IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

LABOUR REVISION NO 45 OF 2021

(C/F LABOUR DISPUTE NO. CMA/ARS/KRT/ARB/180/2020)

BETWEEN

KASTULI LASWAI BASSO.....APPLICANT

VERSUS

NGORONGORO SAFARI LODGE LIMITED..... RESPONDENT

JUDGMENT

01.06.2022 &. 22.06.2022

N.R. MWASEBA, J.

Being aggrieved by the decision of the Commission for Mediation and Arbitration of Arusha (herein will be referred as CMA), the applicant Kastuli Laswai Basso filed the present application seeking revision of the decision in Dispute No. CMA/ARS/KRT/ARB/180/2020.

The application is supported by a sworn affidavit of the applicant herein and resisted by a counter affidavit of the respondent herein.

The brief facts giving rise to this application reveal that, the applicant was employed by the respondent as a chef on 09.01.2006 up to 16.05.2020

when he was terminated due to gross misconduct. The said termination aggrieved him and he decided to refer the matter at CMA on 08.07.2020 claiming for unfair termination. Following the full trial, the CMA decided that the termination was both substantively and procedurally fair and dismissed the application. The said decision aggrieved the applicant who knocked the door of this court armed with the following legal issues:

i. Whether the Commission was right to hold that the applicant herein was fairly terminated.

ii. Whether the Arbitrator failed to consider the evidence adduced by the applicant herein in the Commission for Mediation and Arbitration.

iii. Whether the Arbitrator considered the evidence of the Respondent herein in the Commission for Mediation and Arbitration without any material evidential proof.

When this matter came up for hearing, the applicant was represented by **Mr Ikoda O. Kazzy**, Learned Counsel while the respondent was represented by **Mr Gabriel Malyampa**, also Learned Counsel. At the request of parties, the court ordered parties to argue the application by filing written submissions and both parties adhered to the schedule.

After considering both parties' submissions, court records as well as relevant applicable laws and case laws, I find the following issues to guide my determination of this revision:

a) Whether the applicant's termination was substantively fair.

b) Whether the applicant's termination was procedurally fair.

c) What reliefs are the parties entitled to.

Starting with the first issue of whether the applicant's termination was substantively fair, the applicant alleged that his termination was substantively unfair due to the fact that at the place where the respondent alleged the stolen things were found, all staff members had access to that place (see Exhibit D3) and even DW3 testified that he went to that place looking for a toothpick. Further to that the act of being found at a different place other than his workplace does not prove he was the one who stole the things alleged to have been stolen.

In his responses, counsel for the respondent submitted that, when terminating the applicant, the respondent had fair and valid reasons as required by **Rule 9 (5) of GN 42** of 2007. Further to that, during re-examination the applicant admitted to have been caught with the stolen item and DW2 was never questioned regarding the said allegation of the

stolen properties. **Rule 12 (1) of GN 42** of 2007 stipulates that a termination on the ground of misconduct requires an employer to consider whether an employee contravened a rule or standard regulating conduct relating to employment. He added that under the handbook which was handed over to the applicant specifically clause 2.2 of part 2 provides that misconduct will amount to direct termination and clause 2.2.8 provides that theft or unauthorized possession of the employer's property amounts to misconduct which falls under gross dishonesty. Thus, as the applicant admitted to have been caught with the respondent's property it was a fair reason leading for his termination.

The International Labour Organization Convention No. 158 of 1982 which Tanzania has incorporated it in its local statute provide that:

> "The *employment of the worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirement of the undertaking establishment or services...*"

The cited convention was incorporated under the **Employment and Labour Relations Act** No. 6 of 2004 regarding the termination of an employee by the employer. Under **Section 37 (1) and (2) of the Act** provides that:

which was the property of the respondent. So, based on the evidence adduced and the exhibit tendered particularly Exhibit D2 and D3, and clause 8 and 9 of Part 2 of the Employee's handbook (Exhibit D1) this court agrees with the CMA that the termination was substantively fair.

Turning to the second issue whether or not the applicant's termination was procedurally fair, Mr Kazzy submitted that, the respondent failed to submit the investigation report to prove that the investigation was conducted contrary to **Rule 13 (1) of the Employment and Labour Relations (Code of Good Practice) Rules**, GN No. 42 of 2007. And the CMA failed to consider the issue of investigation whether it was conducted or not. He also cited the case of **Mic Tanzania PLC Vs Sinai Mwakisisile,** Revision Application No. 387 of 2019 (HC-Unreported) to support the importance of conducting investigation. He added that the applicant here was not afforded chance to mitigate at the Disciplinary hearing which is evidently in Exhibit D4 (A disciplinary hearing form) which is contrary to Rule 13 (7) of GN 42 of 2007. In the end they prayed for the revision to be allowed and the CMA decision to be revised, quashed and set aside.

Responding to this issue, Mr Malyampa submitted that, the submission raised in this ground was never raised at CMA therefore the applicant is

1. *It shall be unlawful for an employer to terminate the employment of an employee unfairly.*
2. *A termination of employment by an employer is unfair if the employer fails to prove-*

(a) that the reason for the termination is valid;

(b) that the reason is a fair reason-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer."

The same is provided under **Rule 12 (1) of GN 42** of 2007 that:

"..... *any employer arbitrator or judge who is required to decide as to termination for misconduct is unfair shall consider: -*

1) *Whether or not the employee contravened a rule or standard regulating conduct relating to employment."*

In our present application the applicant's employment was terminated by the respondent on the sole reason of gross misconduct due to his attempt of stealing the employer's property. It was alleged that a security guard suspected him of stealing a box he was carrying and after inspection they found meat and cooking oil mixed with other rubbish. And in his re-examination the applicant agreed that he was found carrying the foods

not permitted to bring fresh issues at this stage. He buttresses his arguments with the case of **Singita Trading Store (E.A) Ltd Vs Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 57 of 2020 at page 12-13 where the CAT quoted with approval the case of **Haystead Vs Commissioner of Taxation** [1920] A.C 155 at page 166 where the court held:

> *"Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case or new version which they present so as to what should be a proper apprehension, by the court of the legal result ... if this were permitted, litigation would have no end except when legal ingenuity is exhausted."*

He added that apart from that the respondent conducted investigation as per Exhibit D3 and the evidence of DW1 to the satisfaction of the law. And since at the CMA the applicant never questioned the issue of investigation it is enough to prove that he was satisfied with the mode of investigation that was conducted. On the issue of mitigation, Mr Kazzy submitted that the same can be corroborated with Exhibit D5 and D6(a hearing form) that the applicant was in satisfactory with the whole procedure of termination that's why he never challenged the issue of

mitigation when he appealed to the higher authority and at CMA. He also cited the case of **Justa Kyaruzi Vs NBC Ltd**, revision No. 79 of 2009 (HC- Unreported) where the court insisted the procedures to be followed not in a checklist fashion but adhered at the basics of fair hearing.

In the end they prayed for the application to be dismissed for want of merit.

Let me start with the issue raised by the respondent's counsel that the issue of investigation report and mitigation was never raised at the CMA hence the same cannot be raised at this stage. Having gone through the trial Commission's proceedings, particularly page 2 the Commission adopted the issues proposed by the respondent in his opening statement and one of the issues was *Whether the termination procedures were adhered*. And since the issue of mitigation and investigation falls under this category, the applicant has the right to question it at this stage since the CMA found the procedure was fairly adhered to.

Now, turning to the issue of investigation report **Rule 13 (1) of GN 42** of 2007 provides that:

> *"The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held."*

In order for an employer to prove that investigation was conducted he was required to submit the investigation report although there are circumstances where there is no need for investigation report especially where the employee admits to the charge as it is the case with matter at hand. The reason behind is to ascertain if there is any ground for a hearing to be conducted.

Having gone through the CMA records, I will not differ with the finding of the CMA that the respondent conducted investigation. And the same is evidenced by Exhibit D3- Collectively where some of the employees who were consulted regarding the incident wrote their statement as to what happened on the material day. So, **Rule 13 (1) of GN 42** of 2007 were complied with by the employer (respondent herein).

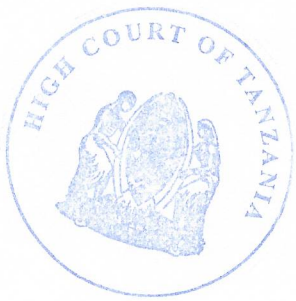
As for the issue of mitigation, I have gone through exhibit D5 "Hearing form" and noted that all the procedures were adhered to although there is no category to write whether the mitigation was taken or not. Further to that even at Part 11 of the Hearing form which is completed by the employee who wants to appeal, he never challenged that he was not given a chance to mitigate. Therefore, raising this matter at this stage becomes an afterthought which lacks merit.

Coming to the reliefs to which parties are entitled, since the court finds the termination to be both substantively and procedurally fair, and since the respondent had already paid the applicant his entitlements, there is nothing left from the respondent to give the employee (applicant herein).

Accordingly, I am convinced that the arbitrator's findings are justified to hold that the applicant was fairly terminated both substantively and procedurally. The application for Revision being meritless, is hereby dismissed with no order as to costs.

It is so ordered.

DATED at **ARUSHA** This 22nd day of June 2022.



N.R. MWASEBA

JUDGE

22.06.2022