

TANZANIA / JUDGMENT

ABAS MBEGA MWANKYENJA ruling

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF
MWANZA AT MWANZA LABOUR REVISION NO. 26693 OF 2023 (Arising from Commission for
Mediation and Arbitration for Mwanza in CMA/MZA/NYAM/41/2023/28/2023) ABAS MBEGA
MWANKENJA..... APPLICANT VERSUS SBC TANZANIA LIMITED
..... RESPONDENT

JUDGEMENT

4th March, 2025 CHUMA, J. In this application the applicant is seeking the indulgence of this court to revise the decision of the Commission for Mediation and Arbitration for Mwanza (CMA) Labour Dispute No. CMA/MZA/NYAM/41/2023/28/2023 which dismissed the applicant's complaint for unfair termination. Briefly counted from the record, the respondent was employed by the respondent effective from 1/9/2014 in the position of Sales Supervisor under permanent employment. In the course of his employment, he was demoted to the position of Salesman cum Driver. His employment was terminated effective from 6/1/2023 for three allegations of misconduct to wit; causing a shortage of company money worth Tshs. 1,468,064/=; failure to give a written statement on time to Head of Department which indicates a sign of insubordination; and failure to go to the market for more than 15 days in which the company is losing sales. The applicant considered his termination to be substantively and procedural unfair hence, he filed Labour Dispute before the CMA. The CMA dismissed the applicant's claim after considering that the first and third reasons for termination were valid and fair and the respondent followed the proper procedure for termination. From that decision, the applicant preferred this application against the award of the CMA. The application is supported by the affidavit of the applicant, whereas it is contested by the counter affidavit of Phocus Lusato the Principal Officer of the respondent. According to paragraph 16 of the affidavit, the application is based on one legal issue that; "Whether the award/decision of the CMA delivered on 6/11/2023 can legally be sustained in the name of justice." The application was disposed of by way of written submissions. The submissions for the applicant were filed by Mr. Peter Makenya Personal Representative whereas Ms. Monica Kabadi learned advocate represented the respondents. Before starting to determine the raised legal issue in line with the submissions for the parties I must say that the submissions of parties 2 were mostly misplaced as parties failed to confine themselves to the raised legal issue in line with salutary issues for determination in disputes for unfair termination which are substantive and procedural fairness. More so in his submission Mr. Makenya took much time and

pages repeating on non- consideration of his final or closing argument there at however, I would wish to remind him that, closing or final arguments are not evidence. They are just supplement or clarifications of their submissions made while presenting their case. Final determination of case is based on the evidence adduced by the parties on record and not on strength of submissions. See the case of Peter Mathias Semagongo Vs. Rightway Nursery & Primary School, Revision Application No. 150 of 2022 (unreported). The manner of filing this application is governed by Rule 24 of Labor Court Rules, 2007 (hereinafter the Rules) According to Rule 24 (3) the affidavit supporting an application to this court shall clearly and concisely set out;

- a. The names, descriptions, and address of the parties;
- b. A statement of the material facts in chronological order on which the application is based'
- c. A statement of the legal issues that arise from the material facts; and 3
- d. Reliefs sought. Therefore, what needs to be determined is what is contained in the statement of legal issues although the court on determining those issues shall consider the grounds to set aside the arbitral award set out in s. 91(2)(a), (b) and (c) of the Employment and Labour Relations Act No. 6 of 2004 (hereinafter the Act) as well as Rule 28 (1) (a), (b), (c), (d) and (e) of the Rules. I will therefore determine the legal issue raised in line with relevant submissions of parties and evidence on record to see whether the termination of the applicant's employment was fair substantively and procedural. Starting with reason(s) for termination the CMA found two reasons to be fair that is to say;
 - i. causing a shortage of company money worth Tshs. 1,468,064/=; and ii. Failure to go to the market for more than 15 days in which the company is losing sales. Mr. Makenya was of the view that, in civil cases, decisions must be founded on the evidence adduced before trial on balance of probabilities. That according to CMA records the applicant was employed as a Salesman. That, in the course of his work, he got shortage of Tshs. 2,081,864/= but he immediately reported the shortage and promised to repay the same within 4 one week commencing on 21/12/2022 as per exhibit SU5 and SM9. That, the respondent unilaterally deducted Tshs. 613,800/= from the applicant's December salary to reduce the shortage and leave his balance at Zero. That such deduction was contrary to section 28(1) and (2) (e) of the Act. Further reference was made to the case of Remigius Muganga Vs. Barrick Bulyanhulu Gold Mine, Reference Application No. 11 of 2015 (unreported). He submitted further that, the arbitrator erred in concluding that the applicant confessed to the charges leveled against him at the disciplinary hearing and he also erred in his view that the applicant's repayment of the shortage money does not remove or reduce the strength of the charges leveled against the applicant. The CMA erred in concluding that the respondent had valid and fair reasons for termination. That the applicant on 29/12/2022 cleared his total debt in excess before the disciplinary hearing. In reply, Ms. Kabadi submitted in respect of reasons for termination that, the deduction made by the respondent from the applicant's December salary was made out of a bonafide claim of right therefore justifiable. That, Mr. Makenya misconstrued section 28(2) (a) of the Act. That, deduction made to the applicant's salary cannot exonerate

him from the charges. That the respondent was justified in his two reasons for terminating the applicant's 5 employment stated herein above. The applicant admitted in exhibit SM8 that he negligently caused a loss to the company and undertook to refund the company. And that he absconded from work for 15 days. I was referred to the case of Constantine Victor John Vs. Muhimbili National Hospital, Civil Application No. 188/01 of 2021. In rejoinder, submission in chief was reiterated. Having gone through the submissions of parties for and against regarding reasons for termination, I will now pause to determine this application. This being the second court to determine the matter in controversy, it takes a form of rehearing. I, therefore, have the mandate to re-appraise, re-assess, and re-analyze the evidence on the record. In the case of Philopo Joseph Lukonde Vs. Faraji Ally Said, Civil Appeal No. 74 of 2019 (unreported) the court of appeal said the following on page 14; "This being a first appeal, this Court has a duty to subject the entire evidence on record to a fresh re-evaluation and come to its own conclusions. The conclusions may affirm the trial court's finding of facts, or this Court may even arrive at a totally different conclusion on the same facts." I will therefore reevaluate the evidence on record to see whether the respondent has valid and fair reasons for termination and whether proper 6 procedures for termination were followed. It is cardinal law under s. 39 of the Employment and Labour Relations Act Cap 366 R.E 2019 (the Act) and Rule 9(3) of the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42, 2007 (the code) that, the burden to prove that fairness of termination of employment lies upon the employer. Starting with the first charge of causing a shortage of company money worth Tshs. 1,468,064/=, the appellant is of the view that the respondent was not justified to terminate the applicant's employment based on this reason because the applicant had already covered the shortage by deduction from December salary and cash payment at the company. According to the respondent's counsel repayment did not acquit the applicant from the first charge. Having considered the evidence in the record there is no dispute that the applicant in the course of his duty got a shortage of Tshs. 2,081,864/=. It is also undisputed that according to a letter dated 21/12/2022 (Exhibit SM9), he admitted and promised to pay the respondent he said; "...nilifanya uzembe na kuleta hasara hiyo ambayo inatambuliwa kama (SHORTAGE) narejea kusema nadhani hii ilitokea kwenye ukusanyaji wa soda za take away PEP na kwakuwa mimi ndiye mwenye dhamana hiyo ilibidi niondoe upungufu huo na kuhamishia katika account yangu ya 7 kampuni tangia itokee hasara hii nimechukulia kama uzembe wangu mimi mwenyewe japo inawezeza kuwa siyo. Pia nimejaribu kutafuta namna ya kulimaliza jambo hili kazi ya kampuni ziendeleo na nadhani au ninaahidi kutoa ushirikiano wangu binafsi ili kuzirejesha pesa hizi ndani ya wiki hii kabla ya kwisha..." It is also not in dispute that, the Salesmen of the respondent in the normal course of their duty used to get shortage but they are only allowed to have the credit of Tshs. 25,000/=. If the amount exceeds the limit the Salesman has to seek approval from the General Manager otherwise, they will not be given other products and cars to go to the market until the full amount of shortage is paid, and if no payment is made the employee will be terminated. DW1 Phocus Rusato in his testimony said that the applicant was given 15 days to pay the money but he showed no interest in paying hence he was served with a notice for a Disciplinary Hearing (exhibit SU6). During cross-examination he testified on

page 7 that; S-Nini maana ya CR shortage or loss J-Ni upungifu wa pesa or loss unaosababishwa na sales man S-Huwa inalipwaje kama yupo tayari J-Huwa mtu anapewa muda wa kulipa kama yupo tayari S-Je mtu anaposababisha shortage huwa anafukuzwa 8 J-Ndio akishindwa kulipa. It is also undisputed that, the applicant's December salary was fully set off to pay the deficit at Tshs. 613,800/= on 23/12/2022. It is also not in dispute that, after deduction, the remaining balance of Tshs. 1,468,064/= was paid at the Cashier by the applicant on 29/12/2022 a day before the Disciplinary Hearing as proved by Pay Slip (Exhibit SM13). From this evidence five facts are certain; one, the applicant had a deficit of Tshs. 2,081,864/= in his accounts; two, the respondent gave the applicant 15 days to repay the loan; three, the applicant admitted and promised to pay within a week; four; two days after the applicant's admission, the applicant's salary of Tshs. 613,8000/= was deducted to pay the deficit on 23/12/2022; five, the applicant on 28/12/2022 was served with a notice for a disciplinary hearing, and on 29/12/2022 the applicant repaid the remaining balance to the respondent before hearing. Now the question comes, was the respondent justified to terminate the applicant's employment based on the reason of causing a shortage of company money of Tshs 1,468,064/= Before I answer this question, I have considered several factors; first, as I have said, according to the evidence on record, it was normal for a Salesman to have deficits in their accounts. The maximum allowed credit is Tshs. 25,000/= on which the salesman will be allowed to take another consignment on credit and continue his work as usual but if he exceeds the maximum amount he will not be allowed to take other consignments until the deficit amount is paid and if he fails he will be terminated; second, the promise by the applicant was not absolute but he had a belief that he will adhere to his promise. I have this view out of his word that 'nadhani au ninaahidi' quoted above; third, after the setoff of December salary, the applicant remained with zero total pay therefore Mr. Makenya was correct to say that the applicant faced some challenges to survive on zero balance. Fourth, having managed to repay the outstanding balance after deduction on the 8th day after his admission, the applicant fulfilled his promise albeit not within the exact week. The applicant in his testimony said on page 21 that; "Mshahara wa December, ulitolewa tarehe 23/12/2022 ila mimi sikulipwa nilifuatilia CRDB Buzuruga Branch ndio nikaambiwa hivyo. Hii iliniathiri kiuchumi kuelekea sikukuu ya Christmas pamoja na familia yangu ya watu 14 ikiwemo mama yangu na dada zangu, mke wangu na watoto wangu. Pamoja na hilo niliendelea na jitihada zangu za kulipa ikiwemo kuchukua mkopo CRDB ila sikukubaliwa, na kwa wafanyajazi wenzangu na walinihidi kulipa tarehe 28/12/2022 ila Saidi akaniambia angenipa ila kasikia kuwa kuna mpango wa kufukuzwa hivyo pesa zao zikapotea na wakaogopa..." 10 This evidence was left uncross-examined by the respondent and therefore admitted. Fifth, with the full amount having been paid before the disciplinary hearing, the respondent had no valid reason to terminate the applicant's employment, or rather hearing was conducted based on defective or overtaken charges. I have that view because if the respondent intended to charge the applicant on the offence of causing shortage of the company money regardless of payment, she ought to charge and conduct hearing on the full amount of Tshs. 2,081,864/= not part of it as the whole amount was settled before the hearing. According to evidence of DW2 and DW3 hearing was

conducted while the Committee knew that the amount was fully repaid. In particular, DW2 said; “Namfahamu Matrona Paul ni cashier mimi niniwa mwenyekiti, katibu alikuwa Manager rasilimali watu (Bw. Focus Rusato) na alitoa taarifa kuwa mlalamika amelipa pesa yote siku moja kabla ya kikao” Despite that Knowledge, a Disciplinary Hearing was conducted based on exhibit SU12/SM10 which partly read; “During payroll preparation for December 20222, management was forced to deduct Tshs. 613,800/= from your salary to reduce the shortage. Hence, your current outstanding read Tsh 1,468,064/=...” 11 For the foregoing, it is the court’s findings that the respondent erroneously relied on an invalid first reason for causing a shortage of company money worth Tshs. 1,468,064/= to terminate the applicant’s employment. The second reason for failure to go to the market for more than 15 days will not detain me for so long. The respondent’s counsel termed it as absenteeism but the records of CMA are silent regarding those allegations rather the applicant was charged for not going to the market. The records were silent as to whether the respondent’s duty was only to go to market for sales without other duties at the office therefore the argument for absenteeism was misplaced. Further, although the charge and evidence of the respondents indicate the applicant to have not gone to market for 15 days, it was not stated from when he failed to go. Counting from the day the applicant was required to give a written explanation regarding shortage (Exhibit SU1/SM8) to the date of hearing, it was only 10 days. It is also clear from records that; if the Salesman exceeds the credit limit of 25,000/= he will not be issued a Car to go to market until the full amount is paid. DW2 said on page 11 that; “Kiwangio cha credit cha muuzaji kilichowekwa na kampuni ni Tsh. 25,000/= zaidi ya hapo mtu hatopewa gari siku inayofata.” 12 That being the case, I am convinced that, like the first reason, the respondent failed to prove this reason to be fair to warrant termination. According to section 37(2) (a) and (b) of the Act, there must be a valid reason for termination of employment. It reads; 37.-(1) It shall be unlawful for an employer to terminate the employment of an employee unfairly.

- (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. On the second legal point, the applicant submitted that the respondent failed to follow proper procedures for termination. He contended that the applicant’s termination was earlier planned by the Human Resources Manager of the Respondent one Phocus Lusato (DW1); the Disciplinary hearing was held while the applicant already settled the deficit amount; during hearing the respondent presented no witness; the committee disregarded the evidence of the applicant that he had already settled the outstanding balance; the applicant was not given the right to mitigate; the applicant was refused to sign and obtain the Hearing Form (exhibit SU7); DW1 deliberately prepared irregular and false minutes (SU9) which do not show that committee members, agenda and proceedings of the hearing. 13 In response, it was submitted that the complaints by the applicant are baseless and unmeritorious. The respondent complied with the provisions of Rule 13 of the Code regarding fair procedures. The applicant was issued a Notice of hearing and the charge for preparation, he was afforded a right to call a witness and he was accorded with right of hearing. The applicant admitted to the charges and he

signed the hearing form. Taking into account the submissions of parties for and against and evidence on record it is this court's finding that the respondent failed to adhere to fair and proper procedures before termination. As I have discussed herein above, the hearing was conducted based on a defective charge which consists of non-existing allegations of causing a shortage of company money worth Tshs. 1,468,064/=. Further, although Proceedings Checklist Compliance (exhibit SU7) shows that the respondent followed procedures during the hearing, the minutes (exhibit SU9) show only questions posed to the applicant and his answers in the form of cross-examination. No indication as to whether the applicant presented his case and afforded with opportunity to call a witness. It is also silent as to what was the substance of the respondent's testimony at the hearing and whether the applicant was afforded the right to cross-examine the respondent's witnesses. That being the case in 14 my view the applicant was not afforded with fair hearing before his termination. Mr. Makenya also contended that exhibit SU9 was prepared by DW1 irregularly and falsely. However, in my view, those are allegations that require proof on a standard more than that balance of probability. See the case of Gabriel Mathias Michael and another V Halima Feruzi and 2 others, Civil Appeal No. 28 of 2020, City Coffee Ltd V the Registered trustee of Iloilo Coffee Group, Civil Appeal No. 94 of 2018 (both unreported). Based on the analysis hereinabove, the applicant's termination was unfairly substantively and procedurally. The decision of the CMA thus was improper and cannot stand. The determination on unfair termination of the applicant leads me to determine the reliefs sought by the applicant. The applicant before the CMA prayed to be paid reliefs stated in the CMA Form No. 1 and Tshs. 1,936/= exceeded on payment made before the cashier on 29/12/2022 and arrears of December salary at Tshs. 411,000/=. The reliefs stated in CMA Form No. 1 were as follows;

- i. Payment of Tshs. 485,378/- being salary from 1st to 10th January when he was terminated; ii. One-month salary in lieu of Notice at Tshs. 1,456,134/- 15 iii. Leave pay for untaken leave for 42 days at Tshs. 2,038,588/=; iv. Severance pay for 8 years' continuous service at Tshs. 2,718,117/=
- v. Compensation of 96 months' salary for unfair termination at Tshs. 139,788,864/= vi. General Damages at Tshs. 300,000,000/= vii. Repatriation costs to Kyela, Mbeya. viii. Subsistence expenses from the date of termination to date of repatriation. According to the termination Letter dated 9/1/2023 (exhibit SM 15) terminal benefits of the applicant were stated to be, payment for a number of days worked including the 6th January 2023; one-month salary in lieu of Notice; 42 days of untaken leave; incentives (if any); severance pay; and Certificate of Service. DW1 testified to the effect that the applicant was paid his terminal benefit he also tendered Terminal Benefit dated 6/1/2023(exhibit SU15) which proves that the applicant was paid all terminal benefits stated in exhibit SM15. The applicant also testified to that effect at page 24 saying that; "Nimefanya clearance tarehe 11/1/2023 kupitia Separation Form. Kwangu mimi ninana sikutendewa haki, terminal benefits nililipwa kupitia bank baada ya kuleta shauri 16 hapa Tume, malipo yalikosewa kwani nina madai yangu hapa" The applicant, therefore, conceded to have been paid terminal benefits stated in exhibit SM15. However, I have noted that the calculation for terminal benefit was done based on the

incorrect net pay of the applicant at the time of termination. The payment was made based on salary and allowance entitlement of June 2022 as shown in Exhibit SM11 while the correct basic salary and allowance at the time of termination are as of December 2022 which shows that, the applicant was paid Tshs. 954,627/- as Basic Salary; Housing allowance at Tshs. 154,019/=; Transport Allowance at Tshs. 120,569/=; Meal Allowance at Tshs. 79,696/= Responsibility Allowance at Tshs. 57,639/= which makes a total of Tshs. 1,366,550/= as correctly stated on page 66 of the applicant's final submission filed before the CMA. It was the testimony of the applicant that his Gross Salary was Tshs. 1,437,756.35/= but in my view this is misleading because he relied on November Salary which according to exhibit SM11 he was paid Arrears of Tshs. 89,401/= and Night Allowance of at Tshs. 182.99/=. Therefore, the correct Gross pay at the time of termination was Tshs. 1,366,550/= and the respondent was supposed to pay the terminal benefits out of this figure. I have also noted that the applicant was paid up to 6th January 2023 while a 17 termination letter was communicated to him on 10/1/2023. Therefore, he is entitled to be paid an extra 4 days from correct net pay. Remedies for unfair terminating are provided under sections 40 (1), 44(1) and (2) of the Act which provides that; 40.-(1) Where an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer –

- (a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or
- (b) to re-engage the employee on any terms that the arbitrator or Court may decide; or
- (c) to pay compensation to the employee of not less than twelve months remuneration. 44.-(1) On termination of employment, an employer shall pay an employee -
 - (a) any remuneration for work done before the termination;
 - (b) any annual leave pay due to an employee under section 31 for leave that the employee has not taken;
 - (c) any annual leave pay accrued during any incomplete leave cycle determined in accordance with section 31(1);
 - (d) any notice pay due under section 41(5); and
 - (e) any severance pay due under section 42; 18
 - (f) any transport allowance that may be due under section 43.
- (2) On termination, the employer shall issue to an employee a prescribed certificate of service. As deliberated above, remedies provided under sections 44(1) and (2) were paid to the applicant save for transport allowance under s. 44(1) (f) which will be discussed hereinafter. With regards to remedies under section 40 of the Act, the applicant prayed for compensation of 96 Months' salary. Having considered the fact that the applicant's termination was unfairly based on reason and procedure and the circumstances on which he was terminated

20 months salary suffices to compensate the applicant for unfair termination. Regarding repatriation costs to Kyela, Mbeya the applicant claims to be repatriated to that place as his place of domicile. In his evidence, the applicant on page 17 testified to the effect that at the time of employment his place of domicile was Matema village of Mbeya Region. He also tendered his personal record form (exhibit SM2). During cross-examination, no question was asked regarding his place of recruitment. It is trite law that failure to cross-examine is taken as an admission. See the case of are cases of Patrick William Magubo Vs. Lilian Peter Kitali, Civil Appeal No. 41 of 2019; Nelson s/o Onyango Vs. Republic, Criminal Appeal No. 49/2017; Paul Yustus Nchia Vs. National Executive Secretary Chama cha Mapinduzi and Another, 19 Civil Appeal No. 85 of 2005 (all unreported). Therefore, I agree with Mr. Makenya that the applicant is entitled to be paid repatriation costs. General damages are discretionary remedies that are considered by the court to be probable consequences of the act complained of as stated in the case of Stroms Vs. Hutchison [1905] A.C. 515. However, in my view, this is not a proper remedy in disputes for unfair termination because when the court considers compensation for unfair termination under section 40(1) (c) of the Act, it considers similar matters that are considered in the award of general damages. The law sets a minimum of 12 months remuneration but the court may award more than 12 months after considering matters which would have been considered in award of general damages. That being said and done, the application has merit, the CMA award was not proper and it cannot be left to stand as it failed to consider that the applicant's termination was unfair based on reason and procedure. I further proceed to grant the applicant the following reliefs;

1. Payment of Tshs. 1,936/= as access money paid to the respondent's cashier on 29/12/2022.
 2. Payment of Tshs. 1,107,412/= as a deficit in payment made to the applicant as a terminal benefit; 20
 3. Payment of four days' salary from 7/1/2023 to 10/1/2023;
 4. Payment of 20 months remuneration as compensation for unfair termination;
 5. Payment of repatriation costs from Mwanza to Matema village of Kyela District of Mbeya Region. Owing to the nature of this matter, I desist from making an order for cost. I so order.
- DATED at MWANZA this 4th day of March 2025. W. M. CHUMA JUDGE 21 Ruling delivered in court virtually in attendance of Mr Peter Makenya personal representative for the applicant and Ms. Monica Kabadi advocate for the respondent this 4th day of March 2025. J. MUSAROCHE DEPUTY REGISTRAR 22

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