofrey Jonas,** Arbitrator, dated **21/06/2017 and** quash the same and in it's place make appropriate orders according to the evidence or record.

In this application, the parties were represented by the learned advocates. Mr. Mbise learned senior counsel represented the applicant while Mr. Chamwai Mussa represented the respondent. Hearing of this application was by way of written submissions upon request of the counsel.

In his Submission for application, Mr. Mbise learned counsel pointed out shortfalls contained in the counter affidavit saying it is in the form of written statement of defence also affidavit is not the evidence in rebuttal. Further that the counsel for the respondent did not participate in the dispute while in the Commission so he does not have any personal knowledge of the substantial part of the case thus he cannot swear the affidavit. The counsel further pointed that the respondent having been served with the notice of application did not file the notice to oppose the matter, again the counter affidavit did not conform with Rule 24 (1) and (2) of the Rules G.N 106 of 2007. Mr. Mbise submitted that in the absence of valid counter affidavit, the application is to proceed ex-parte on the basis of affidavital evidence on record and submissions in support of it.

Mr. Mbise was of the argument that the ruling of the Commission dated 21/06/2017 confirms that the respondent was properly convicted

on disciplinary offence of gross negligence the offence which attracts termination as a sanction, as per Rule 12 (3) (d) of the Employment and Labour Relations (Code of good practice) Rules, 2007 G.N 42 of 2007 as well as the rules obtained at the work place in the Staff Hand Book of Coca Cola Kwanza Ltd. He went further saying, the arbitrator in his ruling deeply explained the negligence committed by the respondent justify his termination in law, he said at page 11 of the ruling the arbitrator said "**From *the above, the complainant termination was based on valid reasons".***

Mr. Mbise went further submitting that the respondent accepted the holding that the termination was on valid reasons that is why he did not challenge the holding. That the arbitrator clearly analysed the evidence before him and ruled that fair procedure was followed as provided under Rule 13 of G.N 42 of 2007. The counsel submitted that the arbitrator made a confusion between the role of the **disciplinary hearing committee** and the role of **the employer** after the **verdict.** He said the respondent being convicted, the committee received mitigating factors to be considered then the role of the committee ended there leaving the role of employer to issue penalty.

On the other hand the counsel for the applicant contended that the employer considered all what was on the record forwarded to him, the law and all surrounding circumstances before issuing termination. Further the respondent did not complain on the severity of the punishment to bring it at this juncture is an afterthought. The fact that the charge of gross negligence attracts termination as a proper sanction nothing was wrong on the party of the applicant to impose the same. He referred this court to the case of **NBC Ltd. Mwanza vs. Justa Kyaruzi**, Labour Revision No. 79 of 2009 High Court (unreported).

Mr. Mbise was of the further argument that it was wrong for the arbitrator to hold that termination was **fair** and then call it **unfair,** simply to justify the award. The counsel submitted that there is difference between ***termination for unfair reasons and unfair procedure***. He referred this court to the case of **SODETRA (SPRL) Ltd. vs. Njellu Mezza and Another**, Labour Revision No. 207 of 2008 High Court (unreported) and **Thabitha Mungavi vs. Pangea Minerals [2015]** LCCD No. 78. He said in any event the respondent was not entitled to any sort of compensation because the applicant did not commit any wrong (as far as 12 months salaries in the sum of Tshs. 9,711,984/=).

Mr. Mbise went further submitting to the effect that the arbitrator rightly found the respondent guilty of gross negligence occasioning a huge loss to the applicant and further confirmed that conviction and held that termination was fair the respondent was not entitled to given **notice.** Thus the award of one month salary Tshs. 809,332/= in lieu of notice offends Section 41 (7) (b) of the Employment and Labour Relations Act No 6 of 2004. Likewise the severance pay of Tshs. 1,867,830/= was wrong because the termination was for fair and valid reasons.

Mr. Mbise concluded that the respondent having been found guilty of serious misconduct of gross negligence and having caused huge loss to the applicant cannot benefit from his own fault, thus urged the award of the commission be revised to remove the injustices caused.

Responding to the applicant's counsel submission, Mr. Chamwai Mussa learned counsel submitted to the effect that Rule 24 (4) of G.N No. 106 of 2007 does not provide how verification clause in the counter affidavit should be. On the fact that Mr. Noel Nchimbi had no personal knowledge as he did not take part in the dispute while at the Commission, the counsel stated that Mr. Noel Nchimbi is the head of legal department of TUICO thus he was informed of the matter. He went

on saying that CPC can come into practice on labour matters only if there is lacuna in labour laws but so long there is provision governing affidavits in labour laws it was wrong for the counsel for the applicant to refer to CPC.

As far as the merit of the application is concerned the counsel for respondent submitted to the effect that, the arbitrator found that the termination was substantive fair but procedural unfair. He said in **exhibit D-1** which is the hearing form No. 24 in item 15 on the category of penalty there is a word TDG which was not known neither of the parties even the applicant's witnesses failed to give the meaning. Therefore at the last sentence the penalty did not appear, thus failure to indicate penalty in the hearing form is equal to have no penalty at all.

On procedural aspect, the counsel submitted that the evidence is clear that the respondent's mitigation was not considered before termination. Also the **rule of consistency** was not considered due to the fact that during mitigation it was revealed that some employees had once committed the same offences but were given lesser punishment. The counsel submitted that Rule 12 (5) of G.N No. 42 provides for the need for the employer to apply sanctions of termination consistently with the way it has been applied to other employees in the past who

committed the same misconduct. He said, the evidence shows that William Mtweve, Walter Mgina, Jacob Mwakabanga and Said Kitenge had committed the same misconduct but were given lesser punishment. To cement his argument he referred the case of **Bulyanhulu Gold Mine vs. Charles Bwanakunu**, Labour Revison No. 2 of 2016 High Court (unreported) he said the Rungwe case cited by the applicant's counsel is distinguishable.

In concluding, the counsel for the applicant said, it was the duty of the employer to make sure that he treats all the employees equally without discrimination. Therefore there was no offensive part is found at page 11 of the ruling because the applicant did not apply the rule of consistence as provided under Rule 12(1) (b)(iv) and 12(5) of G.N No.42 of 2007. He thus said the amount Tshs. 12,389,149/= awarded to the respondent was fair and just as per **Section 40 (1)(c) of the Employment and Labour Relations Act No. 6 of 2004** due to the applicant/employer's failure to comply with part of procedural requirements particularly **mitigation factors** and **rule of consistency.**

In his rejoinder, Mr. Mbise learned counsel submitted that all legal documents are regulated by law, no one is allowed to formulate his own

manner of heading to legal documents. Further the point of law can be raised at any time. He being the respondent cannot raise preliminary objection to his own application and once counter affidavit is defective remains defective it cannot be condoned or bargained. That Order XIX Rule 3(1) of the CPC is applicable to affidavits in labour matters, he referred the case of **Rebeca Daniel William vs. Sandvick Mining Construction Ltd**, Labour Revision No. 10 of 2011.

The counsel further submitted that the fact that Mr. Noel Nchimbi was informed of all what happened in this case thus his affidavit is based on information he obtained to un- disclosed sources thus inadmissible. He referred the case of **Ireen Samwel Mpayo vs. Ndele Mwandoje Mbwafu and 2 Others**, Misc. Land Application no. 32 of 2017. Mr. Mbise submitted that since application for revision is based on affidavital evidence filed in support of the Notice of Application and Chamber Summons, there being no admissible evidence in rebuttal, the effect is that the application remains un-opposed and should be determined on the basis of the evidence in support of the application alone, (EX PARTE). In conclusion the counsel reiterated his submission in chief.

Before going to the merit of the application, I find it crucial to deliberate on some of the issues raid by Mr. Mbise learned advocate in his submission. The first issue was on the form of the counter affidavit filed by the counsel for the applicant. The counsel submitted that the form of the counter affidavit is worth to be titled as written statement of defence and it does not mean anything or advance the case of the opposite side. Having made a look on the said counter affidavit, I agree with Mr. Mbise that its form is in that way but to me it has not contravened the law governing the affidavit because it is not argumentative.

The other issue regarding counter affidavit was that it has been sworn by the person who did not participate in the dispute while in CMA thus he does not have any personal knowledge. As submitted by the counsel for respondent TUICO is the organization which has a legal unit and Mr. Noel Nchimbi advocate being the head of the legal unit must be conversant with what is taking place to the unit as far as the cases of members of TUICO. To my view the fact that Noel Nchimbi swore the counter affidavit is not a question to ponder, the Order XIX of CPC Cap 33 R.E 2002 provides for the person who can swear affidavit that is who is conversant with the facts. All what I can say here is that upon

service of the counter affidavit Mr. Mbise never filed reply to the counter affidavit to point such issues, to bring those issues at that stage is trying to raise objection through back door. The point of determination her is whether before me the application has merit.

Going to the application on merit, having gone through the records of CMA, the application at hand and the submission of the counsels diligently, I find it important to state at the outset, that the labour dispute before CMA is initiated by **Form No. 1** (CMA F1). Neither the mediator nor arbitrator has the power to make changes on what appears on the referral form. See **Power Roads (T) Ltd vs. Haji Omary**, Labour Revision No. 36 of 2007.The dispute referred to the commission is specifically stated in referred form above. The form require the applicant at item 3 of the form to specify type of the dispute which he intent to refer to the Commission. The same item provides clearly that if the dispute is on termination, the applicant who is filing the form has to complete Part B of the form.

I had an opportunity to go through Part B Item 4 (a) of the form it required the respondent to state why he thinks termination was unfair among the reasons given the respondent did not state the disparities of sanctions given between him and fellows whom are alleged had at one

time committed the same offence. The fact that the same was not stated in the form and that it has just risen during hearing of the complaint, the applicant had been taken by surprise and had not prepared for that, this is against the rules of fair trial.

Again, I am at one with the counsel for the applicant on the fact that the Arbitrator particularly at page 11 of the typed award held that the complainant (respondents) termination was based on valid reasons, which the respondent also had not disputed or applied for revision on it. But the arbitrator has faulted the applicant for failure to consider mitigating factors before issuing termination penalty and that the termination sanction was not applied consistently for the same cases already happened. From the decision of the Arbitrator it is clear that substantively termination of the respondent was fair but procedurally unfair for failure to consider mitigation and apply consistency rule in issuing sanction.

Starting with the issue of mitigation, I am at one with the counsel for the respondent on the fact that the law requires the person being found guilty of the disciplinary offence charged he be given opportunity to make mitigation and the same be taken into consideration before sanction is issued against him. This requirement is

provided under Rule **13 of Employment and Labour Relations (Code of Good Practice) Rules, 2007** (G.N No. 42 of 2007). Rule 13 (7) provides:

> *"Where the hearing results in the employee being found guilty of the allegations under consideration, the employee shall be given the opportunity to put forward any mitigating factors before a decision is made on the sanction to be imposed."*

The record reveals that the respondent was given the opportunity to put forward his mitigation it is shown in Exhibit D-1 which is hearing form number 24 at item 12 and the mitigating factors were;

> *(a) The representative points out of what he calls previous case of Said Kitenge and William Mtweve and fact that they were given lesser punishment for what he says are the same mistakes.*
> *(b) Insists William has regretted the incidence.*
> *(c) William Mhando pledge to have the penalty decreased because he has family which needs his support, he says he is experienced and has never done the same mistake.*

Being given such mitigation what followed was the sanction of which the employer had to take into consideration two things aggravating factors as well as mitigating factors. So long both factors were presented to the employer it is very difficult for one to say any of them was not considered. There is no any specific rule which require the

employee to show how he had taken into consideration those factors, apart from communicating the decision to the employee as per Rule **13 (7) of G.N No. 42 of 2007.**

On the issue of failure to apply the **rule consistency.** It is the requirement of law that, the same is provided under rule 12(1) (b) (iv) and sub rule 5 of G.N No. 42 of 2007. The record is self-speaking. The respondent was alone charged for the offence alleged to have committed. But there is no any information on whether sometime some employees were committed to the disciplinary committee of inquiry for the same/similar offence and what was the result/findings of the committee and what was the sanction given upon being found guilty. The act of applying the rule consistently removes the notion of bias or favoritism of the employer when meting out the discipline

The record before me does not have enough facts sufficient to make factual comparisons of the negligence committed by the fellow employees to justify a conclusion of differential application of the rule. See **NBC Ltd. Mwanza vs. Justa B. Kyaruzi**, Labour Revision No. 79 of 2009 High Court (unreported).

Having said so I come to the award of Tshs. 12,000,000/=. The arbitrator has awarded the amount as per Section 40 of Employment

and Labour Relations Act, but as the section provides that such compensation is to be paid when the findings is to the effect that termination was unfair but as stated above, the Arbitrator had already made finding that the applicant termination was on valid reasons, being the case the award of Tshs. 12,389,000/= was improper.

To my view I find there is no basis to award the said amount, I am of the firm view that the arbitrator abused the discretion in the award of Tshs. 12,389,000/=.

I accordingly allow the application, and hold that the applicant was not entitled any compensation.

It is so ordered.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) DIVISHENI YA MAHAKAMA YA KAZI (Labour Division)

D. B. NDUNGURU
JUDGE
23/03/2020

Date: 23/03/2020

Coram: D. B. Ndunguru, J

Applicant: Absent

For the Applicant: Absent

Respondent: Present

For the Respondent: Absent

B/C: M. Mihayo

Court: The matter is for judgment. Judgment is read and the same is delivered in the presence of the respondent and in the absence of the applicant.

D. B. NDUNGURU
JUDGE
23/03/2020

Right of Appeal explained.