

TANZANIA / JUDGMENT

JUDGMENT OF COCA COLA KWANZA VS HENRY MBALA FINALE

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB – REGISTRY AT MBEYA LABOUR REVISION NO. 15 OF 2023 CASE REFERENCE NO.
20231017000534178 (Arising from the award Labour Dispute No. CMA/MBY/mbby/62/2022) COCA
COLA KWANZA LIMITEDAPPLICANT VERSUS HENRY
MBALLARESPONDENT

JUDGMENT

Date of hearing: 24/4/2024 Date of ruling: 16/7/2024 NONGWA, J. The respondent, Henry Mballa succeeded in his unfair termination claim registered as Labour Dispute No. CMA/MBY/mbby/62/2022 in the Commission for Mediation and Arbitration at Mbeya “the CMA” against the applicant, Coca Cola Kwanza Limited, his former employer. Aggrieved by the said outcome, the applicant has preferred this application for revision to set aside the arbitral award. The application is made under section 91(1)(a)(b)(2)(b)(c) and 94(1)(b)(i) of the Employment and Labour Relations Act [Cap.366 R:E 2019] “the ELRA”, Rule 24(1)(2)(a)(b)(c)(d)(e)(f), 24(3)(a)(b)(c)(d) and rule 28(1)(c)(d) (e) of the Labour Court Rules G.N. No. 106 of 2007, it is supported by the affidavit of Ludwing Shayo, Human Resource Manager of the applicant. The application is opposed by the respondent who filed notice of opposition and counter affidavit. Briefly, the respondent was employed by the applicant in 2006 at the position of distribution driver in logistic department. Further the applicant entered into Collective Bargaining Agreement of the respondent’s trade union, Tanzania Union of Industrial and Commercial Workers (TUICO) for, amongst others, age of voluntary and compulsory retirement of the employees and payment of gratuity. In December 2021 during the company’s logistic department cost review, it transpired that in November, drivers were over declaring distance travelled. This raised a concern, the respondent formally charged and disciplinary hearing conducted which eventually led to termination of his employment on 24th December 2021. Aggrieved, the respondent referred the claim of compensation for unfair termination and other reliefs to the CMA. At the end, the CMA found termination was both substantively and procedurally unfair. Consequently, awarded the respondent compensation of twelve months, severance 2 payment, repatriation costs, substance allowance and gratuity based on collective bargaining agreement to the total amount of Tshs. 88,925,062/=. The award aggrieved the applicant who filed the present application for revision on

the following orders; (a) this honourable court be pleased to call and examine the records of the proceedings of the CMA and its award in Labour Dispute No. CMA/MBY/mb/62/2022, revise it and set aside the award delivered by Hon. Mwalongo on 11th September 2023;

- (b) any other relief the court may deem fit and just to grant. The statement of legal issues for determination are found under paragraph 21 of the affidavit. When the application came on for hearing, the applicant was represented by Mr. Kennedy Alex Mgongolwa whereas for the respondent, Mr. Isaya Zebedayo Mwanri, both learned counsels. Parties prayed and were granted leave to argue the application by filing written submissions, the drawn scheduling order was complied with. The first issue was whether termination was unfair both substantively and procedurally. Submitting on that point, counsel for the applicant stated that there was ample evidence from the applicant that the respondent committed the offence he was charged with through exhibits R-11, R-12, R-13, R-14 and R-15 which indicated there was over declaration of kilometers in the full requisition form. Counsel said, the arbitrator placed the standard of proof beyond reasonable doubt contrary to rule 9(3) of the Employment and Labour Relations Citation (Code of Good Practice) G.N. No. 42 of 2007 which requires to be on balance of probabilities. Further argument was that the applicant proved misconduct on part of the respondent upon investigation. In the second issue whether the arbitrator properly analysed and evaluated evidence, it was submission of Mr. Mgongolwa that the arbitrator did not give weight to oral and documentary evidence tendered by the applicant. With respect of salary of the respondent, counsel stated that basic salary was Tsh. 965,116/= per exhibit R-6, transport allowance Tsh. 100,000/=, meal allowance Tsh. 120,000/= and housing allowance Tsh. 100,000/= as evidenced by exhibit R-9, in total Tsh. 1,285,116/= but the arbitrator failed to appreciate documentary evidence tendered. Counsel argued that the arbitrator awarded Tsh. 1,744,646/= based on oral words of the respondent. Submitting on third issue, whether reliefs were properly awarded, it was submitted by Mr. Mgongolwa that severance pay is calculated based on section 42 of the ELRA that is seven days basic wage of each completed year but not above ten years. He said the formula was insisted in the case of *Neema Batchu & Another vs Absa Group Ltd* (formerly Barclays 4 Bank (T) Ltd, Revision Application No. 408 of 2021 [2022] TZHCLD 924 (22 August 2022; TanzLII). Counsel submitted that the respondent was entitled to Tsh. 2,251,937 as severance pay. On twelve months' compensation, the argument of the applicant's counsel was based on salary of Tsh. 1,285,166/= discussed in ground two and payable to the respondent which when is calculated at twelve months brings the total Tsh. 14,421,391/=. In respect of payment of gratuity, counsel for the applicant admitted that Collective Bargaining Agreement, exhibit HM-1 was binding on the applicant. Taking the argument further counsel said in terms of clause 12(1)(c)(i) of exhibit HM-1 when calculated at the basic salary of Tsh. 965,116/= with fourteen years the respondent worked with the applicant, the respondent was entitled to Tsh. 13,511,624/=. It was stated that the arbitrator just took what was claimed by the respondent without justification. From the above submission, the applicant prayed the application to be granted and the award of the arbitrator be set aside. In response to the above submission, Mr. Isaya started with the

cardinal law that termination of employment must be on fair reason and burden to proof that termination was fair is upon the employer. To 5 substantiate the argument, section 37(1) (2) of the ELRA and the case of Serenity On the Lake Ltd vs Dorcas Martin Nyanda, Civil Appeal No. 33 of 2018 [2019] TZCA 64 (12 April 2019; TanzLII) were referred. He added that termination on misconduct must be proved that there were such rules or standards which was contravened and has been consistently applied, reference was made to rule 12(a)(b) of the G.N. No. 42 of 2007. Replying if the applicant proved reason for termination, counsel for respondent stated that existence of route ride, which would have established actual distance the respondent was supposed to travel was not proved. Further that what was being filled in exhibits R-11 to R-15 was an estimate and not the actual distance. He added that it was not proved if fuel was acquired for personal use. Mr. Isaya went on to submit that during disciplinary hearing, methodology to conduct investigation was not stated and the respondent was never involved in the process, availed with report and it was not tendered in evidence in the CMA. He said, failure to conduct investigation is procedural unfairness and therefore grounds for existence of commencing disciplinary hearing was flawed. He cited the case of Enza Zaden Africa Limited vs Edwin Kasena, Civil Appeal No. 427 of 2021

[2023] TZCA 17733 (5 October 2023; TanzLII) to support the point. 6 Further argument was that hearing committee was biased as the complainant constituted the panelist referring to Eric Ollotu and exhibit R-

3. Taking submission of Mr. Isaya on the first issue as the whole, it was argued that the applicant failed to prove fair reason for termination and procedure of termination was not followed. On whether evidence was properly evaluated and analysed, counsel for the respondent was in favour of the decision of the arbitrator. He added that the arbitrator sustained evidence which was heavier than the other. He cited the case of Hemedi Said vs Mohamed Mbilu [1984] TLR 113. Counsel argued that there was no evidence that terminal benefit was paid to the respondent and exhibit R-9 was not served to him. In reliefs awarded to the respondent, Mr. Isaya stated that while the applicant said last salary was Tsh. 1,285,116/=, the respondent said it was Tsh. 1,744,646/= however the last slip document was not tendered by the applicant. He referred to rule 15(1)(h) of the ELRA which imposes duty on the employer to furnish an employee with written statement of particulars containing remuneration and salary. It was submitted that exhibit R-6 shown last salary was in March 2021 but when put to cross examination said it was November, 2021. Further that RW1 through exhibit R-9 said in March 2021 there was salary increase. 7 Concluding on what amount the respondent was to be paid, counsel said because salary payable to the respondent was not clear and the applicant failed to discharge burden of proof which was upon her, then Tsh. 1,744,646/= was proper. On compensation of twelve months awarded, counsel said it was properly awarded. On payment of gratuity, Mr. Isaya submitted that the dispute was on the amount awarded and according to him, taking the salary of Tsh. 1,744,646/= for fifteen years the respondent worked with the applicant the total was to be Tsh. 15,169,690/=. With regard to payment of severance payment, it was submitted that the amount was rightly awarded. Having considered the contending written submissions of the

parties and the record of application, they all boil down to one major issue namely, whether the appellant's termination was substantively and procedurally fair. According to the provisions of section 37 of the ELRA termination of an employee from employment must be for valid reason and in terms of section 39 of the ELRA burden of proof that termination was fair is upon the employer. The follow up question is whether the termination of the appellant from the employment was valid. 8 Beginning with the charge which is a foundation of the disciplinary proceedings whereby an employee must be informed about the nature of the disciplinary offence and the contravened provision so as to enable the employee to prepare his/her defence prior to the hearing and determination of his/her fate. This is embraced under Rule 12(1) of the G.N. No. 42 of 2007. In this application the charge sheet was levelled under Rule 12(3)(a) of the G.N. No. 42 of 2007 and Company's Disciplinary Code Schedule 17 (j)(1) of Coca Cola Staff Handbook. The said disciplinary code was not tendered in evidence. That however, I have gone through the evidence adduced at the CMA, the first count was over declaration of speed in the speedometer, to prove this RW1 stated that before a driver is given a route, they conduct route ride to ascertain distance, road safety and customer in that area with full purpose of establishing standard kilometre in that route. That in November, 2021 the respondent over declared the distance and thus acquired extra liters of diesel. To note here the said report which revealed over declaration was not introduced in evidence. To establish that the respondent over declared kilometers, full requisition form was tendered as exhibit R-11 to R-15. The respondent's counsel has submitted that there was no proof of standard kilometers, and the distance given was just estimated. 9 To prove that there was over declaration of kilometers, the applicant was required to prove, the distance required to be travelled in the route and the distance declared by the respondent and existence of rule of the applicant which creates the offence of over declaring kilometers. Evidence in record by the applicant did not disclose the distance the respondent was required to travel in each route, although exhibits R-11 to R-15 relied upon were tendered but there was no explanation given to get the full picture of what was to be travelled and the over declaration made. In the case of Leonard Dominic Rubuye T/ A Rubuye Agrochemical Supplies vs Yara Tanzania Limited, Civil Appeal No. 219 of 2018, CAT at Dar es Salaam [2022] TZCA 419 (13 July 2022; TanzLII) the court held that; '... documents, although tendered in court, if no explanation is availed as to its purpose are of no assistance to the court. The duty lied on the party relying on them to demonstrate their significance. That said, much as we appreciate that a bunch of documents were tendered in court (exhibit PI), there was need for explanation as to their relevance.' In the CMA the applicant tendered full requisition form but no explanation was given and it is not clear how long distance the respondent was to travel and that which exceeded. There is no oral evidence 10 connecting exhibits R-11 to R-15 with the offence the respondent was charged. As the applicant was required to prove the actual distance and that which was over declared but failed. In absence of the report which triggered over declaring of kilometre by the respondent, investigation report, rules or standard regulating conduct relating to employment of the respondent and route ride report to establish the offences charged it cannot be said termination was for valid reason. On procedural aspect, the same was not

followed, going through evidence of RW1 and RW2 and exhibits tendered particularly exhibit R-1 and R-2, it is clear that the respondent was suspended from work on 18 December 2021 exhibit R-1, on the same day was given chargesheet containing the accusation against him and the date of disciplinary hearing, exhibit R-2. In terms of Rule 13 of the G.N. No. 42 of 2007 the employer must conduct an investigation to ascertain whether there are grounds for a hearing to be held. At hand, there is no evidence as to when investigation was conducted, involvement of the respondent in the investigation and if it was availed to the respondent rather service of charge sheet and date of disciplinary hearing. In *Severo Mutegeki & Another vs Mamlaka Ya Maji Safi Na Usafi Wa Mazingira Mjini* 11 Dodoma, Civil Appeal No. 343 of 2019 [2020] TZCA 310 (19 June 2020; TanzLII) the court stated; ‘... the failure to involve the appellant in the investigation that led to the formulation of the report coupled with the omission to share a copy thereof with the respondent was a serious irregularity.’ Even though the respondent was given charge sheet and attended disciplinary hearing, at the inception, the internal procedure from discovering over declaration of distance to conducting disciplinary hearing the procedure was flawed and therefore it cannot be said there was fair hearing. On evaluation of evidence in ground two, the applicant’s counsel submission was pegged on the calculation of basic salary of the respondent relying on exhibit R-6 and R-9 that it was Tsh. 965,116/=. Adversely it was submitted that the applicant failed to prove that the salary was not increased. On my part after going through evidence of RW1 and exhibit R-6, basic salary of the respondent was Tsh. 965,116/= plus undisputed allowances for meal, transport and housing. I agree that the employer must have full particulars of the employee per section 15 of the ELRA, but it is only relevant at the commencement of employment. 12 In this application the respondent was employed in 2007 and there is evidence per exhibit R-6 that in January 2021 basic salary increased up to Tsh. 965,116/=. The respondent said his salary was Tsh. 1,704,646/= without distinction of basic salary and allowances he was being paid no evidence was tendered to show that the salary was increased beyond that scale to controvert exhibit R-6. Akin scenario was discussed in the case of *Jordan University College vs Mark Ambrose*, Civil Appeal No. 267 of

- 2020) 2024 TZCA 433 (11 June 2024; TanzLII), the court stated; ‘... He said his salary was TZS 1,300,000.00 without tendering any salary slip or document to verify it. The only document showing the last salary was the 3rd employment agreement executed on 26th November, 2015. Clause 6 therein, carry the salary of TZS 1,151,837.00. It was thus wrong to base the calculations on the salary of TZS 1,300,000.00 and neglect what is provided in documentary evidence.’ I do not agree with the respondent’s counsel that the applicant failed to prove this aspect, even the argument that RW1 said salary increase in March 2021 is not discerned in record. By tendered salary increase letter exhibit R-6 and salary payment form exhibit R-9 which proves that basic salary of the respondent was Tsh. 965,116/=. the applicant proved salary payable to the respondent. I therefore, find that the arbitrator wrongly assessed the basic salary of the respondent. 13 As to the reliefs awarded, the respondent was awarded severance pay, twelve month’s compensation, substance

allowance, transportation package and gratuity. It is noteworthy that subsistence allowance and transport package is not challenged in the application. From the submission of the applicant's counsel the dispute was on how basic salary of the respondent was calculated. Of importance is that the daily wage is quantified from the salary that the respondent would have received if was working, it does not include allowance payable to workers on work. See *Security Group (T) Limited vs Steven Gerson Kizinga*, Consolidated Appeal No. 386 of 2020 & 50 of 2021) [2024] TZCA 107 (23 February 2024; TanzLII). On severance pay section 42 (1) of the ELRA provides; '42(1) For the purposes of this section, "severance pay" means an amount at least equal to 7 days' basic wage for each completed year of continuous service with that employer up to a maximum of ten years.' The above provision requires severance pay to be calculated based on basic salary of seven days but payment should be made for not more than ten years. In this application the respondent worked with the applicant for fourteen years, but severance pay must be paid at the 14 maximum of ten years. Taking basic salary of Tsh. 965,116/= at daily wage of Tsh. 32,170.53 for ten years the total is Tsh. 2,251,937.33. Regarding compensation for unfair termination the respondent was given twelve months which when calculated at basic salary of Tsh. 965,116/= the total is Tsh. 11,581,392/= On payment of gratuity, it would seem the applicant was not in dispute that the respondent was entitled to be paid gratuity based on Collective Bargaining Agreement, exhibit HM-1 particularly as provided in clause 12(c)(i). The dispute was in respect of the amount payable. For purpose of clarity, I reproduced that clause; '12. retirement

- a) An employee may retire voluntarily when the employee reaches the age of 50 years and above. Compulsory retirement will take place at the age of 60 years.
- b) N/A
- c) An employer that qualifies for retirement will be entitled to the following benefits
 - i. A gratuity: Equivalent to one month's salary for every year of service.' Emphasize supplied. The Collective Bargaining Agreement had a restrictive condition on eligibility for gratuity, one, employee attaining age of 50 and above, and 15 two, upon retirement be it voluntary or compulsory. Ordinarily a worker who is terminated from employment loses all his benefits unless the tribunal or court overturn the dismissal order, the reason is not farfetched, the employee would be entitled had not been unfair termination. In the Kenyan case of *Bamburi Cement Limited v William Kilonzi* [2016] eKLR, the Court of Appeal of Kenya held; 'Turning to the award of gratuity, the first thing that we must emphasise is that gratuity, as the name implies, is a gratuitous payment for services rendered. It is paid to an employee or his estate by an employer either at the end of a contract or upon resignation or retirement or upon death of the employee, as a lump sum amount at the discretion of an employer. The employee does not contribute any sum or portion of his salary towards payment of gratuity. An employer may consider the option of gratuity in lieu of a pension scheme. Being a gratuitions payment the contract of employment may provide that the employer shall not pay gratuity if the termination of employment is through dismissal arising from gross or

other misconduct. But where, like here, the dismissal is not justified and is wrongful the employee will be awarded gratuity if it is provided for in the contract of employment.' Emphasize added. 16 The above stance applies in Ghana, in the case of Acheapong and Another Vrs Ghana Highway Authority [2019] GHASC 89 (11 December 2019; GhanLII) the Supreme court of Ghana stated; 'We endorse and restate the legal proposition that payments of gratuity, end of service benefits or any other package to a worker severing relationship with the employers on any grounds is a condition precedent on the employee leaving without blemish and upon faithful and efficient service to the employer. Where as in this case the basis for the severance in relationship is on the grounds of fraud, dishonesty, breach of trust or other serious misconduct, the employee would not be entitled to the benefits associated with leaving the service of the employer.' The above is good law and find it applicable in this jurisdiction. In this application the respondent was terminated for misconduct, the course I have held it was not for valid reason. There is proof that the respondent has attained the age above 50 years entitling him under the Collective Bargaining Agreement to payment of gratuity. Proved evidence is that the respondent worked with the applicant for fourteen years. From the basic salary of Tsh. 965,116/= X 14 years = Tsh. 13,511,624/= In the final analysis, I order that the respondent be paid compensation as follows; 17

1. Compensation for 12 months at the rate of Tsh. 965,116/= per month amounting to Tsh. 11,581,392/=
2. Severance pays in the sum of Tsh. 2,251,937.33/=
3. Gratuity of Tsh. 13,511,624/=
4. Unchallenged substance allowance of Tsh. 19,302,320/= and transportation package of Tsh. 1,000,000/= if not paid. In conclusion, I find merit in the application and allow it partly to the extent stated. Being labour dispute, I make no order as to costs. V.M. NONGWA JUDGE 16/7/2024 DATED and DELIVERED at MBEYA this 16th day of July, 2024, in presence Mr. Isaya Mwanri for Respondent also holding brief of Mr. Kennedy Alex Mgongolwa for Applicant. V.M NONGWA JUDGE 18

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