IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 301 OF 2019

BETWEEN

SERENGETI BREWERIES LTD..... APPLICANT

VERSUS

BWIKO KYRIAKOS ..... RESPONDENT

JUDGMENT

Date of Last Order: 03/03/2021

Date of Judgment: 30/03/2021

Z.G Muruke , J.

The applicant Serengeti Breweries Limited employed the respondent on 24th September,2014 as Fleet and Demand and Safety Manager. They worked together until 27th January,2017 when their relations came to an end, after the respondent's termination on ground of misconduct. Aggrieved with the termination, the respondent referred the matter to the Commission of Mediation and Arbitration (herein CMA). CMA's decision was partly in favour of the respondent. The applicant was aggrieved with the CMA's award hence filed present application seeking for revision of the award on the following grounds:

a. Whether it was proper for the arbitrator to conclude that the respondent's termination was procedurally unfair while, the evidence tendered proved the respondent was notified of disciplinary hearing well in advance before the hearing date.

b. Whether it was proper for the arbitrator to order payment of 12 months compensation while the arbitrator agrees that termination was fair.

c. Whether it was proper for the arbitrator to order the respondent to be paid severance pay while termination was based on misconduct and CMA had made a finding that the termination was valid.

d. Whether it was proper for the arbitrator to order payment of notice pay despite evidence adduced during the hearing.

The application was supported by the affidavit of Juvenalis J. Ngowi the applicant's advocate. In challenging the application, the respondent filed his counter affidavit.

With court's leave, hearing was by way of written submission. Both parties were represented by learned advocates. Mr. Juvenalis Ngowi served the applicant while Mr. Edward Peter Chuwa was for the respondent.

Submitting in support of the application, the applicant's counsel abandoned ground (c) and submitted on the remaining grounds.

On the first ground it was submitted that, CMA's found that termination was procedurally unfair on the effect that the respondent was served with a notice of hearing in the hearing date. That the fact was denied by the applicant by stating that, the respondent was notified through email on 13th January,2017. There was no need of producing the email before CMA as the respondent himself admitted to have received the notice through email, and he acknowledged to have received the notification by signing and writing on top of exhibit P6. The arbitrator was notified by DW2 and the respondent during hearing of the

application. Through exhibit P6 the applicant has executed his duty of proving on balance of probabilities, referring Rule 9 (3) of Employment and Labour Relations (Code of, Good Practice) GN. No.42/2007(GN.42 /2007).

In regard to consolidated grounds (b) and (d),Mr Ngowi submitted that, the arbitrator ordered the applicant to pay the respondent compensation of twelve(12) months' compensation, one month salary in lieu of notice, severance pay and clean certificate of service. Concerning the compensation of twelve months salary, the applicant's counsel submitted that the respondent was not entitled to the same because the applicant followed all that was required for termination. The respondent was issued with notice prior the date of disciplinary hearing. The arbitrator failed to consider DW2's evidence who testified that the respondent was paid all his dues.

Moreover, Mr. Ngowi insisted that, the arbitrator misdirected herself in ordering payment of severance pay since she found that the applicant was substantively fair. The respondent was terminated on misconduct thus not entitled to severance pay as provided under Section 42(3)(a) of the Employment and Labour Relations Act, Cap 366 RE 2019 (Cap 366 RE 2019). Also, the arbitrator ordered the respondent be issued with a clean certificate of service. The law under Section 44(2) of Cap 366 RE 2019 provides for issuance of certificate of service upon termination of employment. That the law does not make it compulsory for the employer to give a clean certificate of service. Since the respondent was terminated on misconduct, he does not deserve a clean certificate of service. Issuing the same will be deceiving, unprofessional and

unethical as it will be misleading the and public and other potential employers. Counsel prayed for the application to be allowed.

Responding to the applicant's averment on the first ground, the respondent's counsel submitted that, admitting receipt of notice by the respondent is not sufficient to prove that the notice of hearing was delivered in a proper manner as required by the law. Issuing of a notice is significant as it gives the employee adequate time to prepare for his defence against the allegations. Failure to issue the same will affect the employees right to be heard, referring the case of **Rajab Malenda v. Security group (T) Ltd**. Rev. No. 188/2015.

Respondent counsel further added that, the applicant ought to have procured the said notice sent through email at the CMA. This would have enabled the arbitrator to ascertain that the said notice met the requirement of the law.

Further, Mr Chuwa submitted that such notice should be in a form and language that the employee can reasonably understand. And the same should give an employee reasonable time to prepare for his defence. However the said notice that was sent through email was not tendered before CMA so as to see its propriety, the only notice tendered was that of the hearing date dated 16th January,2017, referring Rule 13(2),(3) of GN.42/2007.

In regard to ground (b) and (d), Mr Chuwa reiterated their submission in chief. Additionally he contended that, the respondent was

not afforded with enough time to prepare for his defence, hence the entire proceedings were illegal consequently void. That it follows the principle that, *action sequitur esse* meaning the action follows the being. He cited the case of **Abbas Sherally & another v Abdul Sultan Haji Mohamed Fazal boy,** Civil Application No. 33/2002.

Respondent counsel further argued that, in his CMA F1 the applicant prayed for compensation, severance payment, leave payment and one month salary in lieu of notice of termination. The respondent's major complaint was luck of adequate notice and payment of salary arrears and salary in lieu of notice. If the same were addressed by the arbitrator, would have cemented the verdict that the termination was unfair. He thus prayed for dismissal of the application.

After careful consideration of the contesting submissions, the following are the issues for determination;

i. Whether termination was procedural fair

ii. What are the reliefs entitled to the parties?

In determining the first issue, the law is very clear that for termination to be procedural fair, the employer has to adhere to the procedures provided under the law as provided under Section 37(2) (c) of Cap 366 RE 2019. The law provides:

> *'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 added]

In the matter at hand, the disputed issue is on whether the respondent was properly served with a notice for attending the disciplinary hearing. The applicant alleged that he had properly served the respondent with a notice on 13th January,2017 through email and the same was acknowledged by the respondent through a notice served to him on 16th January,2017 (exhibit A-6). It was the CMA's finding that termination was procedurally unfair since the respondent was not afforded with an adequate time to prepare for his defence as he was served with a notice on the date of hearing. Rule 13(3) of GN. 42/2007 provides;

'The employee shall be entitled to a reasonable time to prepare for the hearing and to be assisted in the hearing by a trade union representative or fellow employee. What constitute a reasonable time shall depend on circumstances and the complexity of the case, but it shall not normally be less than 48 hours.'

From the wording of that provision, the employee shall be served with a notice to attend disciplinary hearing in not less than 48 hours before the date of the said hearing. I have cautiously gone through the records and found the only notice on record was exhibit A-6 which was given to the respondent on the date of hearing to wit 16th January,2017. However, the respondent while signing a notice served upon him on 16th

January,2017, conceded to have received the said notice through email on 13th January,2017. The words read; ***'prior receipt by email,13th January,2017'.***

From those words it is crystal clear that, the respondent admits to have received the same notice by way of email. It was the respondent's counsel contention that, the applicant's failure to tender the said email before CMA created some uncertainties on the proprieties of the notice sent through email. Having cautiously considered the records and arguments of both counsels, this court is of the view that, the respondent was dully served with a notice on 13th January,2017. The respondent's counsel allegations that the respondent have not received the said notice through email, and it is uncertain as to its propriety in regard to the content and language only because the same was not tendered before CMA. The purpose of a notice is to notify the employee of his charges and give him adequate time to prepare for his defence. The fact that the respondent himself has conceded to have received the notice on 13th January,2017 by signing on exhibit A6, clearly divulge that he was dully saved and understood its contents hence he had enough time to prepare for his defence. If he was not aware of the notice sent through email as he alleged, why did he sign and confirm to have received it on 13th January,2017? There is no proof showing that he was induced in any way to sign, that means he did that with a free will while knowing what he was confirming. I thus find his allegations that he was not afforded with adequate time to prepare for his defence with no merit as the notice was served to the respondent three days prior the hearing date. Therefore, the arbitrator misdirected herself into her

finding that termination was procedurally unfair. She relied on exhibit A6 which was served to the respondent on the date of disciplinary hearing without taking into consideration that, the respondent acknowledged to have received the same prior the hearing date. I hereby fault the arbitrators finding that termination was procedurally unfair.

As regard to the second issue the applicant alleged that CMA has awarded the respondent 12 months' salary compensation for procedural unfairness, as this court has found that termination was procedurally fair do hereby quash and set aside the CMA's order of 12 months' salary compensation.

Concerning the order of payment of severance pay, CMA has ordered payment of 2,153,846.154/= as severance pay. It is on record that CMA found that the respondent's termination was substantively fair. The law under Section 43(2)(a) (b) 3(a) of Cap 366 RE 2019 exempted the employee who have been fairly terminated on ground of misconduct, from being paid severance pay. On that basis it is apparent that the arbitrator misdirected herself to order payment of severance pay to the respondent. I thus quash the order in regard to severance pay.

In regard to the certificate of service, the law requires the employer to issue a certificate of service to the employee upon termination. Therefore, it is a mandatory requirement under Section 44(2) of Cap 366 RE 2019. The certificate of service is a prescribed form made under Regulation 17 of Employment and Labour Relations (General) Regulations,2017. The applicant have to comply with the law

by issuing to a respondent a certificate of service as prescribed in Form LAIF 10 as obtained under the schedule of the regulations.

Basing on the above discussion, I hereby quash and set aside the CMA's order of twelve months' salary compensation for procedurally unfairness and severance pay. The respondent be paid one month salary in lieu of notice, leave (if any) and certificate of service.

Z. G. Muruke

JUDGE

30/03/2021

Judgment delivered in the presence of Kelvin Deogratius for the applicant also holding brief of Happy Daniel for the respondent.

Z. G. Muruke

JUDGE

30/03/2021