

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 533 OF 2020

K. K. SECURITY (T) LTD APPLICANT

VERSUS

LAZARO MAJESHI MKANGARA RESPONDENT

(From the decision of the Commission for Mediation and Arbitration at Kinondoni)

(Ng'washi, : Arbitrator)

Dated 03rd November, 2020

in

REF: CMA/DSM/KIN/66/19/51

EX PARTE JUDGEMENT

04th & 18th March 2022

Rwizile J

This Revision application emanates from the decision of the Commission for Mediation and Arbitration (CMA) in Labour dispute No. CMA/DSM/KIN/66/19/51. The applicant is praying for orders of the Court in the following terms: -

- i. That Honourable Court be pleased to revise the arbitration proceedings and award issued by Hon. Ng'washi, Arbitrator in the Commission for Mediation and Arbitration on 3rd Day of*

November, 2020 in the Labour Dispute No. CMA/DSM/KIN/66/19/51

- ii. That upon receiving the CMA proceedings, decision, orders thereof, this Honourable Court be pleased to issue an order setting aside and quashing the impugned Arbitration award which has been improperly procured.*
- iii. Any other reliefs that this Honourable Court may deem fit and just to grant.*

A brief sequence of facts that triggered this application are traced from CMA record and the affidavit of the applicant. On 29th May 2014 the respondent was employed by the applicant as a Security Guard. Their relationship turned sour on 10th January 2019, when he was terminated for misconduct (Negligence). Aggrieved by the decision, the respondent filed the matter at CMA on 25th January 2019 claiming for terminal benefits due to breach of contract. The Commission decided the matter in his favour regarding substantive aspect by awarding him TZS 2,001,923.00/= Dissatisfied with the CMA decision the applicant filed the present application.

Along with the Chamber summons, the applicant filed affidavit sworn by Mr. Daniel Mwakajila applicant's Human Resource Manager which explains the chronological facts leading to this application. The applicant alleged that; the respondent was fairly terminated on the ground of gross

negligence. The application was not challenged by the respondent as he neither filed counter-affidavit nor appeared for a hearing. An order issued on 04th March 2022, called the matter for *ex parte* hearing.

Mr. Mwemba who appeared for the applicant submitted that, the applicant was justified to terminate the respondent. He cited Section 37(1) of Employment and Labour Relations Act [CAP 366 R.E. 2019] and stated that, termination has to be grounded on reason. He argued, the arbitrator held that there was no stock taking of the alleged goods. In his view, the arbitrator did not consider the evidence of the applicant which is exhibit K3, showing how loss was discovered. He added that, the respondent was the gate keeper, responsible for security of vehicles leaving the premises and so the loss occurred due to his negligence.

It was further submitted that, the arbitrator held that there was breach of contract. He was of the view that the arbitrator misdirected himself because the investigation report stated how the event occurred at night on 29th October 2018 to 30th October 2018.

He finalized by submitting that, the respondent did not do his duty properly leading to the loss of 56 boxes of Grand Malt. He thus prayed for the award to be set aside.

Having considered the submissions by both parties and the CMA record, I find the issues for determination are; *whether there was breach of the*

respondent's contract of employment, if the answer is in the affirmative to what relief parties are intitled to?

At CMA, the arbitrator found that there was no valid reason for terminating the respondent. His findings based on two reasons. *Firstly*, there was no any documentary evidence to support the allegation. *Secondly*, there was no stock taking to establish the exact goods in the store before the loss occurred.

Basing on arbitrator's findings and applicant's submission I am of the view that in addressing the main issue posed before this Court; the disputed aspect regarding reason for termination has to be determined.

In resolving this question, the relevant provision is section 37 of the Employment and Labour Relation Act, [Cap 366 R.E 2019] which provides that: -

"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."

Again, in the case of **Tanzania Revenue Authority v Andrew Mapunda**, Labour Rev. No. 104 of 2014 it was held that: -

"(i) It is the established principle that for the termination of employment to be considered fair it should be based on valid reasons and fair procedure. In other words, there must be substantive fairness and procedural fairness of termination of employment, Section 37(2) of the Act.

(ii) I have no doubt that the intention of the legislature is to require employers to terminate employees only basing on valid reasons and not their will or whims."

The applicant was terminated for allegedly committing a misconduct, that is a breached of the common law duty of acting in good faith and therefore for being negligent. He is alleged not follow the employer's rules as stated in a termination letter. Having gone through the record, it is noted that it is undisputed that fifty (56) Grand Malt cans were found missing. Under the circumstance of this application, I am of the view that the question before this Court is whether the respondent committed that the said misconduct.

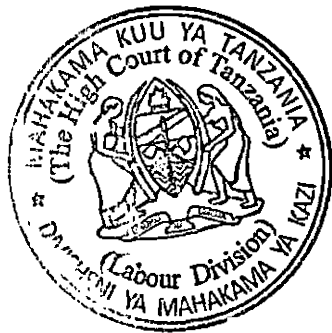
It is on record that the respondent was employed in a position of a security guard as per exhibit K-7- his employment contract.

He was alleged duty bound to verify and inspect the amount of goods

packed before the vehicles leave the employer's premises, Dw1 testified so. But the CMA proceedings shows when examined, the respondent was not aware of that as his duty. The applicant therefore had to prove that it was his duty to do so. The employment letter does not show it his duty. There is no dispute as per exhibit K-3 (Gelaid Maira and Willy Mwakambile written statements) that there was a loss of 56 Grand Malt cans. The evidence does not clearly show when the same were taken from the storage facility or if they were taken out in lumpsum or just in piecemeal. The video footage from the CCTV cameras is not exact on what happened. It is incumbent that the report exhibit K2 shows and suspects that theft existed but was planned by the warehouse men. The respondent, a gate keeper, could easily be blamed for failure to inspect motor vehicles at the gate. But in absence of evidence showing, it was his legal duty one would rely on the recommendation of the report. The same does not point at the respondent.

Based on the nature of the matter and the circumstances of this case, I find the decision of the Commission without fault. It was not proved that the respondent was negligent causing the alleged loss. In the final result, I find the application with not merit, it is dismissed. Each party to take care of its own costs.

Dated at Dar es salaam this 18th Day of March 2022




A. K. Rwizile

JUDGE

18.03.2022

Labour Court TZ.