

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LABOUR DIVISION)
AT DAR ES SALAAM**

REVISION NO. 453 OF 2019

BETWEEN

DARLSON NOEL MIDEKE 1ST APPLICANT

AGUSTINE GODFREY KIMBASHA 2ND APPLICANT

VERSUS

TANZANIA BREWERIES LIMITED RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

By a notice of application lodged under the provisions of Section 91(1)(a),(b),(c) and Section 94(1)(b)(i) of the Employment and Labour Relations Act, 2004, as amended ("ELRA"), read together with Rules 24(1), 24(2)(a),(b),(c),(d),(e),(f), 24(3)(a),(b),(c),(d), and Rule 28(1)(c),(d)(e) of the Labour Court Rules GN. 106 of 2007 ("the Rules"), the two applicant, have lodged this Revision against the award of the Commission for Mediation and Arbitration ("the CMA") before Honorable Lukeha, J Arbitrator, in Labor Dispute No. CMA/DSM/ILA/R400/15/733 ("The Dispute") dated 13th August, 2018. In their Notice of Application as well as the Chamber Summons, the applicants have moved the court for the following orders:

- (a) That this Honourable Court be pleased to call for and examine the proceedings and the subsequent award of the Commission for Mediation and Arbitration of Dar es salaam in Labour Dispute No. Labor Dispute No. CMA/DSM/ILA/R400/15/733 Honorable Lukeha, J Arbitrator, delivered on 13/08/2018 in order to satisfy itself on the correctness of the Award and Order.
- (b) That the Court may be pleased to revise and set aside the award and grant the reliefs sought in the affidavit of each applicant.
- (c) That the Court be pleased to grant any other relief it may deem fit and just to grant

The respondent opposed the application through a notice of opposition lodged under Rule 24(1)(2)(4)(a)&(b) of the Rules, praying that the court reject the application and after rejecting the application confirm the award of the CMA. Surprisingly, the respondent also pressed for costs in a Labor Case. By an order of the court dated 18th August, 2021, the application was disposed by way of written submissions. The applicant's submissions were drawn and filed by Mr. Tibiita Mganga, learned advocate while the respondent's submissions were drawn and filed by Ms. Elizabeth John Mlemeta, learned advocate.

Before I venture into determining the merits or otherwise of this application, it is prudent that the brief background that has led to the current application is narrated. From what I have gathered in the records of both the Labor Dispute and this Revision, the facts are that the applicants were employed by the Respondent in different capacities, the first applicant was a driver and the second applicant was a Warehouse Supervisor. On allegations of attempted theft, fraud, dishonest and forgery, the applicants were terminated from their employment effective from the 18th June, 2015 (Collective EXP6).

The allegations emanated from the following events, that on the 26th May, 2015, the 1st applicant, whose tasks among others was to deliver mixed brand of beer popularly known as "Mkorogo", to customers, was given an order to process by his supervisor (2nd applicant). The supervisor processed the necessary documents and assigned another staff to organize at the loading bay. When the first applicant drove the loaded truck to the main exit, he was stopped for verification of the quantity of the consignment and it was at the gate where it was realized that an extra 66 crates of beer has been loaded without authorization. An investigation was commenced and upon conducting a disciplinary procedure (EXP3 and P5), which was in accordance with the respondent's Code of God

Practice/Human Resource Manual (EXP5); the applicants were found guilty and were terminated from employment (EXP6). They were paid their terminal benefits as evidence by EXP7.

Aggrieved by the said termination, they unsuccessfully lodged the dispute at the CMA, still aggrieved they have lodged this application raising the following grounds as stated in their affidavits:

1. That the arbitrator failed to evaluate and analyse evidence led by both parties consequently arrived at wrong conclusion thereby deciding in favor of the respondent.
2. That the employer had proved his case in the preponderance of probabilities whereas:
 - a. The pallet holding 66 crates of beer remanded within the employer's premises thereby in her possession.
 - b. Neither of the document uttered and tendered evidence had been altered.
 - c. No fictitious document had been prepared to enable the pallet get out of the Employer's premises.

It was the applicants' prayer that the award and order of the CMA is set aside and the applicants be reinstated. From the above grounds, it is

safe to conclude that the applicants are challenging the substantive part of their termination as they attempt to establish that the respondent did not prove the offence that they were charged with and subsequently terminated for. However, I will also analyse and comment on the procedures followed as the first ground is too general covering a wider context of the applicants' complaint.

Under Article 4 of the ILO convention on Termination of Employment, 1982 (No. 158), an employee shall not be terminated from employment unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service. In our law (ELRA) Section 37 prohibits such termination unfairly. The law has further elaborated that a termination of employment by an employer is unfair if the employer fails to prove a valid or fair reason for the termination.

Fairness of the termination must be related to the employee's conduct, capacity or compatibility; or it should be based on the operational requirements of the employer. After proving a valid or fair reason for termination, the employee still has an obligation to prove that the said termination was in accordance with a fair procedure. Therefore in order to

determine whether the termination of employment was substantively and procedurally fair, under Section 39 of the ELRA, the burden to prove that the termination was fair lies on the employer. So in this revision I will first see what the employer established at the CMA on the substance of the termination and then proceed to see whether the procedure thereto was also fair.

According to the evidence of the respondents, DW1 testified that the applicants were served with the statement of their offences (EXP2) outlining their offences and they were given time to respond. The 2nd respondent replied vide EXP10 and denied liability on ground that it was not him who filled the beer in the truck. He also mitigated that he was human and did not intend to make any mistake. According to Exhibit P5, it is a hearing from which it explains the details of the allegations against the applicants. According to EXP5, the 2nd respondent received an order from the 1st respondent, assigned to an employee to organize the order and he personally cross-checked the order signed and confirmed the order to be correct, only to be later found that the truck was carrying extra crates. Therefore he was accused of not following the laid down procedures which required to cross check the truck once loaded. The 2nd respondent cannot therefore avoid liability. If it was his duty to ensure that the consignment is

loaded in the exact order, failure to do puts him into liability. He was also found to have signed pick up slip on behalf of warehouse man which is against the procedures (EXP11) as it resulted into him filing the slip and authorize it himself. Furthermore, the 2nd respondent signed the proceedings, which means it is what transpired at the disciplinary hearing. At this juncture, it is safe to conclude that the substance of the termination of the 2nd applicant was well proved.

As for the 1st applicant, EXP2 shows that he was informed of his offence of an attempt to ship beer without authorization, the exhibit is dated 28/05/2015 and the 1st applicant did not deny to have received it. It had all the exhibits of the consignment that was to be delivered to customers. He was also served with notice of hearing (EXP3) and the allegations were outlined. According to EXP14 it was the 1st applicant's independent stock sheet. He was also served with EXP5 which was hearing form stating his offence, in his defence he alleged that the car was loaded by someone else but didn't bring the person who loaded the car. He was accordingly found guilty. There was also tendered EX14 that showed previous offences conducted by the same applicant. Having gone through the exhibits and the evidence adduced at the CMA, it is to this court's

satisfaction that the respondent successfully established the occurrence of the alleged offence hence the substance for termination was fair.

On those findings above, given the yardstick of termination disputes where is fairness, I find that on the evidence adduced, the balance of probability favored the respondent on the substance of the termination, Therefore as per EXP6, termination of 1st respondent was substantively fair. In conclusion of the first part, the evidence adduced established that the termination of both the applicants was substantively fair.

Coming to the second part of unfairness, the procedural part, I need not be dwelled much by this part. The exhibits show that the applicants were explained the substance of their respective offences, EXP2 the notice of hearing proved that. The disciplinary hearing was held according to the Code of Good Practice (EXP3) whereby the applicants were given opportunity of representation (TUICO), right to defend themselves which they used by establishing that they did not fill the track in question. And the outcome of the hearing is shown by collective EXP5. They were paid their entitlements (EXP7) and were duly terminated vide collective EXP6.

On those findings, I find that the employer complied with Rule 13 of the Code of Good Practice, G.N No. 42/2007 on the fairness of the

procedures, the employees were notified of the allegations and there was no complaint that he didn't understand the language. He was afforded a reasonable time to prepare, hearing was within reasonable time, evidence was presented and he had time to defend himself and the decision was communicated to him. He was even accorded a right to appeal within the internal procedures before he approached the CMA. The termination was hence procedurally fair under Section 37(1)(c) of the ELRA.

In conclusion, I see no merits in the entire revision application; the award of the CMA is therefore upheld. Consequently, this application is hereby dismissed in its entirety.

Dated at Dar-es-salaam this 18th day of October, 2021.



A handwritten signature in blue ink, appearing to read 'S.M. Maghimbi', written over a horizontal dotted line.

S.M. MAGHIMBI
JUDGE