

TANZANIA / JUDGMENT

JOHN PAUL NDANSHAU V

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM REVISION
APPLICATION NO. 17722 OF 2024 JOHN PAUL NDANSHAU.....
APPLICANT VERSUS A-ONE PRODUCTS AND BOTTLERS LTD..... RESPONDENT

JUDGMENT

Date of last Order: 10/09/2024 Date of Judgment: 26/09/2024 B. E. K. Mganga, J. Brief facts of this application are that, on 1st March 2019, John Paul Ndashau, the abovenamed applicant, entered unspecified contract of employment with A-One Products and Bottlers Ltd, the abovenamed respondent. It is undisputed by the parties that applicant was employed as sales officer at monthly salary of TZS 1,229,153/=. It is also undisputed by the parties that on 27th July 2022, applicant felt a pinch of employment relationship after being served with a show cause letter. It was alleged by the respondent in the said show cause letter that applicant committed misconducts dishonest and insubordination. It is further undisputed that, applicant was summoned before the disciplinary hearing committee and that, he was found guilty for both misconducts of dishonest and insubordination, subsequently, he was terminated on 1 5th August 2022. Applicant appealed but on 31st August 2022 respondent confirmed termination. Aggrieved with termination, on 31st August 2022 applicant filed Labour dispute No. CMA/DS/ILA/448/2022/270/2022 before the Commission for Mediation and Arbitration (CMA) at Ilala complaining that respondent terminated his employment unfairly. On fairness of reason, applicant indicated in the referral form (CMA F1) that the claimed offence does not exist and was not proved. On fairness of procedure, he indicated that no witness for employer called nor testified, no employer's customer testified against him during disciplinary hearing, punishment was excessive and no previous warning. Based on the foregoing, applicant indicated in the CMA F1 that he was claiming to be paid TZS 73,749,180/= being salary compensation for 60 months. Having heard evidence of the parties, on 2nd February 2024, Hon. Ng'washi, Y, Arbitrator, issued an award that termination was fair both substantively and procedurally and dismissed the dispute. Applicant was dissatisfied with the said award hence this application for revision. In the support of the notice of application, applicant raised one ground and four issues as hereunder: -

1. That the arbitrator erred both in law and facts in holding that applicant admitted to have committed the misconducts he was charged with. 2

2. Whether it was proper for the arbitrator to consider a letter that had no relation with the charges written by the applicant before being charged with the misconducts.
3. Whether disciplinary hearing was properly conducted while persons who alleged that applicant committed the alleged misconduct were not called as witnesses.
4. Whether disciplinary hearing was properly conducted while applicant was not served with necessary documents.
5. Whether Hon. Arbitrator evaluated evidence of the parties.
6. Whether the arbitrator made a fair or justifiable findings. Respondent opposed this application by filing both the Notice of Opposition and the counter affidavit affirmed by Hassan Dewji, her principal officer. When the application was called on for hearing, Ms. Marietha Loth Mollel, advocate appeared and argued for and on behalf of the applicant while Mr. Adam Mwambene, advocate, appeared and argued for and on behalf of the respondent. Arguing the 1st ground and 2nd issue in support of the application, Ms. Mollel submitted that, on 25th July 2022, applicant wrote a letter (exhibit A2) giving reasons for the delay to serve customers. Ms. Mollel submitted further that, in the said letter, applicant stated that he failed to deliver the products to the customer because the product was out of stock. She added that, applicant also stated that payments were made directly to his phone because there was network problem that led to his 3 failure to send money to the respondent. She went on that, in exhibit A2 applicant apologised for what happened but the arbitrator relied on the said letter to hold that termination was fair because applicant admitted to have committed the misconducts charged with. Mr. Mollel further submitted that, during hearing at CMA, both DW1 and DW2 stated that the decision to terminate applicant was based on exhibit A2. Counsel strongly submitted that, in exhibit A2 applicant did not confess or admit to have committed the alleged misconduct and cited the case of National Microfinance Bank v. Leila Mringo & Others, Civil Appeal No. 30 of 2018, CAT (unreported) to cement her submissions that applicant did not confess to have committed the alleged misconducts. She concluded that the arbitrator erred to rely on exhibit A2 that was written prior to calling applicant to attend the disciplinary hearing. Arguing the 3rd and 4th issues, Ms. Mollel submitted that, customers were not called to testify in the disciplinary hearing to prove that applicant delayed to deliver goods. She added that, respondent was supposed to call customers who complained in absence of the applicant. she went on that, applicant was not served with letters from customers giving out their complaints against applicant rather, he was only served with charge sheet only without any attachment hence termination was 4 unfair procedurally. When probed by the court, counsel conceded that, in CMA F1, applicant did not indicate that he was not served with necessary documents. She was quick to submit that, it was the duty of the respondent to serve applicant with necessary documents and failure of which amounted to breach of fair hearing. To support her submissions, she cited the case of Abbas Sherally v. Addul Sultan Haji and Another, Civil Application No. 133 of 2002, CTA (unreported) and Severe Mtegeki and Another v. DUWASA, civil Appeal No. 343 of 2019, CAT (unreported). In support of the 5th and 6th issues, Ms.

Mollet submitted that, the award was not fair because the arbitrator did not properly consider evidence of the parties. She submitted that, both DW1 and DW2 testified that applicant failed to deliver the product that was ordered by respondent's customer. She further submitted that, both DW1 and DW2 admitted that, at the time customers ordered the product, the said product was out of stock. Learned counsel for the applicant concluded that termination was unfair because respondent did not prove the alleged misconducts. With those submissions, she prayed the court to allow this application and award applicant reliefs prayed in CMA F1. Resisting the 1st and 2nd issues of the application on behalf of the respondent, Mr. Mwambene submitted that, exhibit A2 did not constitute the misconduct that applicant was charged with. He submitted that, applicant was charged with two misconducts namely (i) gross dishonest and (ii) gross insubordination. He further submitted that, during disciplinary hearing, in terms of Rule 13(1) the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007, respondent asked applicant to respond to allegations that were levelled against him by clients as a result, he (applicant) wrote exhibit A2. Mwambene submitted further that, in exhibit A2, applicant admitted to have committed the misconduct. He went on that, the 2nd misconduct was proved by DW2, the supervisor of the applicant. Counsel for the respondent submitted further that, applicant gave discount to certain clients contrary to the instructions given to him by DW2. He also submitted that, based on exhibit A2, respondent issued a show cause letter and thereafter was summoned applicant to attend the disciplinary hearing (exhibit A3 and A4 respectively). Mwambene strongly submitted that, arbitrator did not rely on exhibit A2. He further submitted that, Mringo's case (*supra*) is distinguishable and not applicable to the application at hand. Responding to 3rd and 4th issues, Mr. Mwambene submitted that, the allegation that applicant was not served with necessary documents including letters from customers is unfounded. He added that, there were no letters from respondent's customers. On failure of the respondent to call customers to testify, Mwambene submitted that, complaints were received by DW2 from customers, and he is the one who testified as to what he was informed by the said customers. He further submitted that, Mtegeki's case (*supra*) is distinguishable and does not apply in the application. Mr. Mwambene also submitted that; respondent did not conduct investigation because applicant admitted to have committed the misconducts he was charged with. In support of his submissions that when an employee admits to have committed a misconduct other procedures become irrelevant, he cited the case of *National Bank of Commerce v. Felister Mayoyi*, Labour Revision No. 1 of 2023 HC (unreported). He concluded that, respondent complied with procedural fairness of termination. On the 5th and 6th issues, Mr. Mwambene submitted that, arbitrator evaluated evidence of the parties and that the award is legally valid. With those submissions, he prayed that the application be dismissed for want of merit. In rejoinder, Ms. Mollet reiterated her submissions in chief that arbitrator relied on exhibit A2 to hold that termination was fair both substantively and procedurally. She concluded that, the law does not dispense the need to conduct investigation. 7 I have examined evidence of the parties in the CMA record and considered rival submissions made in this application and find that issues to be answered are whether termination was fair in terms of reason and procedure and to what reliefs are the parties

entitled to. It was submitted on behalf of the applicant that the arbitrator did not evaluate evidence of the parties. I am duty bound at this point to evaluate evidence of the parties to satisfy myself as to whether the conclusion reached by the arbitrator was justified or not. I have pointed hereinabove that; it was alleged that applicant committed the misconduct of dishonest and insubordination. In terms of section 39 of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] it is the duty of the employer/ the respondent to prove that termination was fair. In other words, respondent had a duty of proving that applicant committed the alleged misconduct of dishonest and insubordination. It is undisputed that on 27th July 2022, applicant was served with the show cause letter (exhibit A3) showing that he committed the alleged misconduct of dishonest and insubordination. The said letter reads in part: - "... Uongozi wa Kampuni unakutaka kutoa maelezo ya utetezi wako kuhusu tuhuma zifuatazo na kwa nini hatua za kinidhamu zisichukuliwe dhidi yako; 8

1. Kukosa uaminifu kazini: kwa kitendo cha kufanya udanganyifu kwa wateja, wauzaji na kwa mwajiri wako baada ya kufanya ulaghai wa kuchukua pesa za wateja kwa ahadi ya kuwapa huduma kisha kutowapa huduma hiyo kwa wakati wala hukuziwasilisha pesa hizo kwa mwajiri na badala yake ulizitumia kwa matumizi yako binafsi kinyume na utaratibu.
2. Kutotii Ungozi: Kwa kitendo cha kutofuata maelekezo ya uongozi kwa kuwataka wateja kulipa kwa bei ya punguzo na kuingiza pesa hizo katika namba yako ya simu kinyume na taratibu za mauzo. ..." An official English translation of the above quoted allegations are that, (i) applicant committed the misconduct of dishonest by defrauding customers who gave him money without supplying them goods timely and thereafter appropriated the said money for his personal use instead of handling the money to the employer and (ii) insubordination because applicant failed to abide by instructions as he made discounts to customers and kept the money obtained therefrom in his Tigo pesa. The issue is whether, respondent proved those allegations by evidence. In the bid to prove these allegations, respondent called two witnesses namely Ali Hamis Mirrow (DW1) and Khadija Mohamed Kimaya (DW2). It was evidence of DW1 that applicant committed fraud by taking money from customers of the respondent without supplying them with goods timely and that he did not handle over money to the respondent. It was also evidence of DW1 that, applicant made discount 9 to some customers who were not supposed to get discount. In his evidence, DW1 tendered inter-alia, contract of employment (exhibit A1), show cause letter with the aforementioned allegations (exhibit A3), reply to the show cause (exhibit A2), notice to attend disciplinary hearing (exhibit A4), Hearing form (exhibit A5) and termination letter (exhibit A6). Testifying under cross examination, DW1 stated that the information leading to termination of the applicant came from his department of Human resources management after being obtained from sales department. He admitted that the information came from Khadija Kimaya (DW2) who was the complainant and that he doesn't know the names of the customers who complained. He further admitted that the said customers were not called during disciplinary hearing. Testifying under re-examination, DW1 stated that applicant admitted to have committed the alleged misconducts. I have carefully examined evidence of DW1 and find that it is based on hearsay worth not to be considered by this court. In short,

evidence of DW1 did not prove the alleged misconduct. In her evidence, Khadija Mohamed Kimaya (DW2) stated that, on 19th July 2022 herself and the applicant were called in the officer of one Chettan and the latter informed them that he has received a phone call 10 from Mfaume complaining that he has not received goods he ordered. That, she spoke over the phone with Mfaume and confirmed that he had not received the goods. She also testified that, Mfaume stated over the phone that, on 19th July 2022 applicant gave the said Mfaume a mobile phone number of the driver but the same was not reachable. In her evidence, DW2 also stated that, the said Mfaume ordered soft drinks with different flavours but during that period, orange flavour was out of stock. In her own words, DW2 is recorded stating inter-alia that: - “Mteja aliagiza soda mchanganyiko isipokuwa kipindi hicho ladha moja ya chungwa ndiyo haikuwepo. Mlalamikaji kabla ya kumuahidi mteja kumpelekea bidhaa hizo alitakiwa kumueleza mteja bidhaa zilizokuwepo siku hiyo... mlalamikaji alitakiwa amwambie mteja alipie bidhaa zilizo kuwepo na chungwa ikizalishwa na kupelekewa.” (Emphasis is mine). It was further evidence of DW2 that, applicant directed the said Mfaume to pay the money to Veronica, the sales lady at Vingunguti to clear his personal debt with the said Veronica instead of Elisha Salim salesman. She further stated that, Mfaume paid the money to the said Veronica on the date Mfaume pressed the order. It was also evidence of DW2 that applicant made discount to Mfaume, a customer who does not qualify to receive discount. She stated that, discount is for customers who order 200 cartons or above of beverages. 11 While under cross examination, DW2 stated that after the said phone call from Mfaume, herself and Mr. Chetan visited Mfaume on the same date in absence of the applicant. She admitted that the discussion leading to press of an order by Mfaume involved only Mfaume and applicant and that there is no documentary evidence showing how discount should be made. She further admitted that there is no document showing the manner company money should be paid. DW2 also admitted that she had no evidence to prove that applicant secured loan from Veronica and that both Veronica and Mfaume were not called as witnesses during the disciplinary hearing. In her own words DW2 while under cross examination was recorded stating inter-alia that: - Qn. Huyo Veronica alitwa kwenye kikao cha nidhamu kutoa Ushahidi Ans. Hakuitwa ila nyaraka yake ilikuwepo Qn. Mfaume alitwa kwenye kikao cha nidhamu Ans. Hakuitwa. But during re-examination, DW2 is recorded stating inter-alia that: - Qn. mlijuaje mlalamikaji alidaiwa shilingi 400,000 na Veronica. Ans. Veronica alitoa ushahidi wake. The quoted evidence of DW2 during cross examination and re-examination tells all as to her credibility. The least I can say, is that evidence was more embellished with lies or it was with a view of achieving a certain end. That evidence cannot be accepted as it was 12 held by the Court of Appeal in the case of Patrick s/o Sanga v. The Republic, Criminal Appeal No. 213 of 2008, CAT(Unreported). On the other hand, John Paul Ndanshau (PW1), applicant denied the allegations of dishonest and insubordination. In his evidence, PW1 admitted to have met Mfaume at Tabata Segerea, and the latter pressed an order of soft drinks. He further testified that, when he went back in office, he noted that some products were out of stock, as a result, he informed the said Mfaume over the phone. He further stated that the said Mfaume agreed to be sent the available products and that the unavailable orange and passion flavour will be sent to him once available. It was further evidence of

PW1 that, on 16th July 2022 he notified Mfaume that, orange and passion flavour are available, and arrangements are made so that the said products can be delivered. He added that, unfortunately it was not easy for the said product to be delivered timely due to high demand. PW1 testified further that on 19th July 2022 himself and DW2 were summoned by Chetan and was directed to ensure that the products are delivered to Mr. Mfaume. On allegation that he gave Mfaume unreachable mobile phone number of the driver who was supposed to deliver the product to Mfaume, PW1 stated that, after being notified by the said Mfaume that the driver is not reachable and after his efforts of reaching the said driver over the 13 phone, he physically traced him and when he managed to get the said driver, the latter replied that his mobile phone run out of charge and switched it off. In his evidence, PW1 further stated that, he gave discount so as not to lose the said customer. He also stated that, those who were alleged complained against him were not called during disciplinary hearing. He further testified that termination was unfair and that his monthly salary was TZS 1,229,153/= and that he was claiming to be paid 60 months' salary compensation. Testifying under cross examination, PW1 admitted that he did not call Mfaume to testify on his behalf during the disciplinary hearing committee. He also admitted that in the reply to the show cause letter (exhibit A2) he apologized and promised to be more careful. Going by the above narrated evidence of the parties, I am of the considered opinion that respondent did not prove the allegation relating to dishonest. I am of that considered view because evidence of DW2 supports that of the applicant (PW1) that at that time, orange and passion flavoured soft drinks were out of stock which is why it was not timely delivered to the said Mfaume. It is also my view that delay in delivering goods cannot amount to dishonest. More so, evidence by the applicant that Mfaume agreed to be supplied with orange and passion 14 flavoured soft drinks at the time they were available was not challenged by evidence of the respondent. In addition to that, it was alleged by the respondent that applicant directed Mfaume to pay the money to Veronica to repay his loan. That allegation was also not proved because, Veronica was not called to testify to prove that applicant secured loan from her and that, the money paid by Mfaume repaid the applicant's loan. In fact, both Mfaume and Veronica were not called to testify on behalf of the respondent and no reasons were assigned for that failure. It is my view that, possibly respondent feared that they will adduce evidence unfavorable to her. There is a litany of case laws that, the court can draw adverse inference when the party to the case fails to call a key witness or fails to disclose important information. See the case of Lazaro Kalonga vs Republic (Criminal Appeal 348 of 2008) [2012] TZCA 201 (7 December 2012), Bashiri s/o John vs Republic (Criminal Appeal 486 of 2016) [2019] TZCA 89 (16 May 2019), City Coffee Ltd vs Registered Trustee of Iloilo Coffee Group (Civil Appeal No. 94 of 2018) [2019] TZCA 645 (1 November 2019) and Hamza Byarushengo vs Fulgencia Manyi & 4 Others (Civil Appeal 246 of 2018) [2022] TZCA 833 (12 April 2022). I therefore, draw adverse inference against the respondent and conclude that, she did not prove the allegation of dishonest. 15 It is my further considered view that evidence of both DW1 and DW2 fell short to prove the misconduct of insubordination. Respondent did not adduce evidence relating to insubordination as to who insubordination was committed and how. In my view, making discount to a customer does not amount to insubordination. For

insubordination to occur, the employee must have an intent to defy the order of the superior employee or the order of the employer. In my view, in order to conclude that an employee has committed the misconduct of insubordination, four factors must be met namely, (i) there must be an order by the employer, (ii) the order must be lawful or legal and not contrary to the law, (iii) the employee must acknowledge or be aware of the order and (iv) the employee must refuse to carry out or comply with the order. In the application at hand, evidence of both DW1 and DW2 fell short to prove existence of the order prohibiting respondent or any other employee not to make discounts. It was not stated by both DW1 and DW2 as to who issued the order, when was it issued, why was it issued, how was it issued and whether applicant was aware of it. It is my considered opinion that, not every non-compliance with employer's order amounts to insubordination. I am of that view because, the employee is not required to comply with illegal order issued by the employer or to comply with an order that is contrary to the law or intending the employee to violate the laws or when the order is against public policy. In my view, employees are supposed only to comply with orders that are reasonable and are not contrary to the law or public policy. In terms of guideline 9(2) of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures that are a schedule to the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007, for insubordination to constitute an offence leading to termination, must be serious or repeated and must be committed by the employee to the employer during working hours. The issue in the application at hand is whether, the alleged insubordination was serious warranting termination of employment. Assuming that there is evidence relating to insubordination, of which is wanting, yet, the answer to that issue is in the negative. It was evidence of both DW1 and DW2 that, applicant admitted to have committed the alleged misconducts charged with. Unfortunately, the arbitrator accepted that evidence reference being a reply to the letter to show cause (exhibit A2) written by the applicant. I have carefully examined exhibit A2 that was tendered by DW1 on behalf of the respondent, and it is my considered opinion that applicant did not admit to have committed the misconduct of dishonest or insubordination he was charged with. The said exhibit A2 reads in part: - "MAELEZO KUHUSU MALALAMIKO YA WATEJA NA UCHELEWESHAJI WA MALIPO

1. MALALAMIKO YA BAADHI YA WATEJA KUCHELEWESHEWA BIDHAA. Baadhi ya wateja wateja katika eneo langu la kazi walilalamika kucheleweshewa bidhaa hali iliyotokana na kutokuwepo kwa bidhaa ya chungwa ambazo ndio kusudio kubwa kwani bidhaa nyingine walikuwa nazo na walihitaji oda zao walizihitaji zikiwa zimekamilika, malalamiko yao pia yalitokana na kwamba walitanguliza malipo yao na mimi nilitegemea kuwa bidhaa ya chungwa isingechukua muda na wateja wangepata oda zao zikiwa zimekamilika kwa wakati.
2. UCHELEWESHAJI WA MALIPO Baada ya bidhaa kupatikana oda za wateja zilipelekwa kwa kupitia wauzaji wetu na malipo yaliyokusudiwa kufanyika yalichelewa kutokana na tatizo la kimtandao katika akaunti yangu ya tigo pesa ambayo fedha yote ilihifadhiwa. Hayo ni malipo yaliyopitia kwangu ambapo oda hizi zilipitia kwangu. Hali hii ilisababisha kadhia na sintofahamu kwani malipo hayakufanyika kwa wakati na kusababisha usumbufu kwa

wauzaji, wakati hali hii ikijitokeza nilitoa taarifa pia kwa meneja wangu wa mauzo. Naahidi kuongeza umakini na uadilifu katika kazi yangu ili hali isije ikajirudia. Naomba radhi kwa uongozi wa idara ya mauzo kwa hali hii iliyojitokeza. Signed JOHN NDANSHAU SALES SUPERVISOR” (Emphasis is mine). 18 Nowhere in exhibit A2 quoted hereinabove applicant admitted that he committed the misconduct of dishonest or insubordination. To the contrary, in the said exhibit A2, applicant gave explanation as to what caused the delay to supply the products to customers and reason for failure to remit timely funds to the respondent. In addition, in the said exhibit A2, applicant stated that he reported to his manager. Going by evidence of the parties, the manager of the applicant was DW2. In her evidence DW2 did not dispute the contents of exhibit A2. Be as it may, exhibit A2 was tendered by DW1 hence that is evidence of the respondent. In considering evidence of the parties in totally, I safely conclude that respondent did not prove the alleged misconduct of dishonest and insubordination hence termination was unfair for want of valid reason. Applicant complained in the 3rd issue that the persons who complained against him were not called to testify in the disciplinary hearing. This was one of the complaints of the applicant in CMA F1 on procedural unfairness of termination. It was admitted by both DW1 and DW2 in their evidence that customers and other persons who complained against the applicant were not called to testify in the disciplinary hearing. That was unfair procedurally because respondent relied on hearsay to terminate the applicant. In the said CMA F1, 19 applicant indicated that the punishment was excessive amounting to unfair procedurally. I agree with him because going by exhibit A2 which is respondent’s evidence in this application, what applicant admitted was not serious to lead to termination of his employment. Therefore, termination was also unfair procedurally. For the foregoing, I hold that termination was unfair both substantively and procedurally. Having held that termination was unfair both substantively and procedurally and considering the nature of allegations levelled against the applicant namely dishonest and insubordination that has affected his integrity, I hereby award applicant to be paid (i) TZS 19,666,448/= being salary compensation for 16 months, (ii) TZS 1,229,153/= being leave pay and TZS 860,407/= being severance pay. In short, I award applicant to be paid a total of Twenty-One Million Seven Hundred Fifty- Six Thousand and Eight Tanzanian shillings (TZS 21,756,008/=) only. According to terminal benefits (exhibit A7) applicant was paid one month salary in lieu of notice hence he cannot be paid the said amount. In addition to that, applicant was issued with a certificate of Service (exhibit A9). 20 In the up short, I find that the application has merit. I therefore allow this application and revise the CMA award to the extent explained hereinabove. Dated at Dar es Salaam on this 26th September 2024 B. E. K. Mganga JUDGE Judgment delivered on 26th September 2024 in chambers in presence of Gaspar Urassa, Advocate for the Applicant and Augustino Mahela Masanja, Advocate holding brief of Adam Mwambene, Advocate for the Respondent. B. E. K. Mganga JUDGE 21

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