

IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA

[LABOUR DIVISION]

AT ARUSHA

REVISION APPLICATION NO. 52 OF 2019

(C/F Labour Dispute No. CMA/ARS/ARB/141/19/86/19)

MILESTONE PARK LTD APPLICANT

Versus

SAUMU ALI MBAGA RESPONDENT

JUDGMENT

20th April & 18th May, 2021

Masara, J.

In this Application, the Applicant, is challenging the decision of the Commission for Mediation and Arbitration for Arusha Region (hereinafter the "CMA") in Labour Dispute No. CMA/ARS/ARB/141/19/86/19, Maurice Egbert Sekabila, Arbitrator. In that decision the CMA awarded to the Respondent compensation for unfair termination. Briefly stated, the Respondent had been employed by the Applicant to serve as a waitress at their bar and restaurant. After one year the Respondent was transferred to the bar counter. The Respondent's claim at the CMA was that in early March, 2019 her services were orally terminated by the Manager of the Applicant following exchange of words with one customer on 26th February 2019. The Applicant, on the other hand, stated that the Respondent had been suspended for seven days following a complaint from a customer that the Respondent had verbally abused him. That the Respondent admitted to have uttered the words complained of but as a retaliation to the abusive words uttered by the customer. After hearing of evidence from both parties, the CMA held that the Appellant had unlawfully suspended the Respondent as she was not accorded the right

to a fair disciplinary hearing, including representation. The Arbitrator therefore held that the oral suspension inflicted on the Respondent amounted to unfair termination. The CMA awarded her 12 months compensation, one month's salary in lieu of notice, one month's salary as leave pay, severance pay for five years and Certificate of Service. All amounting to TZS 4,603,846/=. The Applicant was aggrieved and has preferred this Application asking the Court to revise and set aside the CMA award with a view to decide that the Respondent was not terminated and therefore she is not entitled to the compensation awarded to her by the CMA. The grounds for the review are as follows:

- a) That the Arbitrator erred in law and fact by holding that the Applicant was unable to prove the reasons for suspension despite Respondent acknowledging the same;*
- ~~*b) That the Arbitrator erred in law and fact by holding that the Respondent was suspended without being given a right to be heard;*~~
- c) That the Arbitrator erred in law and fact by misdirecting and failing to distinguish between compliance of suspension before disciplinary hearing and suspension as internal disciplinary sanction (warning) between Employer and Employee;*
- d) That the Arbitrator erred in law and fact by holding that there was unfair termination while Respondent was only suspended for 7 days as a warning for her first offence; and*
- e) That the Arbitrator erred in law and fact by holding that suspension as a penalty must be applied after due process of disciplinary hearing.*

The Application is supported by the Affidavit of Sabato Ngogo, learned Advocate. The Respondent opposed the Application and filed a counter affidavit to that effect. During the hearing, the Applicant was represented by Mr. Sabato Ngogo, learned advocate, while the Respondent was represented by Mr. Peter Njau, learned Advocate. Hearing proceeded by way of written submissions.

Submitting on the first ground of revision, Mr. Ngogo contended that the Arbitrator erred in holding that the Applicant was unable to prove reasons for suspension. In his view, the Arbitrator, having determined that there were exchanges between the Respondent and a customer which resulted to a disciplinary misconduct in her part, that was sufficient to establish that the Applicant had justifiable grounds to suspend the Respondent. On the second ground, it was Mr. Ngogo's submissions that it was wrong for the Arbitrator to hold that the Respondent was suspended without being accorded the right to be heard. In his view, the fact that the Respondent was called to a meeting where she apologised, thus a confession from her, it cannot be said that the punishment inflicted to her was unjustifiable.

With respect to the third and fourth grounds, Mr. Ngogo submitted that the Arbitrator misapprehended the type of suspension given to the Respondent. That the Respondent was suspended after it was established that she insulted a customer; thus, it was not a suspension pending a disciplinary hearing as provided for in Rule 27 of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 (hereinafter 'the Rules'), that it was an internal disciplinary sanction. Therefore, the advocate argued, it was wrong to hold that the Respondent was unlawfully terminated while in fact she failed to report back to work after the 7 days suspension. The learned advocate stated further that the main issue for determination before the CMA ought to have been whether there was a reason for suspension as there was no evidence to prove that the respondent was terminated.

On the last ground, Mr. Ngogo fortified that even applying the common law principles the Arbitrator was wrong to hold that there has to be a disciplinary hearing before suspension especially where the wrong doer admits committing a wrong as was in this case. That the punishment given to the Respondent was lenient considering that it was her first offence.

Contesting the grounds of review, Mr. Njau submitted that mere accusations by a customer should not have resulted in a suspension, that the Respondent should have been allowed to defend herself in a neutral disciplinary committee. Thus, her suspension was unjustifiable. Mr. Njau further submitted that it is not true that the Respondent admitted the alleged offence. That the meeting was biased as it was presided over by her accuser and the customer was not called to justify the claims of insult. Mr. Njau concluded that from the exchange of words, whereby the Respondent was told by the manager that "sasa kazi basi", the Respondent was justified to file a claim for unfair termination and suspension, if any, was without justifiable grounds and was done without following the law.

Responding to the third and fourth grounds, Mr. Njau was of the view that the Applicant did not justify their suspension allegations as no letter of suspension was tendered to prove such allegations. That there was nothing on record to prove that the Respondent was given a 7 days suspension and not a verbal termination as she stated. In that regard, the Arbitrator was justified to hold that the unfair suspension amounted to unfair termination.

Submitting on the last ground of revision, Mr. Njau stated that the Arbitrator was correct to hold that the alleged suspension should have been preceded by a disciplinary committee hearing. He concluded that taking the law in one's hands should not be condoned. In that regard he asked the Court to confirm the CMA's decision and dismiss the application accordingly.

I have dispassionately considered the rival submissions by the counsel for the parties, the affidavit for and against the Application as well as the CMA records. The issue which covers all the grounds raised by the Applicant is whether the CMA award that the Respondent was unfairly terminated is justified.

Before tackling the issue, I need to correct one observation that was made by the Arbitrator in the award. He appears to have stated that suspension as a penalty is not provided for in the Employment Act or the Rules made thereof. As it will be shown hereunder, suspension is recognised as one of the remedies of an employer, but the same is done for the purposes of paving investigation.

In reaching the decision that the Respondent was unfairly terminated, the learned Arbitrator held that the alleged suspension of the Respondent was unfair as there was no letter to support the suspension, that she was not accorded the right to be heard and that there are no good grounds to support the allegations which formed the basis of the alleged suspension. In my considered view the Arbitrator is right. Throughout the proceedings, there was no evidence that there was an impartial hearing accorded to

the Respondent. While two witnesses for the Applicant stated that the Respondent admitted to have insulted a customer, one of them said she denied. The Respondent also denied this in her testimony contending that she only replied to an insult directed to her by using the words "the same to you".

Further, there was no letter of suspension tendered. The Applicant justified this by saying it was a verbal suspension. The terms of suspension were not made clear. If the suspension included a cut on the net pay, then the suspension would be unfair for lack of due process. If, however, it was with full pay, one wonders how beneficial that suspension was to the company as that would amount to a paid leave. 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)

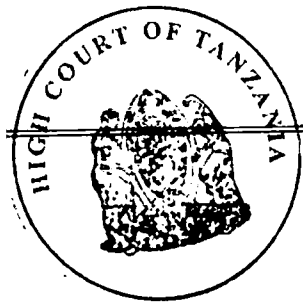
The Respondent stated that she was told "sasa kazi basi" after the manager paid her dues. This was a one-on-one conversation which the other two witnesses for the Applicant were not privy to. Their testimony that the Respondent was only suspended remains to be hearsay. Thus, the Arbitrator, who had the benefit of observing the demeanour of the witnesses, was justified to believe that the Respondent was verbally terminated or that the suspension, if any, was akin to unfair termination.

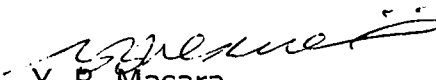
I must state that Applicant's affidavit and the submissions made by the Applicant's counsel have not cleared the doubts about the suspension *viz*

a vis the termination. The Applicant testified that after the seven days suspension period the Respondent did not report back. There is nothing on record to show that there were efforts to procure her attendance or punish her for abscondment. The silence they depicted corroborates the allegations that they had in fact terminated her.

On the premises, I find nothing of substance to fault the CMA award. The same is confirmed in its entirety.

Order accordingly.




Y. B. Masara,
JUDGE.
18th May, 2021.