IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT ARUSHA

LABOUR DIVISION

REVISION NO. 68 OF 2019

(Originating from Labour Dispute No. CMA/ARS/ARB/199/2015)

RANGER SAFARIS LIMITED.....APPLICANT

VERSUS

HELLEN SAUL MOLLEL.....RESPONDENT

JUDGMENT

18/05/2020 & 20/07/2020

GWAE, J

The applicant, **Rangers Safaris Limited** in this Revision calls upon this court to revise the decision of the Commission for Mediation and Arbitration ("CMA") in dispute no. CMA/ARS/ARB/199/2015, set aside the award thereof and order that, the respondent's termination was fair, both in substance and procedure. The application was brought under rule 24 (1), 24 (2) (a) (b) (c) (d) (e) (f) and 24 (3) (a) (b) (c) and (d) of the Labour Court Rules 2007, GN No.106 of 2007 and Rule 28 (1) (c) (d) and (e) of the Labour Court Rules (supra) read together with section 91 (1) (a) and 91 (2) (a) and (c) Section 94 (1) (b) (i) of the Employment and Labour

Relations Act No.6 of 2004. The application is further supported by a sworn affidavit of applicant's learned counsel Ms. Neema Mtayangulwa.

The background of the dispute in brief is that the respondent, **Hellen Saul Mollel** was an employee of the applicant as a Tour Consultant in the department of Reservation from 31/10/2002 until 08/10/2015 when she was terminated for the reasons of gross negligence or causing gross damage to the employer's client relationship and image or incompetence or both as shall be discussed hereinafter.

Feeling termination of his employment was unfair, the respondent referred her complaint to the CMA on 30/10/2015. The CMA heard and determined the complaint and found that the respondent termination was unfair, both in substance and procedure and consequently ordered for the payment of Tshs. 35,539,200/= being 36 months' salary compensation in in favour the respondent to be paid in 14 days from the date the award was procured. Dissatisfied with the CMA award the applicant knocked the doors of this court, hence this application.

On hearing of this matter the parties were represented by the learned advocates **Ms. Neema Mtayangulwa** and **Mr. Salvatory Mosha** respectively. Parties were granted leave to argue their case by written submissions and they accordingly filed their respective submissions as directed by the court.

In support of her application Ms. Neema's arguments were to a large extent an elaboration of what she had stated in her sworn affidavit where she alleged on the following;

Firstly, the Arbitrator's failure to consider the applicant's evidence during hearing'. Ms. Neema argued that the decision of the Arbitrator was supposed to be arrived at after a thorough and critical analysis of evidence adduced by the parties and their witnesses during arbitration hearing. It is her view that the Arbitrator did not do so and hence the award neither reflects the evidence on record nor the law.

Secondly, Arbitrator's omission to record and consider the weight of the applicant's evidence tendered and adduced by DW2 on the 26th June 2018 as DW5 ("Muhtasari wa kikao cha nidhamu dhidi ya Hellen Mollel cha 5th October 2015"). According to the learned counsel this document sums up everything that transpired during disciplinary hearing. The said document was tendered and admitted at the CMA and the respondent did not object it. It is the surprise of the applicant's advocate as why the Arbitrator did not consider the said document and no comment was made as to how it affects the evidence of the applicant.

Thirdly, the Arbitrator adduced unjustifiable reasons on awarding the respondent compensation for 36 (thirty six) months. The learned counsel for the applicant is of the view that the reasons advanced by the arbitrator in awarding the compensation for more than twelve (12) months are unlawful, illogical and irrational.

Fourthly, the arbitrator's ruling on his own issues that were not even discussed by the parties during hearing of the dispute. It is the argument of the Ms. Neema that the issue of the absence of the investigation report and denials of the opportunity to make mitigation are

arbitrator's own creation and complaint and that there is no point in time the respondent complained of the said issues.

Fifthly, the arbitrator did not consider the fact that the respondent did not deny to have committed the offences charged during disciplinary hearing. According to the learned advocate the fact that the respondent does not deny to have committed the offences leveled against her makes it even water tight that the reason for termination is fair.

Sixthly, that the arbitrator admitted in his award that the respondent was negligent in failure to enter proper information in the system which caused loss to the applicant the fact that was also not disputed by the respondent but to her surprise the arbitrator ended up holding that the reason for termination was ambiguous.

Lastly, the learned counsel argued on the arbitrator's misconducts during hearing of the arbitration where she contended that the arbitrator failed to disqualify himself from conducting the arbitration hearing even when he was asked to do so by the counsel. Furthermore the counsel argued that the arbitrator has not been recording properly the Coram throughout the hearing of the arbitration and presence of unnecessary adjournment.

The respondent on the other hand through her learned counsel Mr. Mosha strongly maintained that the award was correct, lawful, logical and it complied with the principles of natural justice. Moreover the award based on the framed issues before the Commission for Mediation and Arbitration

and that the arbitral award was also based on evidence adduced by both parties.

I have dully considered the application, submissions of the parties together with the records from the Commission in their entirety and my determination of this application will be guided by the following issues;

i. Whether the arbitrator was justified to hold that there was unfair termination, both in substance and procedure
ii. Whether the awarded relief is justifiable.

Starting with the **first issue** which is split into two, firstly, whether there was valid reason for termination and secondly, whether termination procedures were adhered to. In dealing with the first, I shall confine myself to the documents tendered during arbitration hearing at the Commission together with the evidence adduced thereto. Termination letter dated 08/01/2015 is to the effect that the respondent was terminated on gross negligence and for the purpose of this application I shall reproduce the reasons for termination as they appear in the termination letter as follows;

> "Sababu za kusitisha ajira ni; uvunjaji wa kanuni za ajira na maadili mema kama inavyoonyesha hapa chini;
>
> 1. Licha ya kupata taarifa za awali kwa barua pepe na kuwa na taarifa za wageni wa african travel Inc, T0686/0915 kwa uzembe ulishindwa kutekeleza majukumu yako ya kazi (haukuweka faili hili kwa system ya kazi)
> 2. Kwa mara nyingine tarehe 30.09.2015 kwa uzembe tena ulishindwa kuhakikisha kuwa maandalizi (booking) za wageni wa T0686/0915 Maison De L'Afrique zilifanyika licha yaw ewe kuwa na taarifa sahihi zao awali na mapema. Ambayo ilisababisha wageni kufika uwanja wa

ndege na kukosa usafiri na kuchukuliwa na taxi na kampuni ilikua haina taarifa na wageni hawa na kulikuwa hakuna maandalizi yoyote juu ya hawa wageni kwa sababu hukuweka taarifa zao kwenye system."

Having reproduced the reasons for termination hereinabove, let me revert to the notice of the disciplinary hearing together with the disciplinary hearing form. Both documents were tendered as exhibits on hearing at the Commission. The notice to appear at the disciplinary hearing must always state the offences which an employee stands charged with so that he can able to prepare his defence adequately. At the Commission, the disciplinary hearing notice was produced and marked as EXH C-2 which notified the respondent to appear to the disciplinary hearing on the 5th October 015 for the charges of; (i) Gross incompetence (ii) Gross damage to the company's client relationship and image.

Moreover the record further reveals that, the applicant at first time tendered a hearing form marked as EXH C.3 held on 05/10/2015 and according to the hearing form at paragraph 3 the respondent was charged with (i) Gross incompetence (ii) Gross damage to the company's client relationship and image. Again, the applicant produced an additional document (DE5-muhtasari wa kikao cha nidhamu dhidi ya Hellen Mollel cha 5/10/2015. In the submission of the applicant's learned advocate she stated that this document **(DE5)** sum up everything that took place at the disciplinary hearing. According to this document the respondent was charged with the offences of Gross incompetence and **Gross negligence**.

Much as the documents stated above speak for themselves, PW1 Richard Gomes when giving his testimony at the Commission he testified

that what the respondent did was a gross negligence however PW2 Emmanuel Samuel Kimaro when testifying he vividly stated that the charge against the respondent was gross incompetence and I wish to quote;

"kwamba tuhuma dhidi ya mlalamikaji zilikuwa gross incompetence"

From the above series of events, it is quite unclear as to the reasons for the termination of the respondent's employment. I am saying so because the documents tendered do not tally or correspond the same offences throughout and going by the documents the offences in the notice of disciplinary are different from those in the Muhtasri wa kikao cha nidhamu and even those advanced at the termination letter. More so the witnesses do not clearly specify the reason (s) for the termination of the respondent and it is at this juncture that I join hands with the Arbitrator that the reason for termination was ambiguous. It follows therefore, by necessary implication, I am justified to hold that there is no clear reason for termination that was advanced by the applicant. The respondent might have admitted the offences leveled against her as illustrated in the applicant's submission however that itself does not suffice to say that there were fair reasons for termination.

Having determined the first limb of the 1st issue for determination of the revision application, I will now turn to the 2nd limb as to whether termination procedures were followed. It is the submission of the applicant that, he followed proper procedures in terminating the respondent. The arbitrator in his award observed that, investigation was not conducted and also the respondent was not given an opportunity to mitigate before the

disciplinary committee reached its final decision. Due to the absence of the investigation report and lack of mitigation the arbitrator was of the view that no procedures were followed.

I have noted that in her affidavit the applicant complained of the arbitrator's failure to consider the exhibit produced as an additional document by DW2 which was the minutes of the disciplinary hearing. According to the said minutes it is indicated that the respondent was given an opportunity to mitigate. However looking at the disciplinary hearing form tendered as EXH C3 the respondent was not given an opportunity to mitigate. In the presence of two contradictory documents which reflect the same cause of event it follows therefore there is no certainty if the right to mitigate was exercised or not as it is not quite unclear as to which document speaks the truth. The arbitrator's decision that there was no mitigation is impliedly based on the disciplinary form C-3 which to my view I think he was correct as the presence of the additional Document **(D5)** does not vitiate the validity or otherwise of the disciplinary hearing form (C-3).

I have also noted that in the letter of termination indicated that the misconducts of the respondent breached the policy of the Company particularly Rule 61 and 63 of the Range's Safaris limited Human Resource Policy and Code of Conduct whose offences are Gross incompetence and doing any act negligently that affects the customer. If at all the respondent was charged with gross incompetence Rule 18 of the Employment and Labour Relations (Code of Good Practice) G.N No.42 provide for procedures to be followed when terminating an employee on account of poor

performance and going by the records the applicant has not complied with such procedures. One among the procedures to be adhered before termination of employment is investigation which the Arbitrator observed that investigation was not conducted. I join hands with the learned arbitrator since the employer's witness, Emmanuel Kimaro (PW2) in his testimony vividly stated that investigation was not conducted and I wish to quote;

> "J:.....hapakuwa na kikao cha kamati ya uchunguzi"

The argument by the applicant that this was a new issue raised by the arbitrator is a misconception by the learned counsel. When determining whether proper procedures were followed investigation and mitigation are among the issues to be considered and taken into account to ascertain as to whether proper procedures were followed or not. I am quite alive of the principle that code of good labour practice should not be considered as chick list when dealing with procedural aspect as what is essential in the labour context is adherence to the basic principles of fair hearing (see a decision of this court in **NBC Co. Ltd Mwanza v. Justa B. Kyaluzi,** Revision No. 79 of 2009 (Unreported). Considering the accumulative non-adherence of termination procedure. To this end I concur with the arbitrator that procedures were not followed.

On the **2nd issue** which is on the justification of the compensation of 36 months compensation. Going through the award the Arbitrator was of the view that the reinstatement of the respondent was not the best option following the relationship between the parties and he eventually awarded a

compensation to the tune of 35,539,200/= being 36 months compensation. In awarding this compensation of more than 12 months compensation the Arbitrator was guided by Rule 32 (5) of G.N no 67 of 2007 and one among the factors considered by the Arbitrator was the conduct of the applicant's counsel which according to the Arbitrator necessitated unnecessary delay. I have gone through the entire records and saw what transpired thereof, I shall not dwell much on that since it has been dealt with up to the High Court. From the records it is also indicated that the respondent was paid her terminal benefits of Tshs. 2,718,171/=, to my considered view, it was therefore quite unjustifiable in the circumstances of this dispute to award 36 months compensation since terminal benefits were accordingly paid in favour of the respondent. For that reason, I thus find the award of 18 months compensation is appropriate and justifiable. Hence the respondent is now awarded Tshs.17, 769, 600/=being a compensation for 18 months.

Before I pen off, I wish to give a remark on an issue of misconduct of the Arbitrator as alleged by the applicant. One among the misconducts alleged is on the failure of the arbitrator to disqualify (recuse) himself from conducting the arbitration hearing. I have carefully gone through the proceedings and observed that this matter has been dealt with my learned sister Nyerere, J where the matter was struck out with no leave to re-file. With due respect to the learned counsel my hands are tied to open up another discussion on the same matter which has already been dealt with another High Court Judge.

In light of the foregoing reasons, this application succeeds to the extent explained above. The CMA award is therefore partly revised and set

aside. Considering that this matter is a labour dispute, no order as to costs is made.

It is ordered.

M.R.GWAE
JUDGE
20/07/2020