

TANZANIA / JUDGMENT

LARGADERE TRAVEL RETAIL BEVCO LIMITED V

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM LABOUR REVISION
APPLICATION NO. 30974 OF 2024 (Arising from Award issued on 30/10/2024 by Hon. Lucia
Chrisantus Chacha, Arbitrator, in Labour Dispute No. CMA/KLM/MOS/M/11/2024) LARGADERE
TRAVEL RETAIL BEVCO LIMITED..... APPLICANT VERSUS MWAJABU
SELEMANI..... RESPONDENT

JUDGMENT

Date of Last Order: 13/03/2025 Date of Judgment: 04/04/2025 B.E.K. Mganga, J It is undisputed by the parties, that on 25th June 2021, Largadere Travel Retail Bevico Limited, the abovenamed applicant, entered unspecified period contract of employment with Mwajabu Selemani, the abovenamed respondent. In the said unspecified period contract, respondent was employed as sales Associate. It is also undisputed that place of recruitment of the respondent was Dar es Salaam, and her first duty station was Julius Nyerere International Airport, Terminal 3, Dar es Salaam. It is further undisputed by the parties that, on 4th July 2022, applicant promoted the respondent to the position of Assistant Manager. It is also undisputed that after the said promotion, respondent was 1 transferred from Dar es Salaam to Kilimanjaro International Airport (KIA). It is further undisputed by the parties that, on 22nd November 2022, applicant served the respondent with a letter to show cause and on 9th December 2023, respondent served the respondent with a disciplinary charge. In the said charge, it was alleged that respondent committed a misconduct of gross dishonesty. It was alleged that by the applicant in the said disciplinary charge that respondent undertook actions that were stated in the said charge with the intent of steal from applicant's customers by selling them products at higher prices than the original prices set by the company and that, the extra money earned from the sales were shared with her colleagues. Disciplinary hearing was conducted as a result, respondent was found guilty as charged. Respondent appealed but applicant confirmed the decision of the Disciplinary hearing committee. On 4th January 2024, applicant terminated employment of the respondent. Respondent was aggrieved with the said termination, as a result, on 30th January 2024 she filed Labour dispute No. CMA/KLM/MOS/M/11/2024 before the Commission for Mediation and Arbitration (CMA) at Moshi. In the referral form (CMA F1), respondent indicated that she was claiming to be paid 2

- (i) TZS 32,400,000/= being 36 months' salary compensation, (ii) TZS 9,360,000/= being variable payments for 36 months, (iii) TZS 787,500/= being severance pay and (iv) TZS 300,000/= being transport allowance. On 30th October 2024, Hon. Lucia Chrisantus Chacha, Arbitrator, having heard evidence of the parties issued an award that termination was unfair both substantively and procedurally. Based on those findings, the arbitrator awarded respondent to be paid (i) TZS 10,800,000/= being 12 months' salary compensation for unfair termination, (ii) TZS 900,000/= being one month salary in lieu of notice, (iii) TZS 450,000/= being severance pay, (iv) TZS 900,000/= being one month salary as leave pay all amounting to TZS 13,050,000/=. I should point out from the outset that, respondent prayed the dispute to be transferred from Moshi to Dar es Salaam as a result, on 6th February 2024, the arbitrator at Moshi issued an order to that effect which is why it was heard in Dar es salaam. Applicant was aggrieved with the said award hence this application for revision. In support of the Notice of Application, applicant filed the affidavit of Sophia Mrimi, her principal officer. In the said affidavit, the deponent raised five (5) grounds namely: - 3
1. That, the arbitrator erred in law and facts by holding that respondent was not issued with investigation report thus applicant did not follow formal procedures.
 2. That, the arbitrator erred in law and fact by holding that applicant did not conduct investigation in relation to the alleged misconduct.
 3. That, the arbitrator erred in law and fact by deciding that applicant had no valid reason for termination.
 4. That, the arbitrator erred in law and fact by failure to analyse evidence that was adduced.
 5. That, the arbitrator erred in law and fact by holding that respondent should have issued a warning letter while the offence committed warrants termination at the first instance. Respondent opposed this application by filing both the Notice of Opposition and the Counter affidavit. When the application was called on for hearing, Ms. Joycelinda Mndeme, advocate, appeared and argued for and on behalf of the applicant while Jaqueline Augustine Manangu, advocate, appeared and argued for and on behalf of the respondent. Arguing in support of the 1st, 2nd, and 3rd grounds, Ms. Mndeme submitted that, the arbitrator failed to analyse evidence and gave a contradictory award. She further submitted that, in the award, the arbitrator acknowledged that respondent admitted having been issued with investigation report but latter on stated that respondent was not served with investigation report. She went on that, in the award, 4 arbitrator acknowledged that disciplinary investigation report was tendered by DW1 along with its attachment (exhibit D2 collectively) but later on, the arbitrator noted only part of the attachment to the investigation report which makes applicant to question the decision arrived at by the arbitrator. Counsel further submitted that, when determining the dispute, the arbitrator was supposed to confine herself to the evidence adduced as it was held in the case of Leonada Benedicto kapele v. Leonard Alfred Mwananzumi (Administrator of the estate of the Late Patrick Alfred Mwananzumi) and Another, Land Appeal No. 34 of 2022, HC, (unreported). She added that, applicant complied

with the requirement of investigation report as it was held in the case of Kiboberry Limitedv. John Van Der Voort, Civil Appeal No. 248 of 2021, CAT (unreported). Counsel for the applicant also submitted that, arbitrator arrived at a wrong conclusion that applicant had no valid reason while DW1, DW2 and exhibits tendered proved that applicant had valid reason. She concluded that termination of the respondent was fair and with valid reason. Arguing in support of the 4th ground, Ms. Mndeme submitted that, arbitrator failed to analyse evidence that was adduced before her as a result, she arrived at a wrong decision. She added that, arbitrator 5 wrongly held that there was no policy tendered at CMA by the applicant to substantiate the misconduct committed by the respondent. When probed by the court, counsel for the applicant conceded that the policy was not tendered. Counsel was quick to submit that Arbitrator did not state that applicant's failure to tender the policy contravened a certain provision of the law. She added that, respondent was alleged to have committed breach of trust as she was alerting fellow employees to remove “price za Mchongo” and put the correct price. Arguing in support of the 5th ground, Ms. Mndeme submitted that, the misconduct committed warranted termination and not warning. Counsel added that, holding by the arbitrator that applicant was supposed to issue warning is contrary to Guideline 5 to the schedule to the Employment and labour Relations (Code of Good Practice) Rules GN. No 42 of 2007 because respondent committed breach of trust. He went on that, considering the sensitive position respondent held and trust applicant had, it was impossible to continue with employment. For the foregoing, counsel prayed that the application be allowed by revising, quashing and setting aside the CMA award. Ms. Manangu, advocate for the respondent opposed the application. Regarding the 1st, 2nd, and the 3rd grounds, counsel for the 6 respondent submitted that, arbitrator did not error to hold that respondent was not issued with investigation report. She also submitted that, arbitrator found that what was issued by the applicant did not suffice to be an investigation report. She added that, the report did not show interview etc to establish the ground for disciplinary hearing that, the alleged misconduct is so gross to warrant termination because it involved allegations of theft and dishonest. Ms. Manangu submitted that, arbitrator found that investigation report was supposed to contain interview and evidence establishing the alleged misconduct. To support her submissions, counsel for the respondent cited the case of FINCA Microfinance Bank Limited v. Jalala Hussein, Labour Revision No. 28234 of 2023 TZHC 1086. When probed by the court, counsel for the respondent conceded that there is no format of investigation report. Ms. Manangu was quick to submit that, the investigation report that was tendered had no information to warrant disciplinary hearing to be conducted. She added that, the trial arbitrator stated that all what was contained in the investigation report were allegations. She went on that, none of the members in the group in which respondent was communicating with relating “prices za mchongo” were interviewed. She also submitted that, it is only the respondent who was interviewed. 7 Counsel for the respondent further submitted that, payments were done via credit cards and there was no possibility of the respondent to steal money though applicant brought some receipts to prove that some customers were over charged. She added that, applicant has no valid reason for termination because there was no evidence that was adduced because all evidence was

based on assumptions. Regarding the 4th ground, Ms. Mndeme submitted that applicant failed to prove the alleged misconduct because evidence adduced by the applicant did not pin directly the respondent. Regarding the 5th ground, counsel for the respondent submitted that, arbitrator did not error because there was no tangible evidence to prove the alleged misconduct. She also submitted that, other employees were given warning as it was testified by DW1, but respondent was terminated. She added that, Rule 12(a) and (b) of GN. 42 of 2007 (supra) requires the arbitrator to consider whether, the employee contravened any rule or standard. Before concluding her submissions, I asked counsel for the respondent to submit whether, in the referral form (CMA F1) respondent pleaded that she was not served with the investigation report. 8 Responding to the issue raised by the Court, counsel for the respondent readily conceded that, respondent did not plead that she was not served with the investigation report. She also submitted that, it was not proper for the arbitrator to hold that respondent was not served with investigation report because parties are bound by their own pleadings. With those submissions, counsel for the respondent prayed the application be dismissed for want of merit. In rejoinder submissions, Ms. Mndeme submitted that, applicant considered seriousness of the allegation in terms of rule 12 of GN. No. 42 of 2007(supra) which is why, she terminated employment contract of the respondent. She clarified that, there were some clients who were paying by cash and others by cards. Responding to the issue raised by the court, Ms. Mndeme concurred with submissions by Ms. Manangu that, in CMA F1, respondent did not indicate that she was not served with investigation report and that, it was not proper for the arbitrator to hold that respondent was not served with investigation report while that was not pleaded in the CMA F1. 9 I have examined the CMA record and considered submissions made on behalf of the parties in this application. The issue is whether termination was fair and to what reliefs ate the partes entitled to. The CMA record shows that, applicant called only Sophia Mrimi (DW1) and Abubakari Haruna Rubanda (DW2) to prove the allegations against the respondent. It was evidence of Sophia Mrimi (DW1) that respondent committed a misconduct with an intention of stealing, failure to supervise her subordinates and failure to report the misconducts that were committed by her subordinates with intent of stealing. In her own words, DW1 is recorded stating inter-alia that: - “...Mlalamikaji alisitishiwa ajira yake baada ya kufanya makosa ya utovu wa nidhamu kwa maana wizi baada ya kushindwa kuwasimamia wenzake vizuri na kutotoa taarifa za yanayoendelea. Kulikuwa na bidhaa ambazo haziuziki hivyo mlalamikiwa aliamua kupunguza bei ya bidhaa hizo na tulipofuatilia tuligundua kuna bidhaa hazikubadilishwa bei kwa faida yao ya kuiba kwa maana waliweka bei ya juu na kupata pesa kwa wateja ...na baadaye walikuwa wakigawana na kulikuwa na meseji kwa njia ya whatsapp.” (Emphasis is mine). While under cross examination, DW1 stated that respondent and others stole money that were paid by customers in the applicant’s bank account and “lipa number and that there was no cash payment. In her own words, DW1 is recorded stating: - 10 “...Pesa walizoiba mlalamikaji na wenzake pesa hizo wateja walikuwa wakilipa kwa njia ya account za mlalamikiwa za bank na lipa namba hakuna malipo ya mkononi/cash na walipolipa kwa njia hizo walitolewa risiti za FDA...” It was evidence of Abubakar Haruna Rubanda (DW2) that, his duties are to prepare price labels and give his

leaders. He also testified that, on 9th October 2023, while on leave, showed Mr. Alfred, the Manager, WhatsApp messages after being asked by the latter. He added that, the said Alfred screen did shoot WhatsApp message dated 5th October 2023 that was shared in the group by the respondent directing employees to remove fictitious prices. Brief as he was, that marked the end of evidence of DW2 in chief. While under cross examination, DW2 testified that he saw the said messages while on leave. He also stated that he only prepared prices but did not participate in changing them. In his own words, DW2 is recorded stating that: - "...Mimi sikuhusika kubadili bei niliziandaa na kuwapa wao waliziweka wenyewe." (Emphasis is mine). In her evidence, Mwajabu Selemani (PW1) stated that, on 8th November 2023 at 14:00hrs after she had completed her leave, she was sent to police station by her branch Manager. That, while at police 11 station, she was interrogated by police who seized her mobile phone. She also testified that, Sophia Mrimi (DW1) informed her that police were investigating offences she has committed, therefore, she should resign on the same day otherwise, she will be terminated. Respondent (PW1) further testified that, she declined the advice of resigning. She also testified that, she was accused of the offence of stealing. In her evidence, applicant (PW1) distanced herself with the allegations that were raised by the applicant. when she was cross examined, PW1 stated that she did not steal and that payments were done through CRDB bank account and Lipa account. I should point out that termination of the respondent was based on the investigation report (exhibit D2) that was authored and tendered by DW1. The said exhibit was dated 9th December 2023 and reads in part: - "...That on 5th October 2023, Mwajabu sent a message to WhatsApp group chat (KIA TEAM) instructing Vivian Mwaisango, Graciana Tarimo, and Anneth Monyo to make sure to remove the altered prices "za mchongo" and to put the correct price labels on the items. It is further alleged that on 30th October 2023 through the WhatsApp group chat (KIA TEAM) Mwajabu instructed her colleague, Gerald Agrey to remove the altered prices "za mchongo" and "price zenye kizaizai" in the perfume zone and to put the correct price labels... Furthermore, it is alleged that this action was undertaken with intent to steal from customers by selling them products at higher prices than the original prices set by the company... 12 Money attained from the sale of the overpriced items was split between Mwajabu and her colleagues. This conduct was against the principles of honesty, integrity, and transparency." (Emphasis is mine). It is undisputed by the parties that, on 22nd November 2023 respondent was served with show cause letter (part of exhibit D2). The said show cause letter reads in part: - "...On 5th October 2023 you sent a message to WhatsApp group chat (KIA TEAM) instructing Vivian Mwaisangp, Graciana Tarimo, and Anneth Monyo to make sure to remove the altered prices' za mchongo' and to put the correct price labels on the items. On 30th October 2023 through the WhatsApp group chat (KIA TEAM) you instructed her colleague, Gerald Agrey to remove the altered prices "za mchongo" and "price zenye kizaizai" in the perfume zone and to put the correct price labels... Further it is alleged that this action was undertaken with the intention of stealing from our customers by selling them products at higher prices than the original prices set by the company... the money attained(sic) was split between you and your colleagues...This conduct goes against the principles of honesty, integrity, and transparency that we uphold. As an assistant manager,

you are entrusted with the responsibility of upholding the highest standards of ethical behaviour and ensuring that the team under your supervision follows suit..." (Emphasis is mine). I should point out that the said show cause letter was served to the respondent on 22nd November 2023 prior to completion of investigation because investigation report (part of exhibit D2) was signed on 9th December 2023. The issue is how did that happen. It is my view that the investigation report was prepared just to cover up the 13 decision taken by the applicant. Unfortunately, on part of the applicant, she forgot to check the dates which, on the other hand, it is fortunate to the respondent. It is further undisputed by the parties that, on 9th December 2023, respondent was served with the charge sheet (exhibit D3). It can be recalled that this is the date she was served with the show cause letter (part of exhibit D2). As pointed hereinabove, in the said charge sheet (exhibit D3), applicant alleged that respondent committed misconduct namely gross dishonesty. Particulars of the said charge sheet (exhibit D3) reads in part: - "...On 5th October 2023 you sent a message to WhatsApp group chat (KIA TEAM) instructing Vivian Mwaisangp, Graciana Tarimo, and Anneth Monyo to make sure to remove the altered prices 'za mchongo' and to put the correct price labels on the items meaning that you were aware of the price changes made by your colleagues. On 30th October 2023 through the WhatsApp group chat (KIA TEAM) You instructed her colleague, Gerald Agrey to remove the altered prices "za mchongo" in the perfume zone and to put the correct prices. That, on 10th October 2023 when you were sitting as the cashier, you issued an EFD receipt of TZS 34,500/= whereas the corresponding CRDB bank receipt for the same transaction shows that the customer paid USD 15 equivalent to TZs 37,500/- thus a difference of TZS 3,000/- in the receipt. Further on 10th October 2023 when you were sitting as the cashier, you issued an EFD receipt of TZs 48,000/- whereas the corresponding CRDB 14 bank receipt for the same transaction shows that the customer paid USD 24 equivalent to TZs 60,000/- thus a difference of TZs 12,000/- in the receipts. Further, on 10th October 2023 when you were sitting as the cashier, you issued an EFD receipt of TZs 119,000/- whereas the corresponding CRDB bank receipt for the same transaction shows that the customer paid USD 52 equivalent to TZs 130,000/- thus a difference of TZS 11,000/- in the receipt. Moreover, these actions were undertaken with the intent to steal from our customers by selling them products at higher prices than the original prices set by the company whereas you were aware of this as the assistant manager and in several instances did the overcharging yourself. And that the extra money earned from the sales was split between you and your colleagues. Such actions are not only unacceptable but a violation of ethical standards...In light of the foregoing, it has been noted that you have conducted yourself in a manner that clearly shows gross dishonesty towards your employer which is unacceptable and regarded as unprofessional behaviour and contrary to Guideline 5 of the Guidelines of an Employee as provided in the Employment and Labour Relations (Code of Good Practice) Rules G.N. 42 of 2007..." I have opted to quote the charge sheet (exhibit D3), show cause letter and the investigation report (part of exhibit D2) at length to show the nature of allegations that were levelled against the respondent though to the detriment of making this judgment long. I should point, albeit briefly that, the afore mentioned allegations that were levelled against respondent are also criminal in nature namely theft. These allegations requires higher

standard of proof than that 15 required in civil cases as it was held in the case of Bilali Ally Kinguti vs Ahadi Lulela Said & Others (Civil Appeal No.500 of 2021) [2023] TZCA 17337 (13 June 2023), Abraham Sykes vs Araf Ally Kleist Sykes (Civil Appeal No. 226 of 2022) [2024] TZCA 20 (7 February 2024) and City Coffee Ltd vs Registered Trustee of Iloilo Coffee Group (Civil Appeal No. 94 of 2018) [2019] TZCA 645 (1 November 2019). In City Coffee's case(supra), the Court of Appeal that: - "Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required... It is now established that when the question whether someone has committed a crime is raised in civil proceedings that allegation need be established on a higher degree of probability than that which is required in ordinary civil cases... the logic and rationality of that rule being that the stigma that attaches to an affirmative finding of fraud justifies the imposition of a strict standard of proof... In view of the foregoing, it is clear that regarding allegations of fraud in civil cases, the particulars of fraud, being a very serious allegation, must be specifically pleaded and the burden of proof thereof, although not that which is required in criminal cases; of proving a case beyond reasonable doubt, it is heavier than a balance of probabilities generally applied in civil cases." It is my view that, in the application at hand, applicant had the burden of proving the allegations against respondent to the abovementioned standard and not at balance of probability. 16 The issue is whether, applicant proved the allegations against the respondent to the standard stated in the above cited case. My answer to the above issues is to negative. Neither DW1 nor DW2 proved the allegation that respondent had intention of stealing from applicant's customers or that she did steal applicant's money. In fact, there is no iota of evidence suggesting that respondent stole money from applicant's customers or that she had an intention to steal from those customers. What happened in this application is that, DW1 just tendered several receipts and other documents as part of exhibit D2 because they were attached to the investigation report without offering explanations as to how they link respondent with the alleged misconduct of gross dishonest. It was testified by DW1 while under cross examination that, all payments were done through applicant's bank account and that, there was no cash payment. That is also evidence by the respondent (PW1). I find that, submissions by counsel for the applicant that some customers paid in cash is unsupported by evidence on record. There is no evidence showing how respondent and her colleagues stole money from applicant's customers while the said money was paid directly in applicant's bank account. There is also no evidence showing that respondent and her colleagues distributed the money 17 amongst themselves. It is therefore my considered opinion that, applicant did not prove the allegations of gross misconduct levelled against the respondent. In short, termination was unfair substantively because applicant had no valid reason of terminating respondent's employment. I should point out that, it was alleged by the applicant that respondent violated standards of ethical behaviour. It is my view that, applicant as the employer, had also the duty of upholding the highest ethical standards and behaviour and ensuring that employees follow suit. It is my view that, it is unethical and uncouth for the employer to raise unfounded allegations against the employee knowingly that the same will lower integrity of the employee in the society. On the complaint relating

to failure to serve respondent with investigation report, it was correctly submitted by both counsel that, in the CMA F1, respondent did not complain that she was not served with the said investigation report. Since CMA F1 is pleading, neither the parties nor the arbitrator was supposed to depart from what was pleaded in the said CMA F1. In fact, on procedural unfairness, in the said CMA F1, respondent indicated that she was served with the letter of outcome of appeal that did not bear the company seal or logo. That is 18 the only procedural issue that was raised by the respondent. It was, therefore, not proper for the respondent to depart from what she stated in the CMA F1 and state in her evidence that she was not served with the investigation report. I am of that view because parties are bound by their pleadings. For the foregoing, I hereby dismiss this application for want of merit. Dated at Dar es Salaam on this 4th April 2025 B. E. K. Mganga JUDGE Judgment delivered on this 4th April 2025 in Chambers in the presence of Joycelinda Mndeme, Advocate for the Applicant and Jacqueline Augustine Manangu, advocate for the Respondent. B. E. K. Mganga JUDGE 19

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