IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KITUSI, J.A., And RUMANYIKA, J.A.)

CIVIL APPEAL NO. 279 OF 2019

PETER MAGHALI ..... APPELLANT

VERSUS

SUPER MEALS LIMITED ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Labour Division at Dar es Salaam)

(Wambura, J.)

dated the 19th day of July, 2019
in
Revision No. 648 of 2018

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JUDGMENT OF THE COURT

11th February & 22nd April, 2022

NDIKA, J.A.:

The appellant, Peter Maghali, was employed on 1st August, 2005 by the respondent, Super Meals Limited, as Sales and Marketing Officer. His services were terminated on 13th October, 2008 by the respondent on the ground that he had allegedly misappropriated TZS. 537,600.00, which he had received from a customer of the respondent as proceeds of sales. He challenged the dismissal in the Commission for Mediation and Arbitration ("the CMA") and later in the High Court of Tanzania,

Labour Division at Dar es Salaam but it was all in vain, hence the present appeal.

The setting in which the appeal arises is briefly as follows: on 11th July, 2008, the appellant was suspended from employment over allegations of misconduct. The letter of suspension (Exhibit P1) expressly stated that he would be paid no salary pending the outcome of the case. He was notified further that he was not allowed to do any company work in office or with the company's customers during suspension. On 4th September, 2008, the appellant was charged in Criminal Case No. 1200 of 2008 before the Resident Magistrate's Court of Dar es Salaam at Kivukoni over the misconduct for which he was suspended. The initial charge (Exhibit D1), dated 4th September, 2008, consisted of a single count of stealing by servant. It was particularized that he stole the property of the respondent, his employer, valued at TZS. 10,058,320.00 between 24th December, 2007 and April, 2008.

It was the respondent's case that the appellant was subsequently discovered to have received during his suspension a total of TZS. 537,600.00 as proceeds of sales from Kiromo View Hotel, one of the respondent's customers, despite being interdicted from acting for or on

behalf of his employer. Besides, it was alleged that he did not account for the said sum of money, implying that he misappropriated the whole of it. In response, the respondent served the appellant with a letter dated 25th September, 2008 (Exhibit D2) requesting explanation over the said allegation but the appellant declined to respond. Consequently, the respondent terminated the appellant's employment vide a letter of 13th October, 2008. He was paid terminal benefits, which included one month's salary, earned leave pay and outstanding salaries for July through 4th October, 2008 minus TZS. 537,600.00 he had allegedly misappropriated. The total amount paid was TZS. 867,800.00.

The appellant admitted receiving the letter (Exhibit D2) to which he furnished no response on the ground that it substantially concerned the pending criminal charge against him. Any response to the letter, he argued, would have supposedly been prejudicial to his defence in the criminal case. However, he denied having been summoned to any disciplinary meeting and claimed that he was dismissed from his employment on the reason of his failure to furnish a reply to the allegation against him.

As hinted earlier, the CMA dismissed the claim. It found that the appellant's collection of proceeds of sale amounting to TZS. 537,600.00 during suspension and without accounting for it was a misconduct and that it constituted a valid reason for the termination. Furthermore, the CMA ruled that the appellant was himself to blame for passing up the chance to be heard before the meeting of the company's Management prior to the dismissal. This finding was based upon the appellant's refusal to furnish a reply to the allegation against him on the ground that the accusation concerned the criminal charge against him, which was not the case. The CMA also observed that the company's Management that dealt with the matter was not properly constituted as a disciplinary committee but it viewed the anomaly as trifling. The High Court substantially upheld the CMA's reasoning, findings and conclusion.

The appeal is predicated on six grounds of grievance as follows:

1. *That, the Honourable Judge erred in holding that the respondent had a valid reason for terminating the appellant.*
2. *That, the Honourable Judge erred in holding that the appellant committed an offence while he was on suspension.*
3. *That, the Honourable Judge erred in holding that the appellant's failure to submit explanation made it impossible for*

the respondent to comply with disciplinary procedures and that the appellant sat on his right to be heard.

4. *That, the Honourable Judge erred in holding that the respondent cannot be said to have denied the appellant the right to be heard and cannot be held to have contravened rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, 2007.*
5. *That, the Honourable Judge erred for failure to take into consideration the fact that two members of the Management meeting which resolved to terminate the services of the appellant were involved in the issue previously contrary to rule 13 (4) of the Code of Good Practice and paragraph 4 (2) of the Schedule to the Code of Good Practice, Guidelines for Disciplinary, Incapacity and Incompatibility Procedures.*
6. *That, the Honourable Judge erred for failure to take into consideration the fact that the Management which resolved to terminate the services of the appellant was not properly constituted as a disciplinary hearing.*

Messrs. Evans Nzowa and Evodius Rutabingwa, learned advocates, argued the appeal before us on behalf of the appellant and respondent respectively. We propose to determine the grounds of appeal in the order they were canvassed by the learned counsel in their respective written and oral arguments.

Beginning with the complaints in the first and second grounds of appeal, Mr. Nzowa essentially contended that the alleged misappropriation of TZS. 537,600.00 as reason for the termination was unfounded and unacceptable. Elaborating, he argued that as the said allegation substantially constituted the criminal charge against the appellant in the pending criminal case, the respondent was barred by section 37 (5) of the Employment and Labour Relations Act, Cap. 366 R.E. 2019 ("the ELRA") from taking any disciplinary action him until the criminal case was finalized.

Conversely, Mr. Rutabingwa supported the High Court's finding that the alleged misappropriation constituted a valid reason for the termination. He argued that the alleged misappropriation occurred while the appellant, being suspended from employment, was not allowed to act for and on behalf of the respondent and that the embezzlement constituted an act of gross dishonesty for which termination is justifiable pursuant to rule 12 (3) (a) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 – Government Notice No. 42 of 2007 ("the Code") read together with Item 6 under paragraph 9 of the Schedule to the Code of Good Practice, Guidelines for Disciplinary,

Incapacity and Incompatibility Procedures ("the Guidelines"). The learned counsel added that section 37 (5) of the ELRA does not forbid termination of employment based on a valid reason that makes the employment relationship intolerable in terms of rule 12 (2) of the Code.

In resolving the issue at hand, we must first determine the import of section 37 (5) of the ELRA. It stipulates as follows:

> *"(5) No disciplinary action in form of penalty, termination or dismissal shall lie upon an employee who has been charged with a criminal offence which is substantially the same until final determination by the Court and any appeal thereto."*

In its natural and ordinary meaning, the above provision forbids an employer from taking any disciplinary action, be it a penalty, termination or dismissal, against an employee who has been charged with a criminal offence that is substantially the same as the misconduct allegedly committed. Moreover, as rightly held by the High Court, Labour Division in **Super Meals Limited v. Peter Magali**, Revision No. 316 of 2009 (unreported), the above provision does not bar an employer from taking a disciplinary action first, followed by a criminal action where

an employee's conduct amounts to a disciplinary misconduct as well as a criminal offence; what it is forbidden is the vice versa. In a similar vein, section 37 (5) does not forbid an employer from taking a disciplinary action against an employee for a transgression substantially different from the criminal offence facing the employee.

In the present case, it is in the evidence that the appellant was suspended on 11th July, 2008 on the allegation of stealing an assortment of bottled water and that on 4th September, 2008 he was formally charged with stealing by servant as a single count. The charge sheet (Exhibit D1) indicates clearly that he was alleged to have stolen the property of the respondent, his employer, valued at TZS. 10,058,320.00 between 24th December, 2007 and April, 2008. It is further in the evidence that the respondent subsequently discovered that the appellant had received a total of TZS. 537,600.00 as proceeds of sales from Kiromo View Hotel, one of the respondent's customers. But to be fair to the appellant, Exhibit D2 shows that of the aforesaid sum, TZS. 257,600.00 was allegedly received on 24th June, 2008 well before his suspension. It is only the other sum, that is, TZS. 280,000.00, which was supposedly received on 28th July, 2008 during his suspension.

Nevertheless, it is certain in the evidence that the alleged misappropriation of TZS. 537,600.00 was not part of the initial charge (Exhibit D1) over stealing of an assortment of bottled water. Thus, the respondent was entitled to take appropriate disciplinary action against the appellant following its discovery of misappropriation around 25th September, 2008. In the premises, with respect, we do not accept Mr. Nzowa's submission that the respondent was precluded by section 37 (5) of the ELRA from taking any disciplinary action against the appellant. We, therefore, hold, as we must, that the alleged failure to account for TZS. 537,600.00 part of which (TZS. 280,000.00) was supposedly received in breach of one of the conditions of suspension constituted a valid reason for the termination. We hold that the first and second grounds of appeal are untenable. They stand dismissed.

We now turn to the grievances in the third and fourth grounds. Submitting on these grounds, Mr. Nzowa censured the High Court for not holding that the impugned termination followed a flawed disciplinary process. He contended that the respondent violated rule 13 (2) of the Code read together with paragraph 4 (3) of the Guidelines. The learned counsel claimed that the show cause letter (Exhibit D2) was neither a

formal charge against the appellant nor was it a notice to attend the proposed disciplinary hearing. That the Management Meeting held on 13th October, 2008 that resolved to terminate the appellant's employment proceeded without affording him an opportunity to be heard. To buttress his submission, he cited our decision in **I.S. Msangi v. Jumuiya ya Wafanyakazi Tanzania & Another**, Civil Appeal No. 26 of 1991 (unreported) for the principle that an employee must be heard by the body that ultimately decided his fate. Further reliance was placed on our decision in **Jimson Security Service v. Joseph Mdegela**, Civil Appeal No. 152 of 2019 (unreported) on the mandatory requirement on the employer to serve a formal charge on the employee. The learned counsel also cited two decisions of the High Court, Labour Division in **Fredrick Mizambwa v. Tanzania Ports Authority**, Revision No. 220 of 2013; and **TTCL v. James Mgaya & Three Others**, Revision No. 30 of 2011 (both unreported) for the proposition that the stipulated disciplinary procedure must be followed and that violation of the procedure can render a termination unfair.

Replying, Mr. Rutabingwa cast the blame to the appellant, contending that he unduly refused to respond to the show cause letter

and that he declined to appear before the disciplinary hearing following his being summoned to the hearing. Citing rule 13 (6) of the Code, he argued that the respondent rightly proceeded with the hearing in the appellant's absence because he had unreasonably refused to attend the hearing. It was his further contention that it did not matter that the show cause letter was neither a formal charge nor a notice of hearing because the appellant was aware of the hearing but he declined to attend the meeting. He supported the High Court's view that the appellant sat on his right to be heard as he was aware of the allegations against him as well as the proposed disciplinary hearing. Given the appellant's recalcitrance, it was posited that the respondent was entitled to dispense with the procedural guidelines in terms of rule 13 (11) of the Code because it could not have reasonably been expected to comply with them. On the authorities relied upon by the appellant, the learned counsel submitted that they were all distinguishable on the ground that the appellant in the instant case was accorded an opportunity to be heard at the hearing but he chose to pass up that chance.

At the outset, it is noteworthy that both learned counsel are at one that rule 13 (2) of the Code read together with paragraph 4 (3) of the

Guidelines enjoin an employer to notify the employee of the allegations against him in a form and language that he could reasonably understand and also to advise him of the time and date of the proposed disciplinary hearing, giving him a reasonable opportunity to prepare for the hearing. However, the learned counsel are at war on whether the respondent duly complied with this requirement.

Having taken a long hard look at the facts of the case and considered the contending submissions, we are persuaded by Mr. Nzowa that the respondent violated the procedure because it convened and held its Management Meeting that ultimately dismissed the appellant from his employment without having served him with any formal charge, which should have detailed the allegations levelled against him. This omission was compounded by the respondent's inexcusable failure to serve the appellant with notice summoning him to the hearing. We find untenable Mr. Rutabingwa's submission that the appellant was aware of the hearing but he declined to appear. So far as the allegation regarding the misappropriation of TZS. 537,600.00 was concerned, the appellant was not served with any document other than the show cause letter (Exhibit D2), which then was followed up by the letter of termination

dated 13th October, 2008. It is too plain for argument that Exhibit D2 was neither a formal charge nor a notice of hearing. The appellant may have refused to furnish a reply to the show cause letter but there was no evidence that he unreasonably refused to attend the disciplinary hearing thereby justifying the respondent to proceed in his absence in terms of rule 13 (6) of the Code. Besides, the record of appeal shows no exceptional circumstances warranting the respondent dispensing with the procedural requirements pursuant to rule 13 (11) of the Code. It is our view that the learned High Court judge erred in holding that the appellant's refusal to reply to the show cause letter frustrated the respondent's effort to comply with the procedure and that the appellant sat on his right of hearing. As a consequence, the purported disciplinary hearing was a futile exercise. We, therefore, find merit in the third and fourth grounds of appeal.

Having held that the disciplinary hearing was a nullity as it was an exercise in vain, it is hardly necessary to delve into the complaints in the fifth and sixth grounds of appeal assailing the constitution and propriety of the impugned Management Meeting as a disciplinary hearing. For, we are satisfied, upon our findings on the first four grounds, that although

the appellant's employment was terminated for a valid and fair reason, the termination was unfair on procedural grounds as the purported disciplinary hearing sullied the appellant's right of hearing.

In the final analysis, we allow the appeal and proceed to quash and set aside the High Court's decision. Accordingly, we order that the appellant be paid twelve months' remuneration as compensation in terms of section 40 (1) (c) of the ELRA. We make no order as to costs bearing in mind that this matter is a labour dispute normally not amenable to any award of costs.

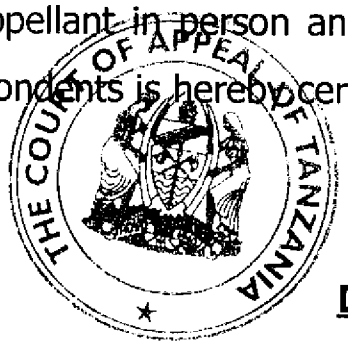
DATED at **DAR ES SALAAM** this 20th day of April, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of April, 2022 in the presence of Appellant in person and Mr. Evodius Rutabingwa, learned counsel for Respondents is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL