

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 255 OF 2023

BETWEEN

BOSWELY ODONGO APPLICANT

VERSUS

COCACOLA KWANZA LIMITED RESPONDENT

JUDGEMENT

Date of last Order: 21/11/2023

Date of Judgement: 08/12/2023

MLYAMBINA, J.

The Applicant was employed by the Respondent as a Plant Maintenance Planner in Manufacturing Department on a permanent base contract as reflected in the employment contract. It was alleged that on November 2021, the Applicant obtained money from National Social Security Funds (NSSF) deposited in his account using falsified documents which had company logo for his personal gain. The Applicant received a total of TZS 17,257,983/= with a held of NSSF official whom he paid TZS 2,070,00/=. Following the allegation, the Applicant was charged and found guilty with gross dishonesty and forgery. He was therefore terminated from employment with effect from 08/07/2022 as indicated in the termination letter (exhibit D10).

Being aggrieved by the termination, the Applicant referred the matter to the Commission for Mediation and Arbitration (herein CMA) claiming

for unfair termination both, substantively and procedurally. After considering the evidence of the parties, the CMA dismissed the Applicant's claim on the ground that he was fairly terminated from his employment. Again, being dissatisfied by the CMA's decision, the Applicant filed the present application on the following grounds:

1. That, in absence of any reliable evidence whatsoever in support of the charge, the presiding Arbitrator proceeded and misdirected herself by holding that the Applicant has committed the offence of forgery of documents and therefore is liable for gross dishonest.
2. That, during hearing, the Respondent's Advocate prayed for tendering the documents namely **CCKL 4, CCKL 5, CCKL 6, CCKL 7, CCKL8** and **CCKL 9** and some other documents from the Respondent's list of documents to be relied upon, but the Applicant Counsel objected the same for being photocopies and electronic documents whose procedures are never been observed. The Arbitrator was reluctant to rule out the objections in promise that she will decide the same during the composition of the judgement. Surprisingly, in the judgement dated 22nd September 2023, the Arbitrator failed to rule out the objection regarding the admissibility of the documentary evidence and therefore decided

the matter basing on unqualified documentary evidence, hence ended in bad judgement.

3. That, the Arbitrator erroneously decided the matter and condemned the Applicant for forgery basing on the documentary evidence bearing other people's signatures who neither investigated nor did any reasons advanced as to why they have not been counted in the same port with the Applicant, therefore amounts to conclusion that the prosecution was purely discriminatory.
4. That, the Arbitrator's Award/Decision is in serious contravention of the governing law by condemning the Applicant for criminal offence beyond its statutory latitude.
5. That, the CMA failed to interpret and honour the mandatory provisions of the law which prohibits any disciplinary action to be taken in form of penalty, termination or dismissal against the employee who has been charged with criminal offence until final determination by the Court or any appeal thereto. Further, no any reasons advanced thereto by the Arbitrator as to why did not count and determine on this mandatory statutory requirement. Hence ended in bad finding.

6. That, the CMA has misdirected itself by holding that the termination was procedurally fair while it is in record that the termination is in serious contravention of the law as failed to conduct investigation and procure the Applicant the investigation report contrary to the law.
7. That, the presiding Arbitrator's seriously offended the law by making decision basing on his personal opinion and allow her personal view to determine the matter and supersede the law.

I appreciate the comprehensive submissions of the parties which shall be taken on board in due course of constructing this judgement. After considering the rival submissions of the parties, CMA and Court records as well as relevant laws, I find the Court is called upon to determine the following issues:

- i. Whether the Respondent proved the misconducts levelled against the Applicant.
- ii. Whether the Respondent followed procedures in terminating the Applicant.
- iii. What relief(s) are the parties entitled.

To start with the first issue, the Applicant was charged with gross dishonesty and forgery. On gross dishonesty, it was alleged that

the Applicant intentionally acquired money from National Social Security Funds (NSSF) using false information contrary to *Rule 12(3)(a) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 (GN. No. 42 of 2007)* and the Company Disciplinary Code *Schedule 17(j)(1) of Coca – Cola Staff handbook*. Regarding forgery, it was alleged that in the period between October and November 2021, the Applicant forged a HR Manager signature and used company's headed paper (with a logo) to access unemployment benefit from NSSF contrary to the company's disciplinary code *schedule 17(j)(4) of Coca – Cola Staff handbook*.

Before this Court, the Applicant strongly alleged that the Arbitrator failed to analyse the evidence properly that the Respondent failed to prove the alleged misconducts. I have carefully examined the records. As rightly found by the Arbitrator, the evidence available in this case proves the misconducts charged.

It should be noted that the standard of proof in case of this nature is on the balance of probability as in terms of *Rule 9(3) of GN. No. 42 of 2007*. Therefore, the Applicant's allegation that forgery can only be proved by eyewitness or handwriting expert lacks legal basis. To

commence with the first misconduct of gross dishonest, the same is provided under *Rule 12 (3) (a) of GN. No. 42/2007*. The misconduct in question is listed as one among the acts which may justify termination.

In the reply to show cause letter (exhibit D13), the Applicant strongly denied the allegations levelled against him. As regards to the misconduct of gross dishonest, he stated that the process was initiated by someone who introduced himself to him as an NSSF employee. He stated that; he met that person while travelling from Mbeya to Dar es Salaam for business. They had a long discussion, and the alleged person promised him to obtain loan from NSSF. The Applicant admitted that he received a total of TZS. 17,257,983/= from NSSF but he maintained that the amount was received as a loan.

On the other hand, the Respondent tendered the NSSF benefit application form (exhibit D3), where the Applicant requested for his unemployment benefits and signed the relevant form. The Respondent also tendered the Applicant's affidavit. He sworn that; he was no longer in employment since 05/10/2021. The Applicant was expected to counter such evidence by producing his loan application form, but he failed to do so. On failure of such strong evidence, it suffices to conclude that the amount received was his unemployment benefit which was

wrongly given to him because he was still in employment and he knew that the benefits is received upon termination of employment.

If the Applicant was not the one who initiated the process why would he accepted to sign the disputed documents without reading the same? During investigation with an investigation officer from NSSF the Applicant admitted that he saw the certificate of service as one among the documents used to acquire the purported loan. Why would he agreed to proceed with the alleged loan process while the certificate of service is self-explanatory? The certificate in question indicated that the Applicant has been working with the Respondent as a Senior Driver from 11/07/2019. I hereunder quote the Applicant's reply when examined by the NSSF officer for easy of reference:

Mjumbe NSSF: Na hii je (certificate of service)

Boswelly: Hii niliona kwenye documents nilizokuwa nina saini.

Mjumbe NSSF: Je, ulihusika kuandaa document zozote kuandaa haya mafao?

Boswelly: Hapana sijaandaa document yeyote

Teddy: Kwanini hukuhoji ulivyoona hiyo certificate of service?

Boswelly: Sikuhoji maana nilijua ni masharti ya mkopo. Na ndio mana nilimuuliza kwanini kwanini nimeulizwa kama nimeacha kazi.

At the CMA the Applicant tendered his employment contract (exhibit P1) which indicated that the Applicant was employed in the capacity of Graduate in Training – Manufacturing. If he did not conspire with his fellow from NSSF as alleged he would have not agreed to proceed with the alleged loan process under the capacity of a Driver which was not his position in the Respondent's company. Therefore, on the basis of the evidence available in records, I join hands with the Arbitrator that the Respondent proved the misconduct levelled.

On the misconduct of forgery, the Applicant firmly disputed the allegation. He stated that after he believed the information, he received from the person who introduced himself as an NSSF employee. Considering the analysis in the first misconduct it is crystal clear the Applicant committed the misconduct in question. He knew the documents used were deceiving but he proceeded to use the same in obtaining the unemployment benefits.

As regards to the allegation that the Applicant's Counsel objected CCKL 4, CCKL 5, CCKL 6, CCKL 7, CCKL8 and CCKL 9 and some other documents from the Respondent's list of documents, the record shows that the relevant documents were objected but the Arbitrator delivered a

decision thereto. Therefore, nothing was left to be decided by the Arbitrator while composing the decision.

The second issue is; *whether the Respondent followed procedures in terminating the Applicant.* As the record speaks, the Applicant was terminated on the ground of misconduct. The termination procedures on such ground are provided under *Rule 13 of GN. No. 42 of 2007* which I find no relevance to reproduce the same. Having examined the records at hand, it is crystal clear that all the termination procedures provided in the relevant provision were followed. The Applicant was summoned before the disciplinary hearing where he was afforded the right to be heard. However, his evidence was not sufficient enough to exempt him from the misconducts charged.

I am not in disregard of the Applicant's allegation that the Respondent did not tender the investigation report as per *Rule 13(1) (supra)*. To the circumstances of this case and the evidence tendered, it is my view that the same were sufficient enough to prove the misconduct charged. The Respondent tendered the minutes of investigation and all documents which were forged by the Applicant to prove the misconducts levelled. Under such circumstances, even in absence of investigation report, the misconduct stands as the proof on

the balance of probabilities as stated above. Therefore, the case of **Severo Mutege and Another v. Mamlaka ya Maji Safi Usafi wa Mazingira Mjini Dodoma (DUWASA)**, Civil appeal No. 343 of 2019 Court of Appeal of Tanzania is distinguishable to the circumstance at hand.

Turning to the last issue, since it is found that the Applicant was fairly terminated from employment both substantively and procedurally as found by the Arbitrator, I find no justifiable reasons to fault the CMA's award.

In the end result, this application is dismissed for being devoid of merits. Order accordingly. It is so ordered.



Y.J. MLYAMBINA

JUDGE

08/12/2023

Judgement pronounced and dated 8th December, 2023 in the absence of the Applicant and in the presence of Counsel Flavian Asenga John holding brief of Godfrey Tesha for the Respondent.



Y.J. MLYAMBINA

JUDGE

08/12/2023