

TANZANIA / JUDGMENT

kioo ltd vs felix burchard karunda

2022 tzhcld 1055 9 november 2022

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9 November 2022

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM REVISION
APPLICATION NO. 279 OF 2022 (Arising from an Award issued on 27/10/2020 by Hon. M. Batenga,
arbitrator, in Labour dispute No. CMA/DSM/TEM/470/19/179/19 at Temeke) KIOO
LTD.....APPLICANT VERSUS FELIX BURCHARD
KARUNDA.....RESPONDENT

JUDGMENT

Date of last Order: 27/10/2022 Date of Judgment: 9/11/2022 B. E. K. Mganga, J. Facts of this application briefly are that, on 2nd March 2011, applicant and respondent entered into a one year fixed term contract of employment renewable. In the said one year fixed term contract of employment, respondent was employed as Lehr checker. The parties enjoyed employment relationship from that time renewing their contracts of employment up to the 1st day of October 2019 when applicant terminated employment of the respondent allegedly that (i) respondent was negligent, (ii) committed a misconduct that led defective bottles to pass through the line to the packing section, and (iii) refused to follow and obey instructions from his supervisor. Respondent was unhappy with termination of his employment, as a result, he filed Labour dispute No. CMA/DSM/TEM/470/19/179 before the Commission for Mediation and Arbitration at Temeke complaining that his employment was unfairly terminated by the herein applicant. Having heard evidence of the parties, on 27th October 2020, Hon. M. Batenga, Arbitrator, issued an award in favour of the respondent that there was no valid reason for termination hence termination was unfair substantively. With that findings, the arbitrator awarded respondent to be paid TZS 5,258,340/= being 12 months' salary compensation and TZS 943,805/= being severance pay for 8 years from 2nd April 2011 to 1st October 2019 all amounting to TZS 6,202,145/=. On the same date parties were served with the copy of the award and signed to acknowledge receipt. On 17th December 2020, the herein applicant noted that there is clerical error on the award as a result she applied at CMA for correction of the number of the dispute appearing on the award. On 23rd December 2020, Hon. Batenga, Arbitrator, rectified the error appearing on the number of the dispute on the award instead of CMA/DSM/TEM/470/19/179/19 that was appearing on the award corrected it to CMA/DSM/470/19/179 and served to the parties on 24th December 2020. Again both sides signed to acknowledge receipt of the corrected award. On 11th January 2021,

applicant filed Miscellaneous application No. 12 of 2021 seeking extension of time within which to file revision as she found herself out of time. The application was granted by Hon. K.T.R. Mteule, J on 16th August 2022 hence this application for revision. 2 In the affidavit affirmed by Athuman Said, the principal officer of the applicant in support of the Notice of Application, raised two grounds namely:-

1. That, the arbitrator erred in law for failure to evaluate and analyse evidence adduced.
2. That, evidence adduced by the respondent did not warrant the arbitrator to issue an award of TZS. 5,258,340/=. Respondent filed both the counter affidavit and the Notice of Opposition opposing this application. When the application was called on for hearing, Mr. Mathias Kabengwe, Advocate appeared and argued for and on behalf of the applicant while Mr. Denis Mwamkwala, the Personal representative, appeared and argued for and on behalf of the respondent. In arguing the application, Mr. Kabengwe argued the two grounds jointly submitting that, on 03rd September 2019, respondent was served with suspension letter (exhibit KL1) and that on 19th September 2019, he was served with notice to attend disciplinary hearing (exhibit KL 2). Counsel submitted further that, the Disciplinary hearing was held on 21st September 2019 and found the respondent guilty of the misconducts charged with (exhibit.KL3). Counsel went on that, based on the findings of the disciplinary hearing committee, on 01st October 2019, applicant terminated employment of the respondent for insubordination and destruction of applicant's property. During submissions, Mr. Kabengwe conceded that the disciplinary hearing form (exhibit KL3), does not show that applicant called witnesses to prove allegations against the respondent. He conceded further that, failure of the applicant to call witnesses to testify during disciplinary hearing was not proper. He however, maintained that Respondent caused loss to the applicant because his acts led to stoppage of work for some minutes because bottles broke out hence applicant proved the alleged misconducts committed by the respondent. Counsel for the applicant concluded his submissions by praying that the application be allowed because termination was fair. On his part, Mr Mwamkwala, submitted that Respondent was terminated due to negligence and causing loss to the applicant as evidenced by the termination (letter KL4.). He submitted further that, the alleged misconduct occurred on 02nd September 2019 the date respondent was not on duty because respondent entered at work on 03rd September 2019 in the morning and reported what he found. He submitted that respondent was suspended to pave way investigation to be conducted in terms of Rule 13(1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. 42 of 2007.
2007. He argued that, respondent was not served with investigation report and cited the case of Tanzania Local Government Workers Union (TALGWU) .v. Sospeter Gallus Omollo, Revision No. 265 of 2020, HC (unreported) to support his submissions that termination was unfair. 4 Mr. Mwamkwala submitted further that, the Disciplinary hearing form does not show that applicant called witnesses on the date disciplinary hearing was conducted. He strongly submitted that applicant did not prove loss allegedly caused by the respondent. He therefore prayed the application be dismissed for want of merit because termination was

unfair both substantively and procedurally. In rejoinder, Mr. Kabengwe, submitted that it was testified on behalf of the applicant that respondent disobeyed the order of his supervisor. When probed by the court as whether, the supervisor testified at CMA, he readily conceded that the said supervisor did not testify. During hearing I examined the CMA record and found that Nerei Emmanuel Massawe (DW1) the only witness who testified for the applicant and Felix Burchard Karunda(PW1) the only witness for the respondent, their evidence were recorded not under oath. I asked the parties to address the court as to the effect of that omission. Responding to the issue raised by the court Mr. Kabangwe submitted that evidence recorded not under oath cannot be acted upon. He therefore submitted that their omission vitiated proceedings and prayed that CMA proceedings be nullified, the award arising therefrom be quashed and set aside and order trial de novo before a different arbitrator. 5 On his part, Mr. Karunda, the applicant had nothing to submit other than leaving the matter to the court to decide. It is true that Arbitrators have powers in terms of section 20(1)(c) of the Labour Institutions Act [Cap. 300 R.E. 2019] and Rule 19(2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. No. 67 of 2007, to administer oath or affirmation to a person called as a witness and that, it is a mandatory requirement under the provisions of section 4(a) of the Oaths and Statutory Declaration Act [Cap. 34 R.E. 2019] and Rule 25(1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. No. 67 of 2007 that before a witness testifies, must take oath or affirmation. Failure to administer oath or affirmation renders the whole proceedings a nullity. There is a litany of case laws to the position that failure of a witness to take oath or affirmation before testifying vitiates the whole proceedings. See the case of Gabriel Boniface Nkakatizi vs. The Board of Trustees of the National Social Security Fund (NSSF) Civil Appeal No. 237 of 2021, National Microfinance Bank PLC vs. Alice Mwamsojo, Civil Appeal No. 235 of 2021, Attu J. Myna v. CFAO Motors Tanzania Limited, Civil Appeal No. 269 of 2021, Unilever Tea Tanzania Limited v. Godfrey Oyema, Civil Appeal No. 416 of 2020, The Copycat Tanzania Limited v. Mariam Chamba, Civil Appeal No. 404 of 2020, North Mara Gold mine Limited v. Khalid Abdallah Salum, Civil Appeal No. 463 of 2020, Unilever Tea 6 Tanzania Limited v. David John, Civil Appeal No. 413 of 2020, and Barclays Bank Tanzania Limited v. Sharaf Shipping Agency (T) Limited and another, Consolidated Civil Appeal No. 117/16 of 2018 and 199 of 2019. Since evidence was recorded not under oath, I hereby nullify CMA proceedings, quash, and set aside the award arising therefrom and order that the parties should go back to CMA where the dispute will be heard de novo before a different arbitrator without delay. Dated in Dar es Salaam on this 9th November 2022. B. E. K. Mganga JUDGE Judgment delivered on this 09th November 2022 in chambers in the presence of Mathias Kabengwe, Advocate for the applicant and Felix Burchard Karunda, for the respondent. B. E. K. Mganga JUDGE 7

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