IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA

[LABOUR DIVISION]
AT ARUSHA

LABOUR REVISION NO. 75 OF 2019
(C/F Labour Dispute No. CMA/ARS/ARB/73/2016)

MOUNT MERU FLOWERS LIMITED ..... APPLICANT

Versus

SHAMIMU HUSSEIN ..... RESPONDENT

JUDGMENT

8th December, 2020& 9th February, 2021

Masara, J.

The Respondent, **Shamimu Hussein,** was employed by the Applicant, **Mount Meru Flowers Limited,** on 1/2/2012 as an Accountant. She was initially on permanent terms but her employment contract changed from permanent to that of specific time (one year) contract after four years. The record shows that the Respondent was suspended from her employment on 2nd March, 2016, for one month, pending investigation on mismanagement of cash transit posting and payments made in different transactions. While on suspension, it is alleged that the Respondent's salary was deducted Tshs 3 Million to cover for the loss she occasioned to the Applicant. Initially she was paid a take home salary of Tshs 1,461, 500/=. The Respondent alleged further that she was suspended on discrimination as she was pregnant. She felt aggrieved by both the suspension and deduction of her salaries. She referred the matter to Commission for Mediation and Arbitration for Arusha (the CMA) vide CMA/ARS/MED/122/2016 for a claim of unfair suspension/termination on 7/3/ 2016.

In its award, the CMA made a finding that the Respondent's suspension was unfair as she was never accorded the right to be heard. It was further found by the CMA that the Applicant suspended the Respondent arbitrarily as initially the suspension was made verbally, contrary to the provisions of sections 28 (2) and 35 of the Employment and Labour Relations Act No. 6 of 2004 as well as Rule 27 (5) of the Code of Good Practice, GN No. 42 of 2007.

In the same vein, the CMA found that the Respondent developed maternal complications following the unlawful suspension since at the time of her suspension she was eight months pregnant. It proceeded to award to the Respondent a total of Tshs 48,255,000/= being payments for the refund of the illegally deducted salaries (Tshs 6,450,000/=), General damages (Tshs 20,000,000/=) and ten months' remunerations of Tshs 21,805,000/=, being payment for the remaining period of the contract. The Applicant was aggrieved by that award, hence this application.

The application is supported by the affidavit sworn by Mr. Shedrack Boniface Mofulu, learned advocate for the Applicant. The application was contested by a counter affidavit affirmed by Mr. Mohamed N. Mhinda, learned advocate for the Respondent. At the hearing of the application, the Applicant was represented by Mr. Shedrack Boniface Mofulu, learned Advocate, while the Respondent was represented by Mr. Frank Wilbert Makishe, learned advocate. The application was heard by way of filing of written submissions. Submitting in support of the application, Mr. Mofulu contended that the Respondent's suspension was made according to the available legal regime,

citing Rule 5(1) of the Guidelines for Disciplinary and Incompatibility Policy and Procedures of the (Code of Good Practice) G.N No. 42 of 2007. He stated that she was suspended by the Managing Director with a written suspension letter dated 2/3/2016 stating out the reasons and terms of the suspension. Further, Mr. Mofulu contended that the Respondent was paid all her salaries from March to April despite the suspension period ending on 2/4/2016. He also contended that the Respondent did not adhere to the condition given; that is, to report to her head of department after four weeks from the date of the suspension letter.

Mr. Mofulu also contended that the Respondent did not give notice of her pregnancy as mandated by section 33(1) of Act No. 6 of 2004. He added that the Applicant employs over 500 employees thus it was not easy to concentrate on every female employee and look on the body morphology unless there is an official notice. He therefore urged that there was discrimination in suspending the Respondent. Mr. Mofulu reiterated that the Respondent did not specify which kind of discrimination she was subjected to because being suspended while pregnant, in his view, does not amount to discrimination.

On the payments made to the Respondent, Mr. Mofulu averred that she was paid more than what she deserved as she was not terminated but suspended, and after her suspension she absconded from work. He argued that the 10 month's salary remaining in the contract awarded to the Respondent as compensation was erroneous. The learned advocate further

stated that the claim of 75 million as specific damages for discrimination are subject to proof, citing the case of ***Juma Misanya and Another Vs. Lista Ndurumai*** [1983] TLR 245 to support his contention. Regarding the unpaid salary of February, 2016, Mr. Mofulu fortified that the Respondent was paid more than what she deserved. The learned counsel concluded that the CMA award ought to be quashed because the Respondent's claims were taken prematurely as she was only suspended and not terminated.

On the other hand, Mr. Makishe initiated his reply submissions by drawing the attention of the Court to the provisions of the law applied by the Applicant's counsel, stating that the Applicant made reference to the older Employment and Labour Relations Act, in lieu of the one revised in 2019, which reformed some of the provisions therein. He therefore implored the Court to disregard all the provisions cited by the Applicant's counsel. In the same vein, Mr. Makishe raised another complaint that the application was filed beyond the time prescribed in law. He argued that the time prescribed to file revision against the CMA award is six weeks (42 days) but the instant application was filed within 44 days, which is 2 days beyond the prescribed time.

On the substance, Mr. Makishe stated that the suspension was illegally done. He confronted the Applicant's submissions on several fronts. First, he argued that the suspension letter never existed as the same was served to the Respondent 18 days after she was orally suspended. He cited Rule 27(5) of G.N 42/2007 stating that it provides for the modus operandi on suspension,

arguing that the letter did not conform to that provision. Mr. Makishe concluded that the disciplinary hearing form reveals that the Applicant was aware of the Respondent's pregnancy.

On whether the Applicant had knowledge of the Respondent's pregnancy, Mr. Makishe submitted that at the time of her suspension the Respondent was 8 months pregnant and was allowed to work half day. He added that according to the medical report tendered in the CMA, the psychological and physiological injury suffered by the Respondent was caused by the suspension. His submissions regarding discrimination is that the Respondent was discriminated as she was suspended while pregnant. The learned counsel made reference to several laws concluding that it is the duty of the employer to prove that the discrimination did not exist.

After summarising the submissions made by the learned counsels, the issues for determination are whether the Application before this Court is competent and whether the Award of the CMA ought to be reversed on the grounds raised by the Applicant. I will first deal with the issues of competence of the Application raised.

On the first point raised by the counsel for the Respondent, I agree with Mr. Makishe that GN No. 140, which was published on 28/2/2020, introduced revised some laws up to the year 2019. The Employment and Labour Relations Act, Cap 366 is one of the laws that were revised. However, I do not agree with the learned advocate's invitation to disregard all the

provisions that were referred by Mr. Mofulu because he did not state under which auspices that power can be exercised. With due respect, since the laws were recently revised, their application is yet to be in the fingertips of most people, including the members from the bar. Further, since the laws were published after the Application had been filed, it will be highly unfair to expect the Applicant to make the references mentioned, Moreover, the learned counsel has not pointed any injustice occasioned on the part of the Respondent.

On the complaint that the application is time barred, I have no hesitation to point out that this argument is, with due respect, misconceived. I say so because the record is clear that the CMA award was delivered on 20/8/2019, and the same was served to the Applicant on 27/8/2019. The instant application was filed in court on 20/9/2019, as it is reflected on the Notice of Application. Therefore, counting from 27/8/2019 to 29/9/2019, there is no lapse of six weeks as stipulated under section 91 (1) of Act No. 6 of 2004. That said, the argument that the application is time barred is misplaced, as rightly contended by Mr. Mofulu.

The last point relates to the competence of advocates for the parties before the CMA. There was an argument raised in the submissions by the Applicant that the Respondent's counsel before the CMA had no valid Practicing licence as he had not renewed his certificate. On the same vein, The Respondent's counsel also submitted that even the Applicant's counsel chaired the so-called disciplinary hearing and defended the matter at the CMA. These

matters were not put before the CMA arbitrator who would have made a decision on them based on the law. Raising them at this stage will do nothing more than to delay the dispensing of justice. I should, however, point out that if the claims are true, both advocates contravened their professional ethics. Regulation 45 of the Advocates (Professional Conduct and Etiquette) Regulations, GN No. 118 of 2018 prohibits an advocate to act where there is a likelihood of conflict of interest. An advocate has a duty to assist the court in the course of administration of justice. Regulations 92 and 93 of the cited Regulations provide for the standards required of an advocate. Acting for a client while knowing that one has no a valid practicing certificate violates the duty of an advocate to the court as well as to his client. For the interest of justice, I desist from making a finding on this aspect and will proceed with the merits o the application, as the misdemeanours allegedly committed by the two advocates have no bearing on the substance of the matter before me.

I now turn to the merit of the application which is the gist of the second issue. I have carefully gone through the CMA record, the affidavit for and against the application and the submissions by the parties' counsels. Seemingly, there are three matters upon which the application is premised and opposed respectively. These are as stated under paragraph 7 of the affidavit; namely, whether the CMA failed to consider the evidence of the Applicant, whether the CMA failed to address the issues raised and, *lastly,* whether the CMA failed to consider that the claim of discrimination was improperly filed.

Starting with the issue of the failure to consider the Applicant's evidence, I have read the suspension letter issued on 2/3/2016 (Exhibit C5). It shows that the Respondent was suspended and was to be paid her terminal package as per the law, pending investigation on accounts of cash in transit. It also shows that the Respondent was directed to return and report back to the head of department after the lapse of four weeks after the suspension, that is to say on 2/4/2016. Based on this therefore, I do not agree with the CMA finding that the Respondent was verbally suspended. There is no iota of proof that the letter was served on the Respondent 18 days after her suspension. As the record shows, what is in dispute is whether she was paid her packages as stipulated in the suspension letter. It was admitted by the Applicant that there was deducted salaries which covered the loss she occasioned. This was proved by the testimony of her chief accountant (DW1). The law provides under Rule 27 (1) of the Code of Good Practice GN No. 42 of 2007 reads that-

> *"Where there are serious allegations of misconduct or incapacity, an employer may suspend an employee* ***on full remuneration*** *whilst the allegations are investigated and pending further action."* (emphasis added)

As shown above, the Applicant deducted salaries to recover loss allegedly caused by the Respondent. Section 28 (2) of the Employment and Labour Relations Act, Cap 366 [R.E 2019] allows such deduction only when the loss was caused by the employee. In this case, the Respondent's salary slips (exhibit D3) shows her salary was deducted while she was on suspension. There is no evidence from the record that the Applicant invoked necessary internal mechanism to establish the Respondent's liability. Further, the

Respondent did not agree to the deductions as compensation to the losses allegedly incurred by her employer. Based on this, I find that there was procedural unfairness in suspending the Respondent. I also note that no evidence was led by the Applicant to substantiate that the suspension was justifiable. It is against those circumstances that one may tend to agree with the Respondent that her suspension from employment was ill motivated or discriminatory. Thus, I uphold the compensation awarded, both with regard to the deductions and the remaining period of the contract.

Turning to the second matter, the CMA record indicate that the CMA raised four issues. However, its decision did not deal with all the issues raised. Of particular concern is the issue whether the Applicant had a right to suspend the Respondent. Although it was imperative for the arbitrator to make a specific finding on this issue, I tend to agree with Mr. Makishe that once the arbitrator made a finding on the legality of the suspension, the issue of whether the Applicant had a right to suspend the Respondent fell out. Furthermore, the issue itself appear to have been unnecessary as it was well covered in the first drawn issue.

Regarding the claim and the award of damages, I note that the arbitrator did not properly scrutinise the evidence before arriving at the conclusion he made. At page 11 the arbitrator made the following observation:

> "... *that because of unfair suspension when she was pregnant she suffered bleeding and other complications ...* ***the Commission after going through exhibit C4 is certain that the Applicant suffered damages as a result of shock from unfair suspension.***"
> (emphasis added)

With due respect, this finding is farfetched. It is true as per exhibit C4 that the Respondent suffered some complications in her pregnancy after she was suspended. However, there is no evidence that such complications would not have arisen had the suspension not taken place. Reading the CMA F1 there is a specific plea of an award of 75 million in damages. These were never proved in evidence. Yet the CMA awarded Tshs. 20 million without assessment and reasons. The Court of Appeal has on several occasions warned courts against the danger of deciding on issues without proper consideration of the parties' arguments and submissions on the same. In ***Kluane Drilling (T) Limited Vs. Salvatory Kimboka,*** Civil Appeal No. 75 of 2008 which was cited by this court in ***God John Ndile Vs. Steven Abraham & 2 Others,*** Land Appeal No. 45 of 2017 H.C at Mbeya (all unreported) the Court held:

> *"We are of the considered view that generally* ***a judge is duty bound to decide a case on the issue on record*** *and that if there are other questions to be considered they* ***should be placed on record and parties be given an opportunity to address the court on those questions."*** (emphasis added)

Based on the above, I find that the learned arbitrator decided the issue of maternal shock and awarded general damages without proper evidence and assessment of the same. In ***Zuberi Augustino Vs. Anicet Mugabe*** [1992] TLR 137 at page 139 it was stated by the court that:

> *"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved."*

The same applies to general damages, which are discretionally awarded by the court but subject to reasons. The Court of Appeal decision in ***Anthony***

Ngoo and Another Vs. Kitinda Kimaro, Civil Appeal No. 25 of 2014 (unreported), observed:

> *"In looking at the record, there are glaring irregularities and non-compliance with the law. The law is settled that general damages are awarded by the trial judge after consideration and deliberation on the evidence on record able to justify the award. The judge has discretion in the award of general damages. However the judge must assign a reason, which was not done in this case."*

In our case, as rightly challenged by the Applicant, the issue of damages was not adequately addressed and proved before the same was awarded by the CMA. Having so stated, it is the finding of this Court that the award of Tshs. 20 million as damages suffered by the Respondent was not based on sufficient grounds, it is accordingly set aside.

Regarding discrimination, it is the Applicant counsel's view that such claim ought to be filed separately. Having read the record, it is not true that the Respondent based her claim on discrimination as the sole reason for her claim of unfair termination/suspension. From the CMA F1, it is apparent that the Respondent's claim was based on the ground that *'the suspension was covered by several irregularities.'* Although the Respondent claimed for damages for discrimination, in her claim form she complained that she suffered a lot due to the suspension. However, as already stated, damages were awarded on a different ground other than discrimination. It is trite law that the CMA is not bound by the reliefs only claimed under the claim form. It may award any relief provided that it results from the cause of the dispute. I refer the case of ***Vodacom Tanzania Vs. Zawadi Bahenge & 6 Others,***

Lab. Div. DSM, Revision No. 12 of 2012 in which (Wambura, J as she then was) ordered compensation to the Respondents for loss of hearing.

Consequently, this Application for revisions fails, serve on the amount awarded for damages. The Applicant should pay to the Respondent Tanzania shillings twenty-eight million two hundred fifty-five thousand shillings only (Tshs. 28,255,000/-) as compensation for unlawful termination/suspension of the Respondent. This being employment dispute, each party shall bear their own costs.

Order accordingly.

Y. B. Masara,
JUDGE.

9th February, 2020