IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 158 OF 2021

BETWEEN

MICHAEL ELIFURAHA MAVURA ..... APPLICANT

VERSUS

TANZANIA BREWERIES LIMITED ..... RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J

The applicant was employed by the respondent as a WareHouseman on 26/07/2010 for an unspecified period. The dispute between the parties arose on 22/09/2016 where it is alleged that while operating the fork lift machine, the applicant negligently damaged the respondent's property, pallet machine line 5. The applicant was summoned to disciplinary hearing where he was found guilty of the offence charged. Consequently on 08/11/2016 the applicant was terminated from employment. Aggrieved by the termination the applicant referred the matter to the Commission for Mediation and Arbitration (CMA) and after considering the evidence of both parties, the CMA found that the applicant was fairly terminated both substantively and procedurally hence his complaint was dismissed. Again, being

resentful by the CMA's award, the applicant filed the present application under the provisions of Section 91(1)(a &b), (2)(a & b) and 94(1)(b)(i) of the Employment and Labour Relations Act No. 6 of 2004 as amended by section 14 of the written laws (Miscellaneous Amendments) (No. 3), Act No. 17 of 2010 and Rule 24(1),(2)(a),(b),(c),(d),(e) & (f) and (3)(a),(b),(c) & (d), Rule 28(1)(c, d and e) of the Labour Court Rules G.N. No. 106 of 2007 on the following grounds: -

i. That the Honourable Arbitrator erred in law and in fact in his assessment of the evidence tendered and as a consequence thereof her award is contrary to law and against the weight of evidence.

ii. That having regard to the evidence on record and the circumstances of case, the Learned Arbitrator erred in law in disregarding and or ignoring the applicant's submissions as well as the CMA record of proceedings in its decision and wrongly held that the applicant caused damage to the employer's property through gross negligence and that from the evidence adduced the respondent had the valid cause for termination.

iii. That having regard to the evidence on record and the circumstances of case the Learned Arbitrator erred in law in

disregarding and or ignoring the applicant's submissions as well as the CMA's record of proceedings in its decision and wrongly held that the respondent complied with procedural requirement of termination as required under Rule 13 of the Employment and Labour Relations (Code of Good Practice) GN 42 of 2007 ('GN 42/2007).

iv. That having regard to the evidence on record and the circumstances of the case in which the predecessor Arbitrator never completed the trial/arbitration to conclusion and after the dispute ended in the hands of successor Arbitrator, the Honourable successor Arbitrator erred in law in failing to in taking over the continuation of the Arbitration without recording reasons as to why the case/dispute was before him.

v. That the Arbitrator erred in law in dismissing the dispute and the applicant's claimed reliefs.

The matter was argued by way of written submissions. Mr. Elisaria Mosha, Learned Counsel appeared for the applicant whereas Mr. Rueben Robert, Learned Counsel was for the respondent. I appreciate the comprehensive submissions of both Counsels which shall be taken on board in due course of constructing this judgement.

Arguing in support of the application Mr. Mosha abandoned the first and fourth grounds of revision. In this judgement I will start with the determination of the second ground which questions the validity of the reason for termination before I come to see whether the procedure was followed.

As to the ground on the validity of the reason for termination Mr. Mosha argued that the law requires employers to terminate employees on valid and fair reason as provided under section 37 of the Employment and Labour Relations Act, Cap. 366 R.E 2019 ('ELRA'). He added that pursuant to section 39 of the ELRA, it is the duty of the employer to prove that the termination was fair. To support his submission the counsel cited the case of **National Microfinance Bank vs Victor Modest Banda (Civil Appeal 29 of 2018) [2020] TZCA 35 (26 February 2020)**. He stated that in the case at hand, the applicant was terminated for distinct allegation from the ones charged in the show cause letter. Mr. Mosha also submitted at length on the allegation of being under the influence of alcohol charged in the show cause letter, I find no relevance to reproduce his submission on such aspect because the mentioned misconduct is not among the offences which led to the applicant's termination.

As to the misconduct which resulted to the applicant's termination, he submitted that there are contradictions in the respondent's evidence. He stated that when DW6 testified at the CMA, he tendered his written statement dated 22/09/2016 (exhibit D11). He argued that the DW6 escaped his liability with respect to the disputed forklift machine when he stated that he did not see the fork lift daily check list of 21/09/2016. He added that no investigation report was tendered to show how the machine works and that the applicant was under the influence of alcohol when driving the alleged fork lift machine which resulted to damage the employer's property.

Responding to that ground Mr. Robert submitted that the applicant's evidence is erroneously based on exhibit P1. He strongly submitted that the Arbitrator properly analysed and considered the evidence on record as reflected at page 7 of the impugned decision. That the applicant ought to have tendered the fork lift daily checklist of the day of the event, 22/09/2016. Mr. Robert was of the view that the applicant was fairly terminated basing on the evidence on record. He stated that the respondent brought six witnesses and tendered sixteen documents to prove substantive fairness of the termination, adding that the applicant admitted to have damaged the pallet discharged machine

as evidenced by exhibit D4 where he did not mention any alleged defects of the fork lift machine.

Mr. Robert went on to submit that since the applicant was the one who alleged defect in the fork lift, he had the duty to prove the alleged defects. He stated that the evidence on record substantiate that the applicant's negligence was caused by being under the influence of alcohol. Mr. Robert also responded to the alcohol allegations the submissions which I find no relevance to reproduce for the reason which will be apparent hereunder.

After considering the rival submissions of the parties on the relevant issue, I find it important to restate the misconducts which led to the applicant's termination as indicated in the termination letter (exhibit D13) where it is stated that: -

> *"As stated in the disciplinary hearing meeting the reasons for terminating your employment with Tanzania Breweries Limited*
>
> *1.1.1.* ***Causing serious damage (Real or potential) of the employer's property through gross negligence or wilful damage, contrary to clauses 8 of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 (GN. No. 42 of 16th February 2007) and control at work***

Clause 2.0, S. (2.3) Negligently and dangerously operating a machine or any other thing on the company on the company premises and causing damage to the company property, or bodily harm to himself or any other person of the Schedule of Offences (Annexture H) found under Tanzania Breweries Limited, Managing Conduct and Relationships at work place (Code of Good Practice)"

The question to be addressed by the court is whether the respondent tendered sufficient evidence to prove the above misconducts. The term "*Gross negligence*" has been defined in a Legal Dictionary by S.L. Salwan and U. Narang, 25th Edition of 2015 to mean: -

"a marked departure from the normal standard of conduct of a professional man as to infer a lack of that ordinary care which a man of ordinary skill would display".

Gross negligence was also defined in the case of **Twiga Bancorp (T) Ltd. vs. David Kanyika**, **Labor Revision No. 346 of 2013,** Dar es Salaam where Rweyemamu J. (Rtd) to mean: -

"a serious careless, a person is gross negligent if he falls far below the ordinary standard of care that one can expect. It differs from ordinary negligence in terms of degree".

The elements of negligence were elaborated in the case of **Tanzania Revenue Authority Vs. Thabit Milimo and Another, Lab. Div. DSM Rev. No. 246 of 2014 [2015] LCCD 1 (191)** where Nyerere J. (Rtd) held that: -

"In the law of negligence liability arises where:-

(i) There is a duty of care and a person breach that duty as a result of which, the other person suffers loss or injury/damage.

(ii) a person acts negligently, when he fails to exercise that degree of care which a reasonable man/person of ordinary prudence, would exercise under the same circumstances.

(iii) Negligence is the opposite of diligence or being careful."

In the application at hand, the respondent strongly alleges that the applicant damaged his property out of negligence. It is undisputed that in the alleged date of 22/09/2016 the applicant had an accident

which he also admitted at the disciplinary hearing that when operating the fork lift machine, he offloaded pallet from the discharge machine line 5 (as it is recorded in the disciplinary hearing form (exhibit D8)). The applicant also admitted that the incident occurred as stated in the reply of show cause letter (exhibit D6). For easy of reference, I hereunder quote part of the applicants reply on his own verbatim: -

> *'Ni kweli tarehe 22/09/2016 niliingia kazini shift ya mchana saa nane hadi saa nne usiku. Nikiwa kazini muda wa saa tatu nanusu usiku nikiwa natoa pallet kutoka kwenye discharge machine jembe moja la fork lift lilinasa kwenye kingo ya discharge machine na hivyo wakati ninanyanyua nikagundua kwamba machine nayo nimenyanyua. Hivyo ikabidi nishushe ambapo ilikaa pembeni kidogo yae neo lake la kawaida. Baada yah apo niliwaita vijana wa kampuni ya kubunga ambao walinisaidia kurudisha katika eneo lake.'*

In the above quotation the applicant admitted that on 22/09/2016 he was on duty around 09:30 pm he caused an accident. The respondent contends that the incident was negligently caused by the applicant because he operated the machine under the influence of alcohol. Based on the evidence on record and oral testimonies of the

parties in my view it is sufficient to establish that on the date of the event the applicant was working under the influence of alcohol which resulted to the accident. In exhibit D6 the applicant again admitted that he was tested alcohol and found positive. All witnesses who were present on the incident testified that the applicant was under the influence of alcohol. Therefore, even in absence of documentary prove of the alcohol test, the witnesses' testimony suffice to find that the applicant worked under the influence of alcohol on the alleged date and caused damage to his employer.

The applicant also alleges that the Arbitrator disregarded forklift daily checklist of 21/09/2016 (exhibit P1), as rightly found by the Arbitrator, the applicant was supposed to tender the checklist of 22/09/2016, the date of the event. Furthermore, in exhibit D6 the applicant did not state that the incident was caused by the defects in the forklift therefore the alleged defects is an afterthought defence. Since it is proved that the applicant operated the machine under the influence of alcohol, it is my view that the misconduct of negligence was proved in this case because the loss caused was never disputed. The termination was hence substantively fair.

On the issue of procedural fairness, Mr. Mosha submitted that the procedures for terminating an employee on the ground of misconduct

are provided under Rule 13 of the Employment and Labour Relations (Code of Good Practice) G.N. 42 of 2007 (The Code). He stated that in the matter at hand the stipulated procedures were not followed. First, he stated that no investigation report was tendered to prove that thorough investigation was conducted pursuant to Rule 13 (1) of the Code. Secondly the counsel contended that the applicant was not served the charge in the language he understands. He stated that the offences indicated in the memo/show cause letter (exhibit D5) were not the ones mentioned in the notice to attend disciplinary hearing (exhibit D7).

Mr. Mosha submitted at length that no sufficient evidence was tendered to prove the allegations levelled against the applicant. He stated that the witnesses testified at the CMA were not called at the Disciplinary Hearing committee to prove the alleged misconducts.

In responding as to whether the termination procedures were complied with or not, Mr. Robert submitted that, as it is the position in various court decisions, the stipulated procedures should not be adhered in a checklist fashion. He cited the case of **Mantra Tanzania Limited v. Daniel Kisola, Revision No. 267 of 2019** (unreported) where the same position was held. The counsel argued that there is no requirement of tendering investigation report in law. To support his

position, he cited the case of **Emmanuel Talalai vs Cocacola Kwanza Limited**, (**Revision 24 of 2019) [2020] TZHC 1887 (08 July 2020).**

As to the distinction of the charges in the alleged documents, Mr. Robert submitted that such allegation is baseless. He alluded that the applicant's counsel fails to differentiate a show cause letter and a formal charge notification. That the offences charged in the notification were the ones tabled before the Disciplinary hearing committee and also, they are the ones in the termination letter. He insisted that the applicant was properly served with the charge and afforded sufficient time to prepare for his defence pursuant to the requirement of the law.

Regarding the allegation that no sufficient evidence was tendered to prove the allegations levelled against the applicant, Mr. Robert reiterated his submission on the above determined ground. He emphasized that the respondent tendered sufficient evidence to prove the misconduct in question.

Having the parties, I find that as rightly submitted by Mr. Mosha the procedures for termination on the ground of misconduct are provided under Rule 13 of the Code, it is now to see whether they were followed. Starting with the issue of investigation report, I am in

agreement with Mr. Robert's assertion and the cases cited thereto that under Rule 13 (1) of the Code, the law only directs an investigation to be conducted but there is no requirement of tendering an investigation report before the CMA. In the matter at hand, I find no relevance of tendering the investigation report because the applicant admitted to the occurrence of the incident as stated in exhibit D6. Therefore, the allegation that no investigation was conducted in this case is not a reason to fault the procedures of termination by the respondent.

Mr. Mosha also contended that the allegation charged were different from the ones served. It is trite law that a show cause letter is not a formal charge sheet to the disciplinary hearing. In this case, so long as the applicant was served with the notification to attend the disciplinary hearing together with the charge sheet before hearing, he had ample time to prepare for his defence because that is the intention of serving the employee with a notice of hearing under 13(2)&(3) of the Code.

As for the offences charged, the records show that the offences in the charge sheet tally with the ones tabled before the disciplinary hearing and listed in the termination letter thus, no contradiction was caused to the applicant by the respondent. Moreover, there is no law

demanding the employer to charge the employee the offences charged in the show cause letter. If no sufficient evidence is available in the offences charged in the termination letter the employer is at liberty to change the offenses and charge the employee accordingly, the important this is to serve the employee with the charges within reasonable time, something which was not at issue in this revision.

The allegation of sufficient evidence not being tendered, has been determined already in the first ground on substantive fairness. There was sufficient evidence to prove the allegations against the applicant.

Having made the above analysis and findings, I join hands with the Arbitrator's findings that the respondent had valid reason to terminate the applicant and he followed the required procedures. The termination was therefore substantively and procedurally fair. The revision before me lacks merits and it is hereby dismissed in its entirety.

It is so ordered.

Dated at Dar es Salaam this 06th day of May, 2022.

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S.M. MAGHIMBI

JUDGE