IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

REVISION APPLICATION NO. 43 OF 2020

(Application for Revision for an award by the Commissioner for Mediation and Arbitration of Arusha at Arusha by Hon. Mourice Egbert Sekabila in CMA/ARS/ARS/43/20)

ISAYA BAHABURA GILIO .....APPLICANT

VERSUS

NICE CATERING CO. LTD ..... RESPONDENT

JUDGMENT

09/06/2022 & 11/08/2022

KAMUZORA, J.

The Applicant Isaya Bahabura Gilio, being aggrieved by the decision of the Commission for Mediation and Arbitration (CMA) preferred this revision under sections 91(1), (a) and (b),91(2) (a) and (b) and section 94(1) (b) (i) of the Employment and Labour Relations Act No. 6/2004, Rule 24(1) 24(2) (a) (b) (c) (d) (e) (f) and 24(3) (a) (b) (c)(d) and Rule 28(1) (b) (c) (d) & (e) of the Labour Court Rules G.N No. 106. The Applicant prays for this Court to be pleased to call for the records of the CMA and revise the decision in CMA/ARS/ARS/43/2020.

The brief facts of the dispute between the parties as depicted from the CMA records as well as this application are such that, the Applicant was employed by the Respondent as a waiter. Applicant claimed that he was terminated from his employment contract by the Respondent for unknown reason. He lodged a complaint at the CMA and the decision was that, there was no proof of unfair termination of employment contract. The CMA also ruled that, the employee with less than 6 months is not covered by unfair termination rules hence the claim by the Applicant was dismissed. Being aggrieved by the CMA decision, the Applicant preferred this revision application on the following reasons: -

1) *That, the Arbitrator erred in law and fact in analysing the Applicants evidence and came up with his own opinion without considering the evidence adduced by the Applicant and further neglected important evidence adduced by the Applicant in the course of hearing of the matter.*
2) *That, the Arbitrator erred in law and fact by relying on employment contract which was never supplied to the Applicant by the Respondent.*
3) *That, the Arbitrator erred in law and fact by holding that the Applicant was a probationary employee.*
4) *That, the Arbitrator erred in law and fact in by relying and dealing with extraneous issues based on new facts, new evidence and preliminary objection raised by the Respondent in final submission*

that was not part and parcel of evidence hence arriving at erroneous decision.

5) *That, the Arbitrator erred in law and fact by not considering the substantive rights of the Applicant hence arriving at an erroneous decision.*
6) *That, the Arbitrator erred in law and fact by assuming facts that were not adduced by the Applicant.*
7) *That, the Arbitrator erred in law and fact by holding that the Applicant and Respondent relationship started to exist on 2018.*

In opposition, the Respondent filed a counter affidavit together with a notice of preliminary objection on the following points of law: -

1) *That, the Applicant's Revision has been filed by the Respondent in clear violation of Rule 43(1) (a) and (b), 46 (2) of the Labour Court Rules GN No. 106.*
2) *That, the Applicant's Revision is bad in law hence incompetent for not detaining lists of documents that are relevant and material to the application as required by the law.*
3) *That, the Applicant's Revision is incompetent for being supported with incurably defective verification clause.*

Hearing of the preliminary objection and the revision application was by way of written submission and as a matter of legal representation, the Applicant enjoyed the service of Mr. Melckizedeck Paul Hekima, learned advocate while the Respondent enjoyed the service of Mr. Alfred T Okech, learned advocate.

It should be noted from the outset that, the hearing of the objection and as well as that of the application was ordered to proceed by way of written submissions. However, the Respondent never submitted in support of the raised points of preliminary objection nor responded to the Applicant's submission in respect of the revision application. As the preliminary objected was raised by the Respondent but not argued, I consider the same as abandoned hence I will not bother to discuss them.

Turning to the merit of the application, the counsel for the Applicant argued jointly grounds 1, 3, 6 and 7 and grounds 2,4 and 5 were also argued jointly. Submitting for grounds 1, 3, 6 and 7 the counsel for the Applicant argued that, the Arbitrator ignored the Applicants employment identities Cards, NSSF Cards, Bank Statement (annexure 1 and 2 of the affidavit) which indicated that the Applicant was employed by the Respondent since 2011 hence the Arbitrator misdirected himself that the Applicant was a probationary employee while he was not. That, under Rule 10(4) of the Employment and Labour Relations (Code of Good Practice, Rules GN No. 64 of 2007 the period of a probationary employee is not more that 12 months. He insisted that, the Applicant was an employee of the Respondent for 8 years. In support of his

submission, he cited the case of **USAID Wajibika Project Vs. Joseph Mandago and Edwin Nkwanga,** High Court Labour Digest of [2015] number 107 at page 4 to 5, **Patrick Tuni Kihenzile Vs. Stanbic Bank (T) Ltd,** High Court Labour Digest (2013) No 10.

The counsel for the Applicant also submitted that, it is a right of the employee to be supplied with the copies of employment contract and when the Applicant demanded for the same it was the reason for his termination of employment contract. That, although the Applicant had signed several employment contracts with the Respondent, he had never been supplied with copy of employment contract. That, by virtual of exhibit D1 the Applicant wrote a letter to the Respondent demanding to be supplied with the written contract and deposition of money by the Respondent to NSSF account and instead, on 5.11.2019 the Applicant was orally terminated from his employment. That, only one contract of 2018 to 2019 was tendered by the Respondent at the CMA which was not even supplied to the Applicant and not mentioned in the opening statement by the Respondent.

Regarding the issue as to whether the Applicant was a probationary employee, the counsel for the Applicant submitted that, the same was not amongst the framed issues at the CMA but a fact raised by the

Respondent as a preliminary objection in the final written submission. He was of the view that the CMA erred in dealing with extraneous maters not prior raised thus rendering the award improperly procured. In support of this argument, he cited the case **of Bruno Wencesluas Nyalifa Vs. The Permanent Secretary, Ministry of Home Affairs,** Civil Appeal No 82 of 2017 Cat at Arusha (unreported), **R.S.A Limited Vs. Hans Automechs limited, Govinder Senthil Kumari,** Civil Appeal No. 179 of 2016 Cat at Dar es Salaam (unreported), **Mateseko Gwabukoba & 5 others Vs. Nyanza Road Works Ltd,** High Court Labour Digest [2013] No 17 Lab Div. MZA, Revision No 45 of 201, 26/2/13.

The counsel for the Applicant submitted further that, under section 39 of the Employment and Labour Relations Act No 6 of 2004, it is the duty of the employer to prove that the termination is fair. That, the burden to prove goes with proof that the procedure for termination is in accordance with rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, 2007, GN. 42/2007 and that, the reason for termination is fair in accordance with section 37 and rule 9(3) of the same GN. No. 42/2007.

On the fairness of the procedure the counsel for the Applicant submitted that, the termination was conducted in blatant abuse of the procedure of Rule 13 (1) to (13) of GN. No. 42/2007 such that, no notice was issued to the complainant to attend to the disciplinary hearing to contest the alleged abscondment. For this, he argued that, the Applicant was denied the right of being heard a per Article 13(6) of the Constitution of the United Republic of Tanzania. To cement his submission reference was made to the case of **Joseph K. Magombi Vs. Tanzania National Park**, Revision No 2/2013 HC at Arusha, **National Housing Corporation Vs. Tanzania Shoes and another** (1995) TLR 251, **Mbeya Rukwa Auto Parts & Transport limited vs. Jestina George Mwakyma,** Civil Appeal No 45/2000 CAT (Unreported).

On the aspect of fairness of reasons for termination, the counsel for the Applicant argued that, the Respondent had burden to prove all the allegations against the Applicant by submitting reliable and tangible evidence before the CMA. To buttress his argument, he cited the case of **Alliance One Tobacco Ltd Vs. George Msingi,** Lab Div MRGR Rev. No 285 of 2008, 23/03/2012, Labour Court Digest of 2011 – 2012 at page 112.

The counsel argued that, no proof of abscondment were issued before the CMA to prove such allegation. He explained that, exhibits P2 and P3 which are message and letter dated 18/11/2019 alleging that the Applicant absconded from work were not corroborated as the Applicant was terminated on 5/11/2019.

From the records, there is no dispute that the Applicant was an employee of the Respondent working as a waiter. That is supported by the evidence on records as well as exhibit P1. It is also clear that the Applicant's employment was terminated and the CMA made its decision that there was no unfair termination of the Applicant's employment as the Applicant was only a probationary employee hence not entitled to claim under the benefits of unfair termination.

Before we go to the fairness or otherwise of the termination, it is important to determine whether the Applicant was terminated. It was concluded by the CMA that there was no termination of the employment contract by the Respondent as the Applicant absented himself from work based on exhibit P2 and P3 collectively. The Applicant however alleged that he was orally terminated after he demanded a copy of employment contract which he signed with the Respondent. At the CMA and pursuant to exhibit P3 the Applicant was alleged to abscond from his working

station without good reason from 05/11/2019 until 18/11/2019 when he was issued with a letter of absenteeism. Looking to the evidence in record, there is no proof of the said absenteeism for the obvious reason that, exhibits P2 and P3 collectively does not justify the argument that the Applicant absented himself from work. Exhibit P2 is the mobile phone photo with a message on it "SINTOWEZA KUJA". The same does not indicate the sender or, the receiver or, the date it was sent hence, unreliable. Exhibit P3 collectively contain a letter to the Applicant dated 11/08/2019. The same was addressed to the post address No. 457 Arusha. It is unfortunate that, the post receipt which is also part of exhibit P3 does not indicate the address to which the letter was sent. It only indicates that the addressee to be Isaya B. Bura whose address is Arusha. In my view, the above exhibits do not prove that there was abscondment proved by the Respondent. In that regard the claim by the Applicant that he was orally terminated stands as the Respondent was unable to show if she still maintains employment relationship with the Applicant.

On the CMA holding that the Applicant was a probationary employee, I agree that a probationary employee cannot claim under unfair termination as the procedure for termination of probationary

employee is governed by the guidelines as so provided under Rule 10 of GN. No. 42 of 2007. Exhibit P1 which is the Employment contract signifies that the nature of contract is a fixed term contract but a renewable one and the probation period was only for 3 months. The evidence from the Respondent's witnesses reveal that the Applicant had worked for four months before the alleged abscondment meaning that he was no longer under probation.

The Applicant in this case was able to show to the CMA that at the time of termination he had worked with the Respondent for 8 years under renewable contract. A fact that it was a renewable contract was supported by exhibit D3, a salary slip which shows various transaction on 25/09/2018 and 23/10/2018 from the Respondent to the Applicant. At page 4 of the typed proceedings, when PW1 was on cross examination he stated that before the present contract the Applicant had previous contract. such the claim that the Applicant was a probationary employee was not proved or even clearly raised during evidence before the CMA but raised in the final submission by the Respondent. In that regard, I agree with the Applicant that the CMA was wrong to rely on the submission to make a conclusion that the Applicant

was a probationary employee. It is my settled mind that the Applicant was right to claim for unfair termination.

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. The burden to prove that the Applicant, employee was fairly terminated lies on the Respondent who is the employer.

Starting with the validity and fairness of the reasons, the allegation against the Applicant was the misconduct associated with absenteeism from work. Absenteeism from work for five working days is a serious misconduct under Regulation 9 (1) of the Guidelines for the Disciplinary Incapacity and Incompatibility Policy and Procedure found under GN. 42 OF 2007. Termination for misconduct is governed by Rule 12 and 13 of GN. No. 42 of 2007 and absenteeism from work being part of the misconduct amounts to a good reason for termination from employment.

At the CMA and pursuant to exhibit P3 the Applicant was alleged to abscond from his working station without good reason from 05/11/2019 until 18/11/2019 when he was issued with a letter of absenteeism. As

pointed above exhibits P2 and P3 collectively does not justify the argument that the Applicant absented himself from work. I therefore find that, there was no valid reason for termination of employment contract.

Regarding the fairness of the procedure for termination under Rule 13 the Employment and Labour Relations (Code of Good practice) GN No. 42/2007, it is my observation that, the procedures were not followed. Absenteeism being a serious misconduct, it was necessary that the investigation be conducted to assess the reasons for absenting from work and to ascertain whether there are grounds for a hearing to be conducted. It is clear from records that no investigation was conducted. But again, the law allows the employer to conduct disciplinary hearing even ex-parte where the employee refuses to attend at the hearing. The record does not show any the said disciplinary hearing was conducted.

For the reasons stated above I find that, there was no any valid reason for the termination of the Applicant's employment and the procedures for termination was not complied with thus amounting to unfair termination of the Applicant. Having found that the Applicant was unfairly terminated it follows therefore that, she is entitled to compensation. I therefore award compensation of 8 months' salary.

The Applicant claimed that he was paid 164,000/= as monthly salary but the employment agreement tendered, exhibit P1 indicate the salary of Tshs. 140,000/= a fact which is also supported by Exhibit D3 the salary slip. Thus, the compensation computation will base on that amount as no evidence was brought proving the change in that salary. The Applicant is therefore entitled to 8 months salary at the rate of Tshs 140,000/= per month equivalent to Tshs. 1,120,000/=. The Applicant is also entitled to leave pay at the tune of Tshs. 140,000/= and payment in leu of notice Tshs. 140,000/= and certificate of service.

In the upshot, the revision application is of merit therefore, allowed. The Respondent is ordered to pay to the Applicant the total amount of Tshs. 1,400,000/= and issue certificate of service to the Applicant. In considering that this is a labour dispute, no order for costs is granted.

DATED at **ARUSHA** this 11th day of August, 2022

D.C. KAMUZORA

JUDGE