IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT ARUSHA

REVISION No. 54 OF 2020

(Originating from labour dispute No. CMA/ARS/MUS/93/19)

MARY MLAY...APPLICANT

VERSUS

GRUMETI RESERVES...RESPONDENT

JUDGMENT

03rd June & 14th July 2022

TIGANGA, J

In this application Mary Mlay, herein after referred to as the applicant, moved this court for revision under Rules 24(1) and 24(2)(a)(b)(c)(d) and (f), 24(3)(a)(b)(c)(d), and rule 55(1) and (2) of the Labour Court Rules 2007 GN No. 106 of 2007 read together with section 94(1)(b)(i) of the Employment and Labour Relations Act, No. 6/2004 and any other enabling provisions of the law. The applicant's prayers in his chamber summons are as follows;

i. That, this Honourable Court be pleased to grant an order that the ruling/award and proceedings of the Commission for Mediation and Arbitration for Arusha at Arusha dated 26th June 2020 be revised and quashed

ii. Costs of this application

iii. Any other relief(s) this Honourable Court may deem fit and just to grant.

The background of this matter is that, the applicant was employed by Grumeti Reserves as a Senior Human Resources Manager on the 17th July, 2017 on permanent basis contract up to when she was terminated on 14th February 2019. In her employment, she was earning a remuneration of Tsh. 8,736,875/= per month. On the 08th February 2019, she was accused of gross dishonesty. Following such accusation, her employment contract was terminated on 14th February 2019, the termination which she considers to be unfair.

Dissatisfied by the termination, she referred the matter to the Commission for Mediation and Arbitration, herein after referred to as the CMA, where she complained on the procedural impropriety in the disciplinary hearing conducted by the respondent, genuine and fair reasons for her

termination. She generally complained that, the whole exercise was carried out without following proper and fair procedures as by the laws and labour regulations established. The applicant lost before the CMA, the consequent of which, she filed revision before this court.

The grounds of her application as can be ascertained from the affidavit sworn by Mr. Emmanuel Peter Akyoo, learned Advocate dully authorized by the applicant to represent him, which was filed in support of the application are so many. But most of them are logically of similar nature therefore, can be consolidated without missing any point as follows:

i. That, the decision has been procured by material irregularities after the Arbitrator had failed to analyze evidence on record and therefore arrived to a wrongful conclusion.
ii. The Arbitrator misdirected himself by basing on the hearsay evidence.
iii. That, the Arbitrator failed to record the evidence properly, the evidence adduced by the applicant after insisting that the applicant admitted to the offence alleged by the employer.
iv. That, the Arbitrator misdirected himself by not considering the fact that the respondent did not follow procedures during the termination of the applicant's employment.

The application was contested by the respondent by filing the notice of opposition and the counter affidavit, sworn and filed by Mr. Innocent Felix Mushi, an Advocate who was dully authorized by the respondent to do so. In the counter affidavit, the counsel deposed that, there is no concrete reasons as to why the applicant was dissatisfied while the award was proper in law.

Also that the application has no merit because the applicant had failed to show and point out the alleged irregularities. For instance he has not shown which evidence the Hon. Arbitrator failed to analyse and which hearsay evidence which has been considered by the Arbitrator. In his view, there is no material irregularities or any failure by the arbitrator to analyse the evidence.

He further submitted that, the Arbitrator recorded evidence properly and no procedure which was flouted in hearing and recording the evidence and the Arbitrator considered the evidence of both parties. He asked that in the best interest of justice the application be dismissed, the award given by the Arbitrator be upheld as there was valid reasons for termination which followed fair procedure.

With leave of the court, parties argued this revision by way of written submissions. The submissions were filed timely as scheduled by the court. In the submission in chief filed in support of the application, the counsel for the applicant submitted that, the background of this dispute between the applicant and the respondent is that, the applicant together with her family and friends visited as tourists, one of her employer's lodges known as Faru Faru Lodge. Their visit was not free from payment, they paid as other tourists do. However, while in the lodge's rooms, they realized that they were not supplied with some items which normally other tourists are supplied as part of the service offered by the lodge. The applicant demanded to be supplied with those items. That act of demanding such items caused the commotion between the applicant and her employer who is the respondent.

He further submitted that, it is in the Rules of the respondent service delivery that in its lodges, anyone who visits there should enjoy the same services like other tourists regardless of the place he/she is coming from or their personal status. He further submitted that, the applicant's act of demanding the same services as other tourists who visit the respondents' lodges was right because it was her right to do so. The Respondent's act of terminating the applicant basing on the ground of demanding such services

contravenes the Labour Rules which require the termination to be fair and to be based on valid reasons. In his view, it was unfair for the respondent to terminate the applicant without valid reasons as required by law.

Further to that, he submitted that, the way the disciplinary proceedings was conducted justifies unfairness. As when the applicant was waiting for the decision of the disciplinary hearing, she was given a ticket to travel back to Dar es salaam and soon after her arrival at her home, she was notified via mail that, she had to pick her termination letter at the office following her termination on 14th February 2019.

The Applicant's Counsel also submitted that, the disciplinary meeting was conducted on 13th February 2019 while the termination occurred on the 14th February 2019. Following such acts, it goes without saying that the Applicant's right to appeal against the decision of the disciplinary meeting was violated as it is contrary to the Labour Court Rules.

He concluded that, it is clearly shown by the applicant's submissions that, there were violation of the labour laws as well as other laws of the land which establishe various principles in administering justice. Hence, the award

by the CMA should be varied as it contravenes the crucial principles of justice and infringes the applicant's rights.

In his reply submission, the counsel for the respondent submitted that, the fact that the applicant was denied some services which she had right to get is unjustifiable since exhibit D4 shows clearly that, the respondent's policy admitted as exhibit before the CMA, nowhere in there which showns that the guests will be given items as indicated by the applicant. Even during the hearing, when the applicant was cross examined before the Arbitrator failed to show that the policy provides for such services as a right alleged by her.

According to him, the applicant admitted to the offence she was charged with as clearly indicated at pages 5, 6 and 7. It was also submitted by the Counsel for the respondent that, the applicant lacks evidence to prove that, she visited the room as a guest, the fact which is denied by the respondent and he required the applicant to give proof.

With regard to the applicant's allegation that she was not given chance to appeal against the disciplinary decision, he submitted that, this ground also should fall apart as it lacks merit to be entertained by this Court. In his

view, it is clear that, the applicant was given a chance to appeal but due to reasons best known to herself she did not make it. Instead, she proceeded to file her case at the CMA as proved by exhibit D2 which is the hearing form at page 8. This form shows very clearly that she was given the right to appeal and her response was that she needed to think about it, therefore, her right to appeal was fully explained.

In further support of the respondent's case, the Counsel for the respondent submitted that, the court has to go through exhibits D2, D3 and D4 to satisfy itself that the termination was according to fair procedure and based on valid and fair reasons. Lastly, the counsel submitted that, the application is without base.

In rejoinder, the applicant argued that, it is not true as stated by the respondent. That, the applicant admitted before the disciplinary hearing. in his view, the applicant was given services as the leader in the company but not as the guest or tourist, something which contravenes the Rules of her employer. He further rejoined that, the moment the applicant and her fellow guests visited one of the respondent's hotels, they paid for the services as other guests use to pay.

He further submitted that, exhibit D4 is the evidence for that and he reiterated that, the applicant's right to appeal was infringed as she was given a ticket to travel to her home in Dar es salaam. While in Dar es salaam, she was told via e-mail that she had to collect her termination letter at the office, which is proved by exhibit P6. He concluded that, following the Applicant's submission, the court has to consider all the grounds for revision so that she can be paid the compensation as prayed.

That makes a summary of the record of the case before the CMA, the pleadings and submissions filed by parties for and against the application. Basing on all these materials, I find the main issue for determination is whether the termination of the respondent is substantively and procedurally unfair.

This issue has been framed basing on the fact that matters of termination of employment are regulated by section 37 of the Employment and Labour Relations Act (supra), which for easy reference is hereby reproduced.

> *"37(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, and

(c) that the employment was terminated in accordance with a fair procedure.

(3) N/A

(4) In deciding whether a termination by an employer is fair, an employer, Arbitrator or Labour Court shall take into account any ***Code of Good Practice published under section 99.***

(5) N/A"[emphasis supplied]

These are the conditions which the court needs to consider before finding that, the termination of employment of the employee by the employer is fair. The code of good practice referred to in subsection 4 of section 37 published under section 99 (1)(a) of the employment and Labour Relations Act, is the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007, herein after referred to as the Code. Also the relevant provision which is required to be relied upon by the arbitrator is Rule 12-(1) of the Code, which provides that:

12(1)"Any employer, Arbitrator or Judge who is required to decide as to whether termination for misconduct is unfair shall consider-

(a) whether or not the employee contravened a rule or standard regulating conduct relating to employment;

(b) if the rule or standard was contravened, whether or not

(i) it is reasonable;

(ii) it is clear and unambiguous;

(iii) the employee was aware of it, or could reasonably be expected to have been aware of it;

(iv) it has been consistently applied by the employer; and

(v) termination is an appropriate sanction for contravening it.

The law continues to provide for limits of the employer in terminating the employee. Under sub rule (2), (3), (4) and (5) it provides:

(2) First offence of an employee shall not justify termination unless it is proved that ***the misconduct is so serious that it makes a continued employment relationship intolerable.***

(3) The acts which may justify termination are;

(a) gross dishonesty;

(b) willful damage to property;

(c) willful endangering the safety of others;

(d) gross negligence;

(e) assault on a co-employee, supplier, customer or a member of the family of, and any person associated with, the employer; and

(4) In determining whether or not termination is the appropriate sanction, the employer should consider: -

***(a) the seriousness of the misconduct in the light of the nature of the job and the circumstances in which it occurred,** health and safety, and the likelihood of repetition; or*

*(b) **the circumstances of the employee such as the employee's employment record, length of service, previous disciplinary record and personal circumstances.***

(5) The employer shall apply the sanction of termination consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who commit same misconduct."

[Emphasis supplied]

From these provisions, it is glaringly clear that, section 37 of the Employment and Labour Relations Act, (supra), must be read together with the Code, made under Section 99(1)(a) of the Employment and Labour Relations Act. These two laws read together, the following are clear directives to be complied with before a decision to terminate the employee is done and upheld by Arbitrator or the Labour Court that;

(i) The employee may be terminated if he/she has contravened the known rule or standard which is reasonable, clear, and free from ambiguity and the employee was aware of it or ought reasonably to be aware of it.

(ii) Generally, the first offence/misconduct of an employee shall not justify termination,

(iii) The termination may exceptionally base on the first offence/misconduct if it is proved that the misconduct is so serious that it makes a continued employment relationship intolerable.

(iv) If that offence/misconduct relates to damage to the property of employer, then it must be established that the act was done willfully.

(v) Taking into account the nature of the job and the circumstances in which it occurred that misconduct is so serious to endanger health and safety, and there is a likelihood of repetition;

(vi) Looking at the circumstances of the employee such as the employee's employment record, length of service, previous

disciplinary record and personal circumstances the misconducts merits termination.

(vii) That the termination is the appropriate sanction for contravening the code.

Given the nature of these conditions, the evidence of complying with those directives can be found from nowhere but on record. Thus, that has necessitated me to visit the record particularly, the proceedings of the disciplinary hearing conducted by the Grumeti Reserves disciplinary meeting. The relevant information is at page 7 and 8 of the disciplinary proceedings which is part of the record. Reading the proceedings of the CMA between lines, I found out that the reason for the applicant's termination was based on gross dishonesty.

On how that was taken to the extent of being based upon in the findings, I find it apposite for purposes of clarity to reproduce small part of the proceedings of the disciplinary hearing committee which contains the findings that the applicant was guilty of gross misconduct, part of the reasons for her being found guilty, the mitigation by the applicant after being found guilty of gross dishonesty, the aggravating factors, the committee's

response to mitigation and the decision of the disciplinary hearing. The said percept reads.

Reasons for the decision;

"She has admitted that she requested one item (salt), she claims to have requested the salt with his fellow guests not herself, being the Senior HR Officer, she ought to have reported the matter or ask for permission that she needed the item"

Mitigation

"I am not involved in theft, it was not my intention, it's a good lesson for me, it is just a bad luck"

Aggravating circumstances

"HR Personnel ought to be working in the high integrity, being a senior officer and being involved in theft, its unacceptable, due to the costs of the item Police would have been involved"

Response to mitigation and aggravating circumstances,

"I have considered the aggravating and mitigation factors and I find nothing that suggests that the Respondent deserves any consideration because the Complainant has well established the bad record and behaviors of the Respondent. ***I advise that the Respondent be terminated.***

__Offence__; Gross Dishonesty *__Sanction__; Termination from employment* *__Start date__; 14th February 2019."*

Following such reproduction of the disciplinary proceedings, I now find myself with a duty to cross check and be assured as to the fairness of the findings that resulted into the applicant's termination. My desire of doing is based on the fact that, section 39 of the **Employment and Labour Relations Act**, (supra) provides that;

> *"In any proceedings concerning unfair termination of an employee by employer, the employer shall prove that the termination is fair".*

Burdens the employer to prove that termination was fair. The fairness referred to in this section to be proved should be in line with the conditions elaborated herein above, as provided under section 37(1)(2) and (4) of the Employment and Labour Relations Act (supra) read together with rule 12(1) (2), (3), (4) and (5) of the Code. In this case, it has not been made clear that the contravened is known to the applicant, and that it is reasonable and clear. The record is clear that the applicant was the first offender. It has not been said and proved by evidence that the misconduct is of a serious nature to the extent of making a continued employment relationship intolerable.

The employer has also not led evidence to prove the magnitude of damage caused by the act of the applicant to the employer, the respondent, shoulders carry the burden of proof. There is also no evidence led to prove that, the conduct of the applicant was dangerous to the health or safety of other employee. Further to that, looking at the circumstances of the applicant, particularly on her employment record, the length of service since 2007 when she was employed up to 2019 when her employment was terminated, a period of more than eleven years of service with a clean sheet of disciplinary record, it is my view that the misconduct being the first offence did not merit termination. As there is no evidence to prove that the termination was the only sanction available under the code of conduct. That said, I see no valid reasons adduced for the termination of the applicant.

Now, on the procedural part, looking at the accusation, the same was elevated to the level of theft. Having elevated it to the level of theft, even its standard of proof was to be a bit higher as **section 258 of the Penal Code, [Cap 16 R: E 2019]** provides the definition of theft as follows:

> *258.(1) A person who **fraudulently** and **without claim of right** takes **anything capable of being stolen**, or **fraudulently converts to the use of any person other than***

***the general or special owner thereof** anything capable of being stolen, steals that thing.*

From the above position of the law, it is my considered view that the allegations and evidence tabled before the disciplinary hearing were supposed to establish the elements of theft as provided by section 258 of the Penal Code (supra), which in this case are lacking. One would think that, theft as grave as it is, was supposed to be necessarily investigated by the state investigative machineries before an action is taken, something which in this case was not done.

Apart from that, the way the proceedings were handled also rise a lot of doubts. The respondent and the disciplinary committee stated that the applicant admitted that she committed such offence. However, the proceedings as reproduced herein above, do not reflect such admission of the fact that she committed the offence of theft. That makes even the procedure for termination to be unreasonable.

From the above findings, it goes without saying that, there are no valid reasons for termination of the applicant. It is clear that the termination was unfair, in both, substantive and procedure. Since the termination was unfair,

it is obvious that the result of the applicant losing her job was not based on fair and valid reasons.

As aforesaid, the decision of the CMA is hereby quashed and set aside. This court orders that, the applicant having been unfairly terminated, the respondent should reinstate her without loss of remuneration.

It is accordingly ordered.

DATED at **ARUSHA** on this 14th day of July 2022.

J. C TIGANGA

JUDGE.