

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
LABOUR DIVISION  
AT ARUSHA**

**REVISION APPLICATION NO. 75 OF 2021**

*(Originating from Commission for Mediation and Arbitration Employment Dispute No.  
CMA/ARS/ARS/612/2018/241/2018)*

**ROBERT SHIYO ..... APPLICANT**

**VERSUS**

**MOUNT MERU HOTEL/HODI**

**(HOTEL MANAGEMENT) COMPANY LIMITED ..... RESPONDENT**

**JUDGMENT**

28/04/2022 & 14/07/2022

**KAMUZORA, J.**

This application was brought under the provision of section 91(1)(a), (b) and (2)(b), (c), of the Employment and Labour Relations Act No Cap 366 R.E 2019 and Rule 24(1),24(2)(a),(b),(c),(d),(e),(f), 24(3),(a),(b),(c),(d), 28(1),(c),(d),(e) of the Labour Court Rules, GN. No. 106 of 2007. The Applicant is seeking for this court to invoke its powers and call the proceedings of the Commission for Mediation and Arbitration (CMA) in CMA/ARS/ARS/612/2018/241/2018 for the purpose of satisfying itself as to the correctness, legality or propriety of the proceedings and orders made therefrom and thereafter set aside the award by the CMA.

The brief background of the matter as may be depicted from CMA record is such that, the Applicant was employed by the Respondent as a boiler operator and on 10<sup>th</sup> July 2018 the Applicant was terminated from his employment contract by the Respondent by way of a letter for the claim of misconduct. The Applicant complained against the Respondent at the CMA and raised the argument that, the Respondent had no valid reason for termination of employment and that the procedure for termination was not followed by the Respondent hence a claim of Tshs 14,760,000/= arising out of the unfair termination.

During hearing at the CMA, the Applicant was the only witness and he tendered one exhibit that is, exhibit P1 which is a termination letter. The Respondent herein presented three witnesses and six exhibits; exhibit D1 (witness statement), exhibit D2 (Applicants employment contract), exhibit D3 (the Respondent's core values, personality, code of conduct and disciplinary code), exhibit D4 (notice to attend a disciplinary hearing), exhibit D5 (disciplinary hearing form) and exhibit D6 (CCTV footage). The decision by the CMA was to the effect that the Applicant was lawfully terminated from his employment. Being aggrieved by the CMA decision, the Applicants preferred this revision application on four reasons as follows: -

- 1) That, the honourable arbitrator error in analysis of the evidence for not considering the Applicants evidence that what he was carrying in the black plastic bag was his tool of works and not stolen items.*
- 2) That, the honourable arbitrator error by relying in exhibit D6 which does not show what was in the plastic bag to ascertain if they were collected from the first instance. Exhibit D6 does not show the Applicant Keeping anything in the car.*
- 3) That, the honourable Arbitrator misdirected himself by relying on the Respondent's evidence which does not show any missing items from the store.*
- 4) That, the honourable Arbitrator misdirected himself for not considering exhibit P1 termination letter which does not show under which misconduct the Applicant was found liable. It is Annex and marked B.*

When the application came up for hearing, the Applicant appeared in person with no legal representation while the Respondent was ably represented by Paschal Kamala, learned advocate. Hearing of the application was by way of written submissions and each part filed its submission as scheduled.

Submitting in support of the first ground the Applicant argued that, his evidence before the CMA reveals that he was carrying a black plastic bag which has tools for work he was doing at the parking area. That, he still had his bag at the parking area when he was questioned

by his supervisor at the office regarding the bag found in the car. The Applicant still maintains that, the bag found in the car is different from the plastic bag which he had. That, arbitrator errored because there is nowhere in the CCTV footage which shows that the Applicant was at the gate and he entered the employer premises. That, the Applicant was not supposed to go with the tools as he is an employer and he uses the tools of the employer found in the employer premises.

The Applicant went on and submitted that, there is nowhere in exhibit D6 which shows that the security inspected the area around the car to find if there is another plastic bag in the area. That, there is no proof that something was taken from the store unlawfully and the same was unlawfully possessed by the Applicant to amount to theft.

Regarding the second ground the Applicant submitted that, the arbitrator relied on exhibit D6, the CCTV footage to decide on the allegation of theft. That, looking at exhibit D6 it does not show the owner of the car or where the Applicant picked up the box or where he took the black plastic bag. That, it is difficult to link the Applicant with the theft as the footage does not establish theft ruled out by the arbitrator.

Regarding ground three the Applicant submitted that, there is no evidence from the store department or from the supervisor claiming for any missing item from their custody and the same being found unlawfully in the possession of the Applicant. That, even exhibit D5, the hearing form does not establish the same. It is the claim by the Applicant that, investigation was not conducted by the Respondent over the alleged misconduct contrary to Rule 13(1) GN No. 42 of 2007 (The employment and Labour Relations (Code of Good Practise). He supported his argument with the case of **Knight Support(T) Limited Vs. Ramadhani Magina Igai**, Labour Court Digest 2014 case No 16, **Tanzania Revenue Authority Vs. Andrew Mapunda**, Labour Court Case Digest 2015 Part 1.

Arguing for ground four the Applicant submitted that, Exhibit P1 states the allegation for termination and not the reason for termination or the reasons and findings for termination. That, the Applicant was charged with; one, the offence of theft or attempt theft and or assisting others to steal including withhold knowledge or attempting to conceal theft, two, Gross negligence or laziness as regards to duties (by working around the premises doing nothing as shown in camera), three, improper and unprofessional conduct (doing what he was not asked to

do) and four, misuse of company items (throwing items without authorization).

The Applicant insisted that, none of the above stated allegations for termination was proved at the disciplinary hearing and at the commission an act which is contrary to Rule 12 (1) (b) of GN No. 42 of 2007. That, based on section 37(2) of the Employment and Labour relations Act No. 6 of 2004 the termination of the Applicant is unfair thus, the Applicant prays that the decision by the arbitrator be quashed and the Applicant be compensated as prayed in CMA F1 at the CMA.

Contesting the application, Mr. Kamala counsel for the Respondent argued that, the Applicant has not considered the evidence in totally specifically the evidence of DW1, Exhibits D1 and D4. That, the evidence of DW1 is clear and is a person who reported the unlawful activity of the Applicant leading to the capture of the Applicant with the stolen items kept in the plastic bag. That, DW1 being a credible witness testified well on the series of the event and the Applicant failed to cross examine on the facts testified by DW1 and did not deny them in the record. To cement his argument, he cited the case of **Kilanya General Supplies Ltd and another Vs. CRDB Bank Limited and 2others**, Civil Appeal No. 1 of 2018 CAT at Dar es Salaam (unreported).

Arguing on the evidence presented before the CMA he submitted that, exhibit D4 shows that the Applicant admitted being found with a plastic bag containing the properties of the company. That, basing on the Applicant's admission of the dishonest the employer had a right to terminate the employee without even conducting a disciplinary hearing. He supported his submission with the case of **Nickson Alex Vs. Plan International**, Revision No 22 of 2014 HC at Mwanza(unreported).

The Respondent added that, it is a settled law that acts of dishonest like theft has zero tolerance at work place and the employer is at liberty to terminate the employment. He cited the case of **Rowena De leon Cruiz vs. Bank of the Philippine Island**, G.R No 173357, **Carter Vs Value Track Rental (Pty)** (26 indus. LJ (Juta) 711 (2005), **National Microfinance Bank (NMB) Vs David Bernard Haule** at Sumbawanga (LCCD) (2014) 48 to support his argument.

The Respondent is aware of the requirement of Rule 13(1) of GN. No 42 of 2007 which requires to conduct the investigation in need to establish the basis of a disciplinary hearing. He submitted that, as per the evidence of DW1, after he suspected the illegal activities by the Applicant, he decided to call the management for more steps who viewed the CCTV footage showing the Applicant entering the employer's

premises and how he was roaming around the working premises. That, the management in the presence of DW1 decided to inspect the motor vehicle which the Applicant was seen putting the plastic bag and found the stolen item. That, the evidence by DW1 shows how the employer investigated to establish the unlawful act of the Applicant.

The Respondent finalised by submitting that, the evidence tendered before the CMA and the testimony of DW1 indicated that the employer had a valid reason to terminate the employee on ground of dishonest and that the procedure for termination was followed.

Upon a brief rejoinder the Applicant reiterated his submission in chief and added that, nowhere in the CCTV footage tendered shows the stolen item and there is no report or any claim of the employer of the missing items from the store department or any other person. That, the Respondent was not right to state that the evidence presented before the commission that is exhibit D4 shows that the Applicant admitted being found with plastic bag containing the properties of the company. He claimed that, the case of **Nickson Alex** is irrelevant to the case at hand.

The Applicant further added that, as per section 37(2) (c) of the Employment and Labour Relations Act it is the duty of the employer to



prove that the procedure for terminating the employment was followed and the issue of investigation been complied with. To cement on this, he cited the case of **Tanzania Revenue Authority Vs Andrew Mapunda** HC, Labour Court Case Digest 2015 part 1. He maintained that, no investigation was conducted by the Respondent.

After a thorough reading of the records of the CMA, the present application, affidavit in support of the application and the submissions by the Applicants as well as the counsel for the Respondent, the issue that need court determination is whether the CMA was correct to conclude that the Applicant was lawful terminated from his employment by the Respondent and the procedures for termination were followed.

The burden of proof in labour matters lies upon the employer to prove that the employee was fairly terminated and the procedures for termination were followed. In determining the fairness of employment termination, it is important to consider the provision of section 37(2) (a) (b) and (c) of the Employment and Labour Relations Act, 2004 which requires employer to prove that the reason for termination is valid and fair and the termination is in accordance with fair procedures.

Starting with the validity and fairness of the reasons, the allegation against the Applicant that led to the termination of his employment

contract is misconduct associated with stealing from his employer. Rule 12(3) of Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 states the misconducts which may justify termination and it includes gross dishonesty and gross negligence. Under that provision if the employee contravened a rule or standard regulating conduct relating to employment that can be the reason for termination.

As per the termination letter (exhibit P1), the Applicant was terminated due to misconduct and those misconduct includes; theft or attempt theft, gross negligence or laziness, improper and unprofessional conduct as well as misuse of company items. The evidence by DW1 a security officer of the Respondent shows that he saw the Applicant with a plastic bag. His evidence was supported by DW3 who is the CCTV operator of the Respondent who claimed that the Applicant was seen on the CCTV footage carrying a plastic bag and taking it to the parking and leaving it behind the car. Exhibit D3 which is the code of conduct clearly stipulates the rules and standards to be adhered to by the employee. Those standards were read and signed by the Applicant meaning that he was aware of the office rules. Being in possession of the properties belonging to the employer without permission amounted to an offence,

gross negligence and or dishonest to which the only sanction available was termination of the employment.

The law also requires that, in determining whether or not termination is the appropriate sanction, the employer should consider on the other hand the seriousness of the misconduct in the light of the nature of the job and the circumstances in which it occurred. By the evidence adduced at the CMA, it is evident that although there is no criminal offence filed against the Applicant proving the offence of theft beyond reasonable doubt, the conduct of the Applicant was more suspicious that he was involved in theft activities by assisting another staff to steal from their employer hence, the same also amounts to misconduct and gross negligence. In that regard I find that there was fair reason for termination.

Regarding the fairness of the procedure for termination, the same is guided by Rule 13 of the Employment and Labour Relations (Code of Good practice) GN No. 42/2007. The rule requires the investigation to be conducted before terminating the employee and in this matter, DW1 the security officer stated in one way or the other how they investigated into the allegation. He clearly stated that, after noticing the movements of the Applicant he informed the management on the suspicious acts and

the evidence of DW3 together with exhibit D6 shows how the facts were collected by the Respondent in relation to the allegation. After all process on investigation, the Applicant was issued with Exhibit D4 a notice to attend a disciplinary hearing which was conducted on 23/6/2018 and the hearing form was tendered as exhibit D5.

The Applicant claims that, the procedures for termination was unfair on account that the investigation was not conducted, in other words the Applicant condemns the CMA award that it was not proper for reasons that the Respondent relied on exhibit D6 alone while no any claim that the Respondent had reported any missing item from the store. It is also the claim by the Applicant that what he was caring in the plastic bag is his tools for working which he had.

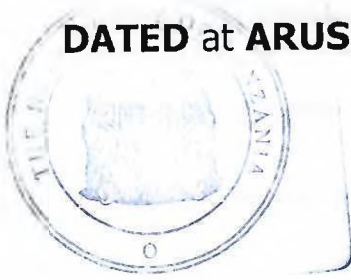
With the facts and the series of evidence tendered at the CMA, I find it that, the claim that there was no investigation is with no legal basis. The evidence on record as per page 16 of the typed proceedings reveals that the investigation was conducted and through the CCTV footage the Applicant was seen leaving a luggage behind the car and the owner of the car went there and picked up the luggage and kept it in the car. It was later discovered that the luggage contained properties belonging to the Respondent and not working tools as alleged by the

Applicant. The Applicant was linked with being dishonest or negligent in handling the employers' properties. The fact that no report was made on the missing property is immaterial and the claim that what the Applicant carried was his working tools lacks supportive evidence as what is seen under the footage contradicts the testimony of the Applicant at the CMA.

Again, the Applicant contended that, the termination letter does not show under which misconduct the Applicant was found liable. Reading exhibit D4 which is a notice to attend disciplinary hearing, the Applicant was charged for gross negligence or laziness and taking items not authorised amounting to theft. Since all the offence were discussed and dealt with in the disciplinary hearing and the Applicant was availed with an opportunity to respond to each allegation, I find that, all the issues related to the Applicant's misconduct was proved and the procedure for termination were followed.

From the above arguments and reasons there to, I find no reason strong enough to make this court temper with the decision of the CMA. The Applicant was lawfully and fairly terminated from employment. This application is therefore devoid of merit and its hereby dismissed. In considering that this is a labour matter, I make no order as to costs.

**DATED at ARUSHA** this 14<sup>th</sup> July, 2022.



  
D.C. KAMUZORA

JUDGE