

TANZANIA / JUDGMENT

MSAFIRI Ruling Final

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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. 12943 OF 2024 From dispute No. CMA/
NYAM/301/2022/115/2022) MSAFIRI ABEID MSAFIRI
APPLICANT VERSUS CROWN PAINTS TANZANIA LTD RESPONDENT

RULING

3rd & 13th December, 2024 CHUMA, J. The applicant herein was distressed by the award of Commission for Mediation and Arbitration for Mwanza (herein the CMA) in Labour Dispute No. CMA/NYAM/301/2022/115/2022. He is seeking the indulgence of this court to revise the decision of the CMA on three legal issues as here under: -

1. Whether or not the arbitrator analyzed and evaluated properly the evidence on record;
2. Whether or not the arbitrator failed correctly to apply the law;
3. Whether or not there was a breach of employment contract by the respondent; and
4. Whether or not the award dated 29/4/2024 was improperly procured. Briefly counted from the records, the applicant was employed by the respondent for two years of fixed-term employment as a warehouse incharge from 4.9.2022 to 3.9.2022. His employment was however terminated by the respondent for Gross Negligence of Duty on 1.11.2022. The applicant herein, referred the dispute before the CMA claiming that the respondent has breached the employment contract. Before the CMA he was claiming unpaid salaries for the remaining period of the contract, Payment of one-month salary instead of notice, severance pay, and payment of untaken leave totaling TZS. 52,598,707. The arbitrator, found the applicant to have materially breached the employment contract and proceeded to dismiss the dispute. Hence this application. During the hearing parties were represented by Messrs. Stephen Mhoja and Mashaka Tuguta learned advocates for the applicant and respondent respectively. Mr. Mhoja submitted on the first issue that, the procedure and the reasons leading to that termination were not followed. That according to exhibit P2, the alleged offence was gross misconduct and gross negligence of duty. That, the employer had a duty to substantiate or justify by tangible evidence of the alleged offences. The applicant was warehouse in charge hence he was not concerned with the issuance of invoice. Even if he was involved but still no invoice or any other document was tendered before the CMA in

proof of the alleged offence against the applicant. That, according to page 14 of the proceedings, the evidence indicates that the invoice was issued from the headquarters in Arusha and not Mwanza. Mr. Mhoja referred to the case of Ramadhan Masoud Vs. Bank of Africa, Civil Appeal No. 345 of 2024 on page 15 where it was decided that, in the absence of clear evidence the charge cannot be said to have been proved. He submitted further that, in the absence of tangible proof, the applicant was unfairly terminated contrary to Rules 8, 9, 12, and 13 of the Employment and Labour Relations (Code of Good Practice) Rules GN No. 42, 2007 (the code). Exhibit SU9 reveals nothing relating to the issue of invoices and the alleged loss. The conversation was recorded by phone but what was submitted as evidence was a flash which letter was transferred to or copied to the laptop without specifying the kind of laptop and the type of phone used. Section 18 (2) (b) of Electronic Transaction Act Cap 442 RE 2022 requires maintenance of the data message while sub-section 3 emphasizes the authenticity of data messages. On the second point, Mr. Mhoja submitted that to prove whether termination was fair the employer must adhere to Rules 12 and 13 of the Code and section 39 of the Employment and Labour Relations Act, No. 6 of 2004. That, the employer must establish, one, the employee committed serious misconduct, two, that the procedure for fair termination under the code was complied with. The evidence of SU1 on page 12, clearly shows that the applicant was not a party to the disciplinary committee meeting which is a denial of the right to be heard. Reference was made to the case of Jacqueline Ntuyabaliwe Mengi & Two Others Vs. Abdiel Reginald Mengi, Civil Application No. 748/01 of 2022 page 12 where the court while referring to Article 13(6)(a) of the Constitution of United Republic of Tanzania emphasized the right to a fair trial being a fundamental right. Three, the sanction imposed was justifiable and has been consistently applied to other employees who committed the same misconduct. On the third issue, Mr. Mhoja submitted that exhibit PE2 indicates misconduct leading to the applicant's termination but no witness or documents were ever brought before the CMA to prove the allegation. On the fourth issue, it was submitted that, since the allegation was not substantiated by not tendering any tangible evidence, the award was improperly procured. That, the voice note despite not connecting the alleged misconduct, was also illegally admitted. The applicant was not accorded a right to a hearing. He therefore prayed for the application to be allowed. In reply, Mr. Tuguta submitted that the application is baseless because, for an application of this nature to succeed, the affidavit in support of the application has to bear true information. That, paragraph 2 of the affidavit contains false information as the applicant asserts to have been employed as a teacher which is not the case. Regarding the first issue, he submitted that, in complaint in form No. 1 the applicant alleged breach of employment contract by the respondent. That, during hearing both parties had a duty to bring evidence before CMA. The applicant had a duty to prove that the respondent did breach the contract and the respondent to disprove the same. The arbitrator analyzed the evidence before it on pages 8 to 12 where the rights of the parties were determined specific evidence was indicated showing a failure to analyze the evidence. Rather, in his submission the appellant submitted on non-tendering of the invoice which had never been an issue. He submitted further that, the fact can be proved by oral evidence, documentary evidence, or both under section 61 of

the Tanzania Evidence Act, Cap. 6 RE:2022. On the second issue, Mr. Tuguta submitted that the arbitrator correctly applied the law. That termination was fair and complied with the procedure. That, procedure governing disputes on breach of contract is provided by Rules 8, 9, 12, and 13 of GN No.42 of 2007. That, under rule 8 (1)(a), the employer has been mandated to terminate employment against the applicant subject to compliance with the provision of the contract relating to termination. That, Exhibit PU1/SU1, provides a procedure for termination under item 6. That, under Rule (8)(2)(d)(ii) of the GN No 42 of 2007, where the employee material breaches the employment contract the employer is not required to issue notice to the applicant on termination hence since there was material breach of contract the respondent had no obligation to issue notice before termination. That, Rule (9)(1) is to the effect that, procedural fairness complied by the respondent may differ from case to case depending to some extent on the reason assigned leading to termination. The rules provide a list of reasons justifying termination by the employer which includes the conduct of the employee under Rule (9)(4)(a). That, according to PE2/SU2 and PE6/SU2 allegations and reason for termination were based on gross misconduct and negligence. That, in the case of Fadhil Rahisi Kipugila Vs. Kioo Limited, Civil Appeal No. 31 of 2021, on page 9 the court stated that offences that may attract warning are like late arrival at work but not dishonest. He submitted further that, on page 3 of the award the arbitrator well assessed the evidence and cited Rule 13. The applicant was informed of the allegation in the show cause letter and replied via letter dated 13.10.2022 (exhibit P3). On page 11 of the proceedings, the applicant admitted to attending the meeting that he was allowed to explain himself. On the third issue, he replied that the respondent never breached the contract of employment. Items 10 and 12 of the contracts of employment, required the applicant to serve the company diligently, faithfully, and truly and should not be involved in illegal activities against the company. The said condition ought to remain intact as tilting will lead to a breach. That, on page 9 of the proceedings PW1 when cross- examined in terms of item or close 10 and 12 admitted knowing about them. That, on the admission of exhibit SU9 the only objection was on absence of an affidavit to prove authenticity, other issues raised in this application were not raised before the CMA. The affidavit as to authenticity is not a requirement under section 18 of the Electronic Transaction Act. Further reference was made to the case of Tanzania Union of Industries and Commercial Workers (Tuico) Vs. Serengeti Breweries Limited (SBL) Labour dispute No. 7 of 2022. That, on page 18 when cross-examined by the applicant, SU2 stated that the phone used in communication by him and the appellant was 0786314278 the appellant never challenged the alleged communication. SU 2 stated that he did record the voice call and shifted it to the laptop. The issue of authenticity or validity of exhibit SU 9 is not questionable. That, on page 11, the applicant admitted deciding against the interest of the company which is also reflected in Exhibit SU 9. That, by his conduct the applicant materially breached fundamental terms and conditions of the employment contract, the proper sanction is termination. On the third and fourth grounds he submitted that the respondent never breached the employment contract rather the arbitrator's verdict was right because it is the applicant who breached fundamental terms and conditions of the contract of employment. That, the CMA award was legally procured. In rejoinder, Mr. Mhoja

submitted that the averment in the affidavit that the applicant was employed as a teacher is just a slip of a pen. That, the procedure was not followed and the reasons were never assigned as per Rule 13 (5). That, the alleged misconduct was not proved tangibly. That, Exhibit P5 listed participants of that meeting, and the applicant is missing in that list. That, On the voice (exhibit SU9), is a casual communication that does not reflect anything regarding the alleged misconduct. That, the applicant never made any act for his benefit but rather for the company's interest, in the absence of any tangible evidence the termination was unfair. Having considered both party's submissions for and against, the court records, and the points for revisions I find the issue for determination being whether the decision of the CMA was appropriate. Before that, the issue raised by Mr. Tuguta that the affidavit tells that the applicant was employed as a teacher held no water. I consider it a mere slip of pen that does not affect the substantive part of this application or rather go to the root cause of the matter. Reverting to the main concern I will start by discussing the issue stated by the respondents on whether the arbitrator analyzed the evidence on record. On this point, the applicant argued that the reasons and procedures for termination were not proper invoice was tendered to justify the applicant's negligence. Starting with reasons, Rule 13 (10) of the Code requires the employee to be made aware of the reason for termination. This requirement also applies to fixed-term employment Contracts. In the case of Jordan University College & Mark Ambrose, Civil Appeal No. 267 of 2020 (unreported) the Court of Appeal said: - "As it is apparent above, no reasons were given for this termination. We think, as rightly expressed by counsel for the respondent, despite the fact that this was a fixed term contract which has a termination clause providing for the procedure of termination, but clause 10 was not supposed to be read in isolation of the law for parties cannot contract and chose to operate outside the law. Clause 10 was supposed to be read with rule 13 (10) of the Code of Good Practice..." (emphasis added) In this matter, according to Exhibit P2 (Show Cause Letter), Exhibit P4 (Notice to attend a Disciplinary Hearing) and Exhibit P6 (Termination of Employment), the reason for termination was Gross Misconduct and Gross Negligence of Duty. Therefore, the reason was clearly stated. On how the reason was fair, exhibit P2 shows that the applicant committed four acts that were considered by the respondent to constitute Gross Misconduct and Gross Negligence of Duty. That is to say: -

1. The applicant asked Mr. Venance Mgeta (sales Executive) to process an order from an unknown customer who does not hold an account with the respondent using a credit customer's account (Magesa Egon Magesa). Upon seeking confirmation of the order with the customers it was revealed that the order was not placed by Mr. Magesa.
2. The applicant has been doing partial/short deliveries.
3. Delivery notes are not signed and stamped by customers therefore exposing the respondent to substantial loss.
4. The applicant has been falsely raising monthly invoices by the name of Martha Lubala to acquire money from the respondent. According to Exhibit P5 (outcome of Disciplinary Hearing held on 31st October, 2022), the applicant was terminated based on the first and

fourth allegation only according to part 3 (c) of Exhibit P5. I agree with Mr. Muhoja on the 4th allegation that it was not proved by the respondent. No invoice was tendered to prove that the same was falsely raised by the applicant. I pause to consider the first allegation whether it was genuine and whether it constituted Gross Misconduct and Gross Negligence of Duty. The applicant was inter alia bound by clause No. 12 of the Employment Contract (Exhibit P1) to serve the company diligently, faithfully, truly, actively, efficiently, with integrity and loyalty and shall neither engage nor participate in any subversive or illegal activities against the company nor shall engage directly or indirectly in any activity which may disturb the industrial peace. As I have stated herein, the offence which inter-alia led to the applicant's termination was the use of a credit customer's account to bill an order of another person. The reasoning of the respondent on how that act constituted Gross Misconduct and Gross Negligence of Duty is found on page 4 of exhibit P5. It partly reads; "using cash customers account to bill other customer has far-reaching impacts to the business and act borders on integrity....it is not in dispute that there was gross misconduct and gross negligence in handling customer's Account. This resulted in the customer not receiving the order for which was billed through his account, confusion in reconciling invoices, and irregularity in handling the customer's account. It also has tax implications on the customer account with TRA...when a Warehouse in charge commits gross misconduct and gross negligence in regards to customer's account and business, the Management cannot rely on this person..." According to the evidence on record, exhibit SU9 proves that the applicant billed other customers' orders using the account of another client. The reason advanced by the applicant in exhibit SU9 was that, the said customer had no Tax Identification Card (TIN) or National Identity Card (NIDA) and that the customer by purchasing directly from the respondent aimed at getting discounts enjoyed by wholesale customers. The applicant partly said: - "...mimi kama Msafiri nimeshakiri na hili kosa... naomba nimuondoe huyu mteja kwa kuchukua amana yake...ninaomba invoice ipigwe kisha mimi ndio nije niadhibiwe na niko tayari kwa lolote sijafanya kwa ubaya...Magesa ni mtu wangu naweza kuongea nae tu bila shida yaani...mimi sijala hela...hata hiyo kutolewa kazini nipo tayari...tena kwa amani na sitokuwa na kinyongo kabisa yaani...mtu hana TIN namba hana kitambulisho cha NIDA namsaidiaje?...hebu tumtoe mteja aende alafu nishughulikiwe mimi niliyefanya makosa...yeye alichokuwa anataka, anataka unafuu, watu wanapokuja hapa wanataka/wanatafuta unafuu..." This evidence was corroborated by the testimony of the appellant on page 11 of the CMA proceedings where he said that he was making some personal decisions versa vie the company's benefit. The evidence reads: - "swali: Kwa hiyo ulikuwa unafanya maamuzi binafsi kushinda maslahi ya ofisi? Jibu: nilikuwa nafanya" On his part, DW1 in Exhibit SU9 was arguing with the applicant that, by using another customer's account the company would be blamed, that one employee named Baraka was recently terminated for the same mistake, and other employees including the applicant and DW1 were warned by their superior one Nicolaus. Previously other employees used the same means to bill some orders using other customer's accounts but it caused a big loss to the respondent. That is why the applicant did not advise the said customer to go and buy from their wholesale customers because if they sell the same product to small customers,

the retail customers will lack customers. In my view, the act done by the applicant materially breached clause No. 12 of the employment contract because, by using another client's account for other customers the applicant was deceiving the respondent and exposing the respondent's business at risk. The applicant did an illegal act to the detriment of the respondent and the holder of the account. By purchasing a product, a holder of TIN will account for taxes. The act of the applicant would have tarnished the image of the respondent's business to customers and unfairly compete with retail customers who buy in bulk the products of the respondent to sell to small customers. The applicant was not loyal diligent and faithfully. He acted without integrity and disturbed the industrial peace of the respondent. It was argued by the applicant's counsel that, exhibit SU9 was received contrary to Section 18 (2) (b) and (3) of the Electronic Transaction Act (supra), I disagree with this argument because DW2 testified under oath and during cross-examination explained that the number used for communication by the applicant was 0786314278 and explained further that, the voice note was copied by him from the phone to computer then to flash disk (exhibit SU9) in the case of Tanzania Union of Industries and Commercial workers (Tuico) Vs. Serengeti Breweries Limited (supra) this court said at page 29; "In the case of Ami Tanzania Limited vs Prosper Joseph Msele (Civil Appeal No. 159 of 2020) [2021] TZCA 668 having quoted the provisions of section 18(1) of the Electronic Transactions Act and definition of a data message in section 3 of the same Act, the Court of Appeal held that the law does not require any endorsement by anyone to authenticate a data message. Again in the case of Standard Chartered Bank Ltd vs Justin Tineishemo (Revs Appl No. 184 of 2022)

[2022] TZHCLD 1084 held inter-alia that the authenticity of electronic evidence can be tested or cleared during cross-examination... It was not a duty of the complainant to file a certificate of authenticity while the law itself has created a presumption on authenticity." In another case of Onesmo Nangole Vs. Dr. Stephen Lemomo Kiruswa & Others, Civil Appeal No. 117 of 2017, the Court of Appeal at page 22 had the following to say: - "Under the ETA a flash disk and mobile phone are recognized as output devices in a computer system which can capture, receive, store and transmit electronic data." Guided by the above authorities, I find that Exhibit SU1 was properly admitted and relied upon. Having considered the evidence on record, the reason for termination was valid the applicant materially breached clause No. 12 of the employment contract. Rule 8(2) (a) of the code provides that: - "(a) where an employer has employed an employee on a fixed term contract, the employer may only terminate the contract before the expiry of the contract period if the employee materially breaches the contract" Regarding procedures adopted by the respondent for termination, Mr. Mhoja was of the view that the applicant was not a party to the disciplinary committee meeting and therefore denied with right to be heard. Having considered the evidence, it is not true that the applicant was denied the right to be heard. According to Exhibit P5, the applicant was present and he was heard. Exhibit P4 informed him of the date of the hearing and his right to call witnesses to have an interpreter and be represented. Further on page 11 of the proceedings, the applicant testified that he was notified of the disciplinary hearing and he was present. The evidence reds; Swali: ni kweli

uliitwa kwenye kikao cha nidhamu? Jibu: Niliitwa Swali: Ulihudhuria Jibu: Niliingia ndani kabisa Swali: Kikao kilifanyika Jibu: Kilifanyika Further, it is my settled position that the sanction imposed on the applicant was justifiable under Rule 8(2) (a) of the Code quoted above and according to exhibit SU9, the same sanction was used against another employee who committed the same offence with the name Baraka. The second issue thus lacks merit. Based on what I have stated herein above, the third and fourth issues will not detain me for so long. I agree that the delivery notes and invoices were not tendered as evidence by the respondent at CMA. However, the 1st allegation of using the account of another person to bill an order of another unqualified customer constitutes a material breach of contract which suffices to terminate the applicant's contract. The respondent did not breach the contract rather the applicant and the award of the CMA were properly procured. In my final analysis, I found that the award of the Commission for Mediation and Arbitration was proper. This application thus lacks merit and is dismissed. Parties to shoulder their own costs. I so order DATED at MWANZA this 13th December, 2024. W.M. CHUMA JUDGE The judgement delivered in court before Mr. Fabian Kurwa learned counsel for the applicant and Mr. Venance Kiburika advocate for the respondent this 13th day of December, 2024. J. MUSAROCHE DEPUTY REGISTRAR

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