IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 889 OF 2019

(Arising from Referral No. CMA/KIN/R.420/15/741)

BETWEEN

COCACOLA KWANZA LTD ..... APPLICANT

VERSUS

LIGOHA MABADA ..... RESPONDENT

JUDGMENT

Date of Last Order: 11/08/2021

Date of Judgment: 05/11/2021

I. Arufani, J.

The applicant prays the court to call for records, revise and set aside the award dated 13th April, 2017 issued by the Commission for Mediation and Arbitration (hereinafter referred as the CMA) in Labour Dispute No. CMA/DSM/KIN/18/R.420/15/741. The application is made under sections 91 (1) (a) and (b), 91 (2) (b) and (c), 91 (4) (a) and (b), and 94 (1) (b) (i) of the Employment and Labour Relations Act, (henceforth referred as the ELRA), Rules 24 (1), (2) (a), (b), (c), (d), (e) and (f), (3) (a), (b), (c) and (d), 28 (1) (c), (d) and (e) of the Labour Court Rules, GN. No. 106 of 2007 (henceforth; the Rules) and any other enabling provision of the law.

The application is supported by an affidavit sworn by Ms. Scolastika Augustine, the Applicant's Human Resources Manager and it was opposed by the respondent who filed his counter affidavit in the court for that purpose. While the applicant was represented in the matter by Mr. Godfrey Tesha, Learned Advocate the respondent was represented by Mr. Abdallah Kazungu, Learned Advocate.

The brief history of the matter is to the effect that, the respondent was employed by the applicant on 1st May, 2006 to work as a Red Truck Clerk and thereafter he was promoted to a post of SAP Clerk. In 2013 he was promoted again to the post of Warehouse Stock Controller. His employment was terminated on 12th June, 2015 on ground of gross negligence, gross dishonest and gross inefficiency for the respondent's failure to control stock of the applicant and caused the loss of 6,226 cases of CBF (Crates) valued TZS. 62,620,000/=.

The respondent was aggrieved by the said termination of his employment and referred his grievances to the CMA which found his termination was unfair as it was not made on fair and valid reason. The CMA ordered the applicant to reinstate the respondent and pay him the sum of TZS. 29,295,000/= being his unpaid salaries for the

whole period of being suspended from his employment. The applicant was dissatisfied by the decision made by the CMA and filed in this court the present application urging the court to revise the award issued by the CMA.

The counsel for the applicant prayed to adopt the affidavit supporting the application and argued that, the applicant was dissatisfied by the finding of the Arbitrator at page 10 and 11 of the award issued by the CMA where is stated that, the applicant failed to prove termination of the respondent's employment was made on fair reason. He submitted that, the applicant proved the respondent was terminated on fair reason as they proved the respondent was working as the Warehousing Stock Controller and his main duty was to control movement of the stock within and outside of the applicant's plant.

He argued that, as his title depict his main duty was to ensure proper movement of the applicant's stock and that was supported by the evidence of DW2 as recorded at page 5 of the typed award. He said under that circumstances the respondent was required to count the stock everyday as he was a leader. He went on arguing that, although the respondent denied before the CMA that it was not his duty to count the stock and said his duty was only to post the stock

in the system but his evidence as appearing at page 7 of the award shows he was signing declaration form. He said those forms shows physical counting of stock was the duty of the respondent.

He argued that, another evidence showing the respondent had a duty of doing physical counting of the stock is his job description which the Arbitrator stated at page 10 of the award that, the respondent has a duty of physical counting of the stock. He submitted that the Arbitrator erred in finding the job description was not given to the respondent as the respondent never disputed before the disciplinary hearing that he had not been given the job description.

He submitted that the disciplinary hearing minutes admitted in the matter as exhibit D7 shows the finding of the disciplinary committee was based on the job description of the respondent. He submitted further that, the allegation that the respondent was given his job description after being terminated from his employment as stated at page 10 of the award is an after afterthought. He prays the court grant the application by revising the award issued by the CMA and set the same aside.

In his reply the counsel for the respondent prayed to adopt the counter affidavit of the respondent and stated that, the argument that the respondent never disputed his job description and DW2 said the respondent was employed as a Warehouse Stock Controller that is mere oral evidence which is not supported by any evidence as the respondent was not given contract of employment after being promoted to the post of Warehouse Stock Controller. He resorted into section 15 (6) of the ELRA which states where an employer has failed to produce a contract of employment of an employee it will be taken, he has failed to discharge his duty.

The counsel for the respondent stated that, when the respondent was promoted to the post of Warehouse Stock Controller, he was told he would have been assigned duties to do by Warehouse Manager who was his boss. He said the applicant failed to tender the job description alleged was given to the respondent and said what happened is that the job description was made and brought to the CMA later on while Rule 24 (6) of the GN. No. 67 of 2007 requires all documents intended to be relied upon to be listed and filed in the CMA before hearing of the matter commenced. He said that is why they objected the alleged job description to be admitted in the matter as evidence.

He argued that, although the applicant said the respondent was reporting to the Warehousing Manager, but the said Warehousing Manager was not called to testify before the CMA. He said if the Warehousing Manager was called, he would have testified against the applicant. He referred the Court to the case of **Kunduchi Beach Hotel & Apartment V. Rose Muze**, Revision No. 240 of 2013 where it was said where a key witness is not called the court is required to draw an adverse inference.

He stated that, the argument that the respondent had a duty of doing daily physical counting of the stock of the applicant is a hearsay and an afterthought story. He said the evidence adduce before the CMA shows there were two sections and one of them was Empties Section whose Controller was the one who was doing physical counting and reported to the Respondent who was a Warehouse Stock Controller and the respondent was required to feed the counting in the system. He added that, the report of stock was being done monthly and not daily.

He went on arguing that, there was no valid reason for terminating employment of the respondent. He submitted that, although DW2 said they conducted surprise checkup and discovered

the loss but throughout the hearing of the matter there is nowhere stated when the alleged loss of crates occurred for the purpose of establishing when the respondent committed the alleged misconduct and when it ended. He argued that, although it was stated there was investigation which was conducted but the investigation report was not tendered before the disciplinary hearing or before the CMA.

He argued that, the respondent was charged with the offence of failure to detect physical shortage which was not his duty and failure to prevent occurrence of theft. He submitted that, in order to say a person is negligent it must be proved that the person had a duty and he failed to perform that duty. He said the employer was required to take respondent to the training but that was not done. He said the third offence was gross inefficiency and the fourth offence was occasioning loss to his employer which were not proved.

He cited Rule 3 (1) of the Rules which states the labour court is a court of record, law, equity and mediation. He referred the court to the case of **Cocacola Kwanza Ltd. V. Robert Kingazi**, Revision No. 784 of 2018, HCLD (unreported) where the same offences leveled against the respondent were preferred against another employee of the applicant and said that show the case laid against

the respondent is a fabricated case and it is not known who caused the alleged loss.

He cited in his arguments the case of **MIC Tanzania PLC V. Sinai Mwakisisile**, Revision No. 387 of 2019, HCLD at DSM (unreported) where it was stated that, before terminating employment of an employee, he must be given chance to make his mitigation and from those mitigation is where a sanction can be imposed against him. He argued that, although the counsel for the applicant stated the respondent made a declaration that the stock was correct but there is no declaration form tendered before the CMA to support that assertion. At the end he prays the award of the CMA be confirmed and the application for revision be dismissed.

In his rejoinder the counsel for the applicant said it is not true that the job description of the respondent was not admitted in the matter as the award states it was admitted in the matter as evidence. As for the argument that it was not a duty of the respondent to conduct physical counting of the stock as there were heads of subsections who were doing that work and reported to the respondent the counsel for the applicant stated that, they do not know where the Arbitrator got the said words as were not stated in

the proceedings of the CMA. He conceded there is no report showing the alleged loss of 6,262 crates of the applicant and said that loss was discovered by the respondent and his fellow employees and the Management relied on the finding of the respondent and his team that there was loss as stated in exhibit D3.

As for the issue of investigation report he stated it was held in the case of **Cocacola Kwanza Ltd.** (supra) that, there is no fast and hard rule in conducting investigation and preparing a report of investigation. He said there is no justification to say the case was fabricated while the respondent stated himself that he discovered the loss and reported the same to his employer. He added that, there is nowhere in the charges levelled against the respondent stated he was charged with the offence of failure to prevent theft but the offence was failure to prevent loss which was admitted by the respondent.

He went on stating that, the argument that the respondent was not given training is a new issue which was not raised before the CMA. Likewise, the argument of the applicant to be not aware as to who caused the loss as Rogert Kingazi was charged with the similar offences he stated that is also a new issue which was not raised

before the CMA. He submitted that, although loss referred in the case of Rogert Kingazi is similar to the loss referred in the case of the respondent but each of them was charged on his own capacity. He stated that, while Rogert Kingazi was charged as section controller, the respondent was charged as he was Warehousing Stock Controller and both of them failed to prevent the loss occurred to the applicant.

He argued further that, the argument that the respondent was not given chance of making his mitigation before sanction be imposed to him is a new issue which was not raised before the CMA and submitted that, the Arbitrator found there was no violation of the procedure in terminating the respondent. He stated that, exhibit D6 shows the respondent was given chance to make his mitigation before sanction be imposed to him. In fine he reiterated what he argued in his submission in chief and prays the application to be granted.

Having carefully considered the argument fronted to the court by the counsel for the parties and after going through the CMA record together with the award issued by the CMA the court has found the issues required to be determined in this matter are as follows:-

1. *Whether there was valid and fair reason for termination of the respondent's employment.*

2. *Whether the reliefs granted in the award of the CMA are justifiable.*

Starting with the first issue, it is the requirement of the law that termination of employment of an employee by an employer must be on fair and valid reason. The above stated requirement of the law is provided under section 37 (1) of the ELRA which states that, it shall be unlawful for an employer to terminate the employment of an employee unfairly. It is provided further under section 37 (2) (a) of the ELRA that, termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid.

As provided under section 37 (2) (b) (i) and (ii); and (c) of the ELRA the reason for termination is fair if is related to the employee's conduct, capacity or compatibility; or is based on the operational requirements of the employer and the employment was terminated in accordance with a fair procedure. The requirements provided in the above referred provisions of the law were put clear by my Learned Sister Abood, J. in the case of **Tanzania Revenue Authority V. Andrew Mapunda**, Labour Revision No. 104 of 2014 where she

stated inter alia that:-

> *"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."*

That being the requirement of the law the court has found in relation to the application at hand that, as the respondent's employment was terminated basing on the reasons of gross negligence, gross dishonest, gross inefficiency for failure to control stock of the employer and causing loss to the employer the issue to determine here is whether the stated reasons were proved to be valid and fair. The court has found that, as provided under section 39 of the ELRA the duty to prove fairness and validity of the stated reasons was on the applicant who was an employer of the respondent. The referred provision of the law states as follows:-

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

That being the requirement of the law the court has found the counsel for the applicant argued the applicant proved the respondent's employment was terminated on fair reasons. In doing

so the applicant called two witnesses before the CMA who were Scolastica Augustine and Nicholous Ochieng Oyotto who hereinafter will be referred as DW1 and DW2 respectively. The mentioned witnesses stated in their evidence that, the respondent was responsible with the movement of any stock moving inside and outside the warehouse of the applicant. They said in doing so the respondent was required to make sure that, there was daily counting of the stock during morning and evening times. In case of any difference, he was required to report to the Warehouse Manager.

The counsel for the applicant submitted that, the main duty of the respondent as a stock controller and as his title suggest was to control stocks. The court has been of the view that, although it is true that the title of the respondent suggest he was a stock controller but there is no evidence adduced before the CMA to show he was responsible with physical counting of the stock as stated by DW1 and DW2. The court has found that, as rightly argued by the counsel for the respondent and stated by the respondent in the evidence he adduced before the CMA there is no evidence adduced before the CMA showing the respondent had a duty of conducting physical counting of the stock of the applicant.

The court has found that, as rightly stated by the arbitrator at page 11 of the award the letter used to promote the respondent to the post of Warehouse Stock Controller admitted in the proceedings of the CMA as exhibit D8 does not state what were the duties and obligations of the respondent. The promotion letter states the respondent would have discussed with his manager in particular reference to the objectives of the applicant and other performance related matters. However, it was not stated anywhere in the evidence adduced before the CMA the respondent discussed with his manager the said objectives and other performances related factors.

The court has found that, even the job descriptions alleged was given to the respondent and tendered before the CMA as an exhibit it was said it was given to him when he had already been terminated from his employment. To the view of this court and as provided under section 110 (1) of the Evidence Act, Cap 6 R.E 2002 [Now R.E 2019 the applicant was duty bound to adduce sufficient evidence to establish it was the duty of the respondent to conduct daily physical counting of the crates and not anybody else.

The court has arrived to the above finding after seeing the respondent stated in the evidence he adduced before the CMA that

the work of doing physical counting of the stock of the applicant was being done by other people who were section leaders and those section leaders were reporting to him and his duty was to enter the report of the stock in the system. The court has considered the argument by the counsel for the applicant that the title of the applicant of Warehouse Stock Controller shows he had a duty of doing physical counting of the stock but failed to agree with his line of argument. The court has failed to accept his argument after seeing is mostly based on assumption which is not supported by any material evidence.

The court has considered the argument by the counsel for the applicant that the respondent had a duty of counting the stock physically as he signed a stock declaration form and find that argument was also considered by the arbitrator and found that, as the stated declaration form was not tendered before the CMA it would have not been relied upon to find the respondent had a duty of doing daily physical counting of the stock of the applicant. The court has also found that even if the stated declaration form would have been tendered and admitted in the matter before the CMA it would have not been enough to establish the respondent had a duty of conducting daily physical counting of the stock of the applicant

because a mere signing of a declaration form does not mean he was also required to conduct physical counting of the stock of the applicant.

The court has found that, it is a legal requirement as provided under section 15 (1) (c) of the ELRA for an employer to supply to an employee his job description at the commencement of employment. Where an employer has failed to discharge that duty, he is required by subsection (6) of section 15 of the ELRA to prove in any legal proceedings what were the terms and conditions of employment of an employee. The court has found that, as exhibit D8 is not showing what were the job description of the respondent and it was not proved the respondent was told by his Warehouse Manager his duty would have been to do physical counting of the stock it cannot be said it was established the respondent failed to discharge his duty and caused loss to his employer.

The court has also found even the Warehouse Manager who was required to discuss with the respondent about his responsibilities was not called to testify before the CMA. To the view of this court and as rightly argued by the counsel for the respondent the said Warehouse Manager was an important witness who would have assured the CMA

the applicant was informed, he had a duty of doing daily physical counting of the stock. Failure to call the said witness caused the court to draw an adverse inference as stated in the case of **Kunduchi Beach Hotel & Apartment** (supra) that his evidence would have not supported the applicant's case.

As for the argument by the counsel for the applicant that the arbitrator stated at page 10 of the award that the respondent had a duty of doing daily physical counting of the stock is not supported by the said part of the award as there is nowhere the arbitrator stated the respondent had a duty of doing physical counting of the stock of the applicant. As for the further argument that the job description of the respondent was used in the disciplinary hearing the court has found that, it is true that it appears in the proceedings of the disciplinary hearing that the job description of the respondent was referred therein.

However, there is nowhere in the disciplinary hearing proceedings stated and established the respondent had a duty of doing daily physical counting of the stock. What was stated in the disciplinary hearing proceedings is that the respondent had the overall responsibility for stock management in the warehouse. As also

rightly argued by the counsel for the respondent it was not even stated exactly as to when the alleged loss occurred so as to establish the respondent is responsible with the alleged loss but it was only stated when the alleged loss was discovered. Moreover, the court has found there is no any report relating to the stock alleged was lost was adduced before the CMA to establish the respondent committed the offences leveled against him.

The above finding caused the court to come to the settled views that there was no sufficient evidence adduced before the CMA to establish the respondent was terminated from his employment on valid and fair reason to move the court to go contrary to the finding of the arbitrator stated in the award of the CMA. In other word the court has found that, as rightly found by the arbitrator termination of employment of the respondent was not made on valid and fair reason as it was not proved the respondent neglected or failed to perform the duty he was required to performed.

Coming to the last issue relating to the reliefs the parties are entitled the court has found that, as it has already been found termination of employment of the respondent was unfair, the respondent was entitled to be paid his rights relating to unfair

termination of his employment. The court has found the arbitrator ordered the respondent be reinstated in his employment and paid all of his salaries from June, 2015 together with leave of 2015 which its sum is Tshs. 29,295,000/=. The court has found that, as there is nothing stated by the counsel for the parties in relation to the said award there is no justifiable reason to move it to interfere with the reliefs stated in the award.

Consequently, the court has found the applicant has not managed to establish the arbitrator erred in the award issued in favour of the respondent and against the applicant. In the upshot the applicant is hereby dismissed in its entirety for being devoid of merit. It is so ordered.

Dated at Dar es Salaam this 05th November, 2021.

I. Arufani

JUDGE

05/11/2021

Court:

Judgment delivered today 5th day of November, 2021 in the presence of Mr. Flavian A. John, Learned Advocate holding brief of Mr. Godfrey

Tesha, Learned Advocate for the Applicant and in the presence of the Respondent in person. Right of appeal is fully explained.

I. Arufani

JUDGE

05/11/2021