

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**LABOUR REVISION NO. 10 OF 2019**

**ESTHER KARIA.....APPLICANT**

**VERSUS**

**JAPHERY CHARITABLE MEDICAL SERVICE.....RESPONDENT**

**RULING**

Last order: 23/6/2020

Date of delivery: 15/10/2020

**Mwenempazi, J**

The applicant is aggrieved by decision of the commission for Mediation and Arbitration for Moshi at Moshi in Labour Dispute no. CMA/KL/ARB/41/2018 dated 16<sup>TH</sup> may, 2019 delivered by Hon. H. I. Lukiha, Arbitrator.

She is applying for an order for revision; an order that the order for termination was unfair and that the applicant be paid compensation for unfair termination and other terminal benefits.

She is also praying for the court to issue any other relief that the court may deem fit to grant.

The application is made under section 91(1) (a) and 91(2)(b) and (c) of the Employment and Labour Relations ACT, 2004 and Rules 24(1), (2),(a),

(b), (c), (d), (e) and (f) and Rule 24(3), (a), (b), (c) and (d) and Rule 28 (1),(c) and (e) of the Labour Court Rules GN, 106 OF 2007. It is supported by an affidavit of Ester Karia the applicant herein named.

In the affidavit the applicant has stated that she was employed by the Respondent as Laboratory technician since 1<sup>st</sup> February, 2012 and her service was officially terminated on the 1<sup>st</sup> February, 2019 on allegations of theft. Prior to the termination the applicant was temporarily suspended from her employment pending investigation for the allegations of theft of money belonging to the Respondent to the tune of Tshs. 2,496,000/=. The deponent has stated that she was required to meet the Respondent's managing Director on 15<sup>th</sup> September, 2019 so as to be informed of the result of investigation. She was not informed and no any disciplinary proceedings were conducted. As a result she was not given any chance to defend herself.

The applicant referred the matter to the commission for Mediation and arbitration where the arbitrator decided that the process was meaningless as the applicant had already been found guilty of theft.

The applicant has deposed that there has never been any report to the police nor theft charges against her. Thus, no evidence has ever been tendered to prove the allegations against her.

The applicant and deponent in the affidavit supporting the application has raised grounds of application in paragraph 10-14 that the CMA erred by wrongly deciding basing on Exhibit R1 which was objected to as the applicant denied to have signed it; there was no opportunity for the applicant to know

how she was involved in the stealing of money while she was working in the laboratory; that the decision was incorrect in finding that the applicant wrote a letter to apologize without giving details. That it was wrong for the arbitrator to grant the applicant one month salary in lieu of notice, two months salary of August and September 2018 and the certificate of service without compensating her for unfair termination and giving her other terminal benefits, in her statement, the determination was unfair both procedurally and substantively.

The Respondent is opposing the application. In the Notice of opposing the Respondent has stated that the application has no merit and he prays the same to be dismissed.

In addition the court may be pleased to issue any other order. The ground for such a position are:-

1. That the decision of the commission for mediation and Arbitration was justifiable and genuine.
2. The relief that the applicant was supposed to be paid (Tshs. 750m000/=) was also incorrect as the said Applicant was found with grievous misconduct that the applicant who is stealing at work place is not entitled to any terminal benefit.
3. The applicant at the trial commission wrote a letter to apologize for the money stolen and the property of the employer.
4. The applicant failed to address the CMA the purpose of letter.
5. Her fellow employee testified that she stole the money the property of her employer.

6. The employer was able to prove that and there are no grounds to counter that.

In the counter affidavit deposed by Isack Samson, the advocate for the Respondent, he has stated that there was no need for proof as the applicant confessed to have stolen and promised to reimburse the money.

The application was heard by way of written submission. The applicant was represented by Emmanuel Karia, Advocate and the Respondent was represented by Mr. Isack Samson Advocate. In the written submission by the applicant's counsel, he has mostly, reiterated the contents of the affidavit and then submitted that the CMA contravened the provision of Rule 13(1),(2), (3) (4) and (5) of the Employment and Labour Relations (Code of GM 47/2007 Good Practice) Rules, 2007.

*The same provides that: -*

*Rule 13(2) the employer shall conduct an investigation to ascertain whether there are grounds for hearing to be held.*

*(2) Where a hearing is to be held, the employer shall notify the employee of the allegations using a form and language that the employee can reasonably understand*

*(3) The employee shall entitled to a reasonable time to prepare for the hearing and to assist in the hearing by a trade union representative or fellow employee. What constitutes a reasonable time shall depend on the circumstances and complexity of the case, but it shall not normally be less than 4 hours.*

*(4) The hearing shall be held and finalized within reasonable time, and chaired by a sufficiently senior management representative who shall not have been involved in the circumstances giving rise to the case.*

*(5) Evidence in support of the allegations against the employee shall be presented at the hearing. The employee shall be given a proper opportunity at the hearing to respond to the allegations, questions any witness called by the employer and to call witness if necessary.*

The counsel for the applicant has submitted that the above cited rules were not complied with. The applicant was not informed how she was involved in the allegations and instead she was given termination letter. According to the applicant, the respondent failed to clarify how the laboratory technician was involved in the stealing money while laboratory technicians do not receive money, rather the payments are made to the cashier and then services are given by the laboratory technician.

Failure to hold a hearing denied the applicant an opportunity to be heard and contravened the provisions cited. Basing on that the applicant prays that the award be nullified so as the applicant may be given her terminal benefits and compensation for unfair termination.

The applicant has faulted the decision of the CMA holding that the Respondent had no need to follow all termination procedure as required by law because the applicant was involved in a theft. However, it is the argument of the applicant that the respondent denied her the right to be heard and failed to prove the allegations against the applicant. The arbitrator



did not consider that there was no police report or charges against the applicant. That was wrong as the allegation were not provide.

In justification for the decision the arbitrator relied on Exhibit. P1. That exhibit had no applicant's signature. Also the apology alleged to have been had was not to admit stealing. It was for the misunderstanding with the administrator thought they were forced to pay stolen money.

She prays the CMA award to be set aside and the termination be declared as unfair and the respondent be ordered to pay he applicant two months salary arrears, (August of September,) statutory Notice and compensation for unfair termination.

In response to the submission by the applicant's counsel the counsel for the Respondent has submitted that this application deserve to be dismissed as the Respondent is not the legal person to be sued. The proper party was KHOJA SHIA ITHNAESHERI COMMUNITY (MOSHI BRANCH). He has attached form no. 503 made under The Societies (Application for Registration) Rules, 1954. Issued on 27<sup>th</sup> September, 1954.

According to the facts the applicant's employment was terminated due to grievous misconduct, dishonest thus not entitled to any terminal benefit.

Facts show that she even apologized for what was done by issuing Exhibit R1. It is the argument by counsel for the Respondent that denial of the signature in the document is an after thought otherwise the applicant's argue that the apology was to connect with misunderstanding with the administrator is an admission that the document is genuine.

I have read the record and the submission as I have tried to summarize herein the Ruling. The application is challenging the award by the CMA. The applicant moves this court to revise the award and set it aside and declare that termination of her employment was unfair. In her submission and arguments.

As it would be referred in the submission above the applicant has submitted that the CMA arbitrator erred in law for holding that termination was fair and that is based on Exhibit R1 in that the applicant admitted to have stolen Respondent's money.

In trying to verify the genuineness of the Exhibit challenged, I have observed that though the applicant denies it, yet still she is relying on it to show that she wrote a letter to apologize for the misunderstanding resulting between herself and the administrator of the hospital. If we buy the argument, then, the letter is clearly authored by her. Under the circumstance it is an afterthought to argue that the signature was forged.

Having found that the letter for apology was authored by the applicant, the question now is whether in the said letter the applicant did apologize for committing the offence of theft. The last sentence of the said letter reads as follows:-

“Ni kweli kilikuwa(kulikuwa) na tuhuma za upotevu wa fedha za JCMS ambazo tulihusishwa wafanyakazi wengi ambazo tuliamrishwa kulipa na tulikubali”

The word in the quoted sentence are very clear that they (applicant and other employees) were involved in the allegations and they admitted, it was ordered that they pay the said money.

It is aboard in my view at this point to deny that there was proof. The applicant would have denied at the first instance before even writing the letter exhibit R2.

The next question is whether there was contravention of the requirement for disciplinary hearing. The requirement for disciplinary hearing is for the fairness of the procedure Rule 13(2) and (2) of the Employment and Labour Relations (code of good Practice) Rules, 2007, GN No. 42 of 2007 are relevant.

13(1) the employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held.

Where hearing is to be held the employer shall notify the employee of the allegations using a form and language that the employee can reasonably understand.

According to the rules, the important and necessary process is to conduct investigation in order to ascertain whether there are grounds for a hearing to be held. (Emphasis mine).

The applicant had already admitted in a letter exhibit R2. What was on the plate was payment of the lost money.

Under the circumstances the complainants are unfounded in my opinion.



In the written submission however, the applicant has requested this court to rectify the record do that the respondent is read to be KHOJA SHIA ITHANAESHERI COMMUNITY (Moshi branch). That seems to be supported by the counsel for the Respondent. He has attacked a certificate of registration showing the party who was sued is not the proper one. He has prayed that the application be dismissed, as the correction at this level will affect the whole proceeding in the CMA and in this court.

I agree rite respondents' submission, claims against a party are simultaneous to according re respondent his rights to defend himself or herself.

For the reasons this application is dismissed for lack of merit.

It is ordered accordingly.



  
**T. Mwenempazi**  
**Judge**  
**16/10/2020**