IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

REVISION NO. 22 OF 2021

(C/F Originating from Dispute No. CMA/ARS/ARB/231/2018)

DORA MELANCHTON FOYA.....APPLICANT

VERSUS

WORLD AIR TRAVEL AND TOURS LTD.....RESPONDENT

JUDGMENT

18/10/2021 & 06/12/2021

GWAE, J

The applicant, Dora Melanchton Foya dissatisfied with the award of the Commission for Mediation and Arbitration (CMA) for Arusha at Arusha has filed this application under the provisions of Section 91 (1)(a), (2), (b) and (c) and Section 94 (1) (b) (i) of the Employment and Labour Relations Act, No. 6 of 2004, Rules 24(1), (2), (a), (b), (c), (d), (e) & (f) and (3)(a), (b), (c) and (d), 28(1) (a), (c), (d) and (e) of the Labour Court Rules, GN No. 106 of 2007, praying for the following Orders:

1. That, this Court be pleased to call for the record of the CMA at Arusha in Labour Dispute No. CMA/ARS/ARB/231/2018 so as to

examine the records, proceedings and an Award of the CMA so that this court should satisfy itself on the legality, propriety, logical rationality and propriety of the findings and decision of the Arbitrator that;

(i) That, there is no evidence that the applicant was arraigned in Arusha Central Police for interrogation on the 28th June 2018

(ii) That, the applicant absconded from work from 28th March 2018 without notifying the employer, the respondent

(iii) That, the arbitrator erred in law and fact in not considering that in Exhibit D3, the applicant had taken earlier necessary steps to inquire about her employment status with the respondent after arraignment in police

(iv) The arbitrator erred in law and fact in omitting to consider other reliefs which the applicant is entitled to, such as salary for the month of June 2018 and certificate of service that admitted by DW1 in his evidence.

The application is supported by an affidavit of the applicant's counsel, Mr. Ipanga Kimaay. The respondent on the other hand, seriously challenged the application through the counter affidavit sworn by Mr. Gospel Sanava, the Human Resource Manager of the respondent.

Brief background facts of the dispute are best apprehended as follows; the applicant and the respondent were in an employment relationship which commenced on the 16th November 2015 and ended on the 8th June 2018 when the respondent terminated the employment contract of the applicant on reasons of the alleged abscondment from work.

It was the respondent's allegation that, sometimes in the years 2018 there was misappropriation of funds in his office. The incidence was reported to the Police Station and the applicant being an accountant of the respondent was required to go to the Police Station to give her statement. It is further revealed that, after the applicant had gone to give her statement to the Police Station, she never went back to the office despite being told by the respondent to report back to the office. Consequently, the respondent issued the applicant with a notice to appear to the disciplinary hearing and later on the aapplicant was issued with the termination letter. Supporting his assertion, the respondent tendered seven (7) documentary evidence.

On the other hand, the applicant denied to have absconded from work and contended that, the reason as to why she could not go back to her working station was because after she had given her statement to the Police

Station, she was required to report to the Police Station every day and that, the Police had told her not to go to work nor to have communication to any one from her office as the case was still under investigation. She further contended that she even enquired to the respondent as to the status of her employment constituting that she was still willing and persistent to go back to work.

Aggrieved by the termination, the applicant referred the matter to the CMA which procured its award in favour of the respondent on the ground that, the applicant absconded from work and therefore she terminated her own employment contract with the respondent, the complaint was thus dismissed for lack of merit.

On the date fixed for hearing, the applicant was represented by the learned counsel **Mr. Ipanga Kimaay** whereas the respondent despite the fact that, she filed her counter affidavit but she never showed up to argue against the application, consequently, hearing of the matter proceeded in her absence.

Orally supporting this application Mr. Kimaay submitted that the applicant was accused to the police following the respondent's complaint and

the police released her on bail with instruction that, she should not report to her working place as she was facing criminal charges on the offence of theft. The counsel went on submitting that, the applicant attended disciplinary hearing while there was a pendency of the criminal charges against her and that the charges have never been withdrawn to date.

More so, the counsel went on submitting that, the respondent did not promptly answer the applicant's letter which enquired to the status of her employment. As to the fourth ground, the counsel submitted that following the termination of the applicant's employment, she was therefore entitled to a full month-salary, one-month salary in leu of notice and certificate of service.

After considering the applicant's submission, court records and relevant labour laws the key issue for determination is whether the Arbitrator was justified to hold that the applicant terminated her employment contract by absconding from work.

The law under section under Section 37 (2) of the Employment and Labour Relations Act Cap 366 R.E 2019 provides that it shall be unlawful for an employer to terminate the employment of an employee unfairly. In our

instant case the applicant was terminated for the alleged reason of absenteeism from work without her employer's permission. On her own testimony at the CMA the applicant admitted that, she was absent from work because she had been reporting to the Police Station and that she was told by the Police not to go to her working place as the case was still under investigation. Nevertheless, this complaint was not backed up by any evidence showing that the applicant was reporting to the Police Station and that, she was forbidden to go back to her working place.

The records further revealed that on the 10th April 2018, the applicant through her advocate Mr. Ipanga Kimaay wrote a letter to the respondent requesting about the applicant's employment status during the whole period of investigation on the complaint. On the 14th April 2018 the respondent wrote a reply letter to the applicant's advocate stating that the applicant though was arrested but she is still their employee and she ought to have reported back to her working place immediately after being released on bail. For easy of clarity, I wish to reproduce part of the letter hereunder;

> "That your client is still our client's employee and she ought to have reported to work on 29th March 2018 at her working station after she was admitted to police bail.

> That her absence without giving any valid reasons amounts to a serious labour transgression.....That, your client need to report to our client's office and her working place to receive further instruction."

From the wordings of this letter, it is vividly that, the respondent acknowledged that the applicant was arrested and that she was still their employee and that she was required to report back to her working place after her release on bail by police. The applicant herein has alleged that she was informed by the police not to report to her work place nor could she communicate with any person to her office as the case was still under investigation but with these two letters it is shown that the applicant through her advocate made communications to the respondent who insisted that the applicant should report back to her working place. Surprisingly, despite the letter from the respondent requiring the applicant to go back to her work place the applicant did not comply to the said letter and apparently on the 2nd May 2018 the applicant's advocate wrote another letter to the respondent.

This court is of the firm view that, as it was undisputed fact by both parties that the applicant herein was arrested and later on, she was released on police bail, and that after her release, the applicant inquired as to her

employment status where she was informed to report back to her working place. But to the reasons best known to herself the applicant refrained from reporting back to her working place something which this court considers to be inappropriate, I think the applicant ought to have gone back to her work place as directed by her employer and not speculating that her employer was technically terminating her. It is the further view of this court that had the respondent terminated the applicant on reasons in line with the offence that was still under investigation, the findings of this court would perhaps be different as it is settled principle that, there is no justifiable termination of an employee who is still facing criminal charges except suspension with full pay until finalization of the charges (See the case of **Mathias Petro vs. Jandu Construction & Plumbers,** Labour Revision No. 175 of 2014), reported in Labour Court Cases Digest 2015.

However, as the respondent's reason of termination is far from what was under investigation by police, it follows therefore, I am legally persuaded that, the respondent had a valid reason to terminate the applicant.

The law under the Employment and Labour Relations (Code of Good Practice) GN No. 42 of 2007 on Guidelines for Disciplinary, Capacity and

Incompatibility Policy and Procedures on the heading entitled *offence which may constitute serious misconduct and leading to termination of an employee* one of such misconducts is absence from work without permission or without acceptable reason for more than five working days. From the wording of this rule, it is thus apparent that, the respondent was correct and justified in terminating the applicant's employment because the applicant was given an opportunity to turn back to her work place but refused to do so. In the event, I find the applicant was terminated for the valid reason. In essence, she was the one who initiated the termination of her employment contract. It is also my view that, had the applicant proven that she was requested to report to police daily yet she would have reported to her work place unless the police station to which she was reporting was far away from her work place.

Turning to the procedural aspect, the requirement for procedural fairness in termination is part of the law by virtue of section 37 (2) of the ELRA. On this aspect it is evident from records that, the respondent before terminating the applicant issued her a notice to attend a disciplinary hearing which was vividly conducted on 06/06/2018. The disciplinary hearing form was tendered in evidence as exhibit D6. Rule 13 of the Code provides for

procedures to be followed in order a termination of employment to be procedural fair. Among others is that where the hearing result in case an employee is found guilty of a disciplinary offence, the employee shall be given an opportunity to put forward any mitigating factors a decision is made on the sanction imposed. From the disciplinary hearing form tendered, this court has observed that, the applicant was plainly not accorded the right to mitigation by the Disciplinary Hearing Committee before reaching to its conclusion of terminating her employment.

Nevertheless, the above irregularity alone, in my firm view, cannot outweigh the fact that, the applicant absconded from work despite being informed by her employer to report back to her work place. It has also been held that, what is important is not application of the code in a checklist fashion, rather to ensure that the process applied adhered to basics of fair hearing in the labour context depending on circumstances of the parties, so as to ensure that, an act to terminate is not reached arbitrary (See the case of **NBC Ltd v. Justa B. Kyaruzi**, Revision Application No. 79/2009 Mwanza Sub Registry (Unreported).

I have also considered if the applicant's complaint that, the applicant was entitled to her June salary 2018 and found that, the applicant would not be entitled to June 2018's salary since she had not worked for it. How can one earn without working? The answer is negative.

As far as the applicant's complaint that the learned arbitrator erred in law and fact in not awarding her a certificate of service. In my opinion, an issuance of the certificate of employment to an employee by an employer, upon termination, is a mandatory requirement notwithstanding the fact that, such employee is either found guilty of a misconduct or not (See section 44 (2) of the Employment and Labour Relation, Act, (supra). Hence, the Commission made an oversight for its failure to direct the respondent to issue a certificate of service.

That being told, I unhesitatingly find that, the termination of the applicant's employment, was both substantively and procedurally fair. The CMA award was therefore properly procured save of the omission to direct the respondent to issue a certificate of service in favour of the applicant. No orders for costs.

It is so ordered

M. R. GWAE
JUDGE
06/12/2021

Court: Right of appeal is open.

M. R. GWAE
JUDGE
06/12/2021