IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISRTY OF ARUSHA

AT ARUSHA

REVISION NO.39 OF 2020

(Originating from Employment Dispute CMA/ARS/ARS/611/2018/240/2018)

MOHAMED OMARY MOHAMED.....APPLICANT

Vs

MOUNT MERU HOTEL.....1ST RESPONDENT

HODI (HOTEL MANAGEMENT)

COMPANY LIMITED .....2ND RESPONDENT

RULING

Date of last order: 16-11-2021

Date of ruling: 25-1-2022

B. K. PHILLIP, J

The applicant lodged this application under the provisions of section 91(1) (a) (c) , 94 (1) (b) (i) of the Employment and Labour Relations Act No.6 of 2004, Rule 24 (1) (2) (a), (b) , (c), (d),(e), (f) , (3) (a), (b), (d) and 28 (1) (c), (d), and (e) of the Labour Court Rule, 2007, GN.No.106 of 2007) praying for the following orders;

a) That this Honorouble Court be pleased to call for and examine the records of the Award delivered on 8th June 2020 by Hon.Arbitrator Adolf K. Anosisye for the purpose of satisfying itself as to the

correctness , legality or propriety of the proceedings and orders made therein , revise and set aside the award

b) Any other relief that this Honorouble Court deems fit and just to grant.

The application is supported by the affidavit sworn by the applicant. The respondents' Human Resources Manager Ms Janeth Pallangyo swore a counter affidavit in opposition to the application. The learned Advocate Eric S. Stanslaus appeared for the respondent whereas the applicant was unrepresented. He appeared in person. I ordered the application to be disposed of by way of written submissions.

A brief background to this application is that the applicant was employed by the 1st respondent as a security guard at the 2nd respondent. The 2nd respondent is one of the hotels owned by the 1st respondent. The applicant's employment was terminated on the ground of misconduct after conducting a disciplinary hearing. The facts of the matter as can be discerned from the proceedings of the case shows that on 8th June 2018 the 1st respondent's officer (supervisor) called the applicant and requested him to attend to work on 9th June 2018 , which was his off day on the reason that there was an emergency as other security guards who were supposed to be on duty on 9th June 2018 were sick and the 2nd respondent was expecting to receive a big number of guests who had

booked the Hotel. Upon being requested to attend to work the following day, that is 9th June 2018, on the reason I have stated herein above, the applicant replied as follows;" *tutaona"* .Thereafter, the supervisor scheduled the applicant to attend to work on 9th June 2018.The supervisor called other three security guards , two of them were not reachable and the last one told him that he was not capable of heeding to his request because he was sick. On 9th June 2018, the applicant did not go to work, instead at around 5.00 am, he went to the supervisor's home and told him that he was not able to go to work on that day. The 1st respondent was not pleased with the applicant's act. He charged him with misconduct and insubordination. A disciplinary hearing was conducted. The same resulted into the termination of the applicant's employment. The applicant was paid his terminal benefits. However, he was aggrieved by termination of his employment. He lodged his complaints at the Commission for Mediation and Arbitration (Hence forth "the CMA") vide Dispute No.CMA/ARS/ARS/611/2018/240/2018, seeking for an order for payment of Tshs 12,751,200/=, being a sum of money equivalent to thirty six months salaries as compensation for the termination of his employment .The said application was dismissed for lack of merits. The applicant did not despair. He lodged the instant

application seeking for the orders I have mentioned at the beginning of this application.

Briefly, the applicant's complaint at the CMA was as follows; that the termination of his employment was not fair both procedurally and substantively as he did not agree to go to work on 9th June 2018 which was his day off. He contended that he had a good reason for not attending to work on 9th June 2018 as he had serious family problems. His wife was pregnant and was due to delivery, thus he was compelled to stay at home so as to provide necessary assistance to her.

The CMA's findings were to the effect that the applicant did not make any submission on the complaint concerning the unfairness of the procedure adopted in terminating his employment. As regards the substantive aspect of the his termination, the Arbitrator was of the view that the same was substantively fair because upon being called by supervisor ,the applicant's response suggested that he agreed to attend to work on 9th June 2018 and the supervisor included him in the list of the names of security guards for 9th June 2018.Thus, applicant's decision not to attend to work on 9th June 2018 amounted to insubordination.

Submitting for the application, the applicant contended as follows; that he did not agree to go work on 9th June 2018. His response to the request made by the supervisor was not straight forward that he was ready to go

work as requested. The word " *tutaona* " meant that he was not sure if he could attend to work on 9th June 2018, due to the fact that he had serious family problems. His wife was pregnant. She needed the assistance of the applicant. Thus, it was wrong for the supervisor to include him in the list of guards for 9th June 2018 while he did not get a confirmation that the applicant was available on 9th June 2018 which was his day off.

Expounding on this point, the applicant argued that if he was ready to go to work on 9th June 2018, his reply to the supervisor would have been a straight forward " yes". He maintained that Arbitrator erred for ignoring the fact that on the fateful day he informed the supervisor early in the morning at around 5.00 am that he was not able to go to work. He was of the view that the supervisor had ample time to look for another security guard as he normally does if there is an emergency. The applicant insisted that the supervisor could have hired a private guard because that was the practice in case of emergency.

Furthermore, the applicant argued that it was wrong in law for the supervisor to order the applicant to work on his day off. He cited the provisions of section 24 (1) (a) (b) of the Employment and Labour Relations Act, No.6 of 2004, to cement his arguments. He contended that there was no any agreement between him and his employer for double

payment for working on his day off as required by the law cited herein above.

In addition to the above, citing the provisions of Rule 8 and 11 of the Employment and Labour Relations (Code of Good Practice), GN. No. 42 of 2007, the applicant argued that the disciplinary Committee ignored his defence and the mitigating factor that he had to attend his wife who was pregnant. The disciplinary committee was supposed to give him a lesser punishment not termination of employment. He insisted that pursuant to the provisions of section 37 (2) of the ELRA, his termination of his employment was not fair. He beseeched this Court to revise the decision of the CMA.

In rebuttal the respondents' advocate argued that the decision of the CMA is legally sound. The Arbitrator's interpretation of the applicant's response to the supervisor, that is, it amounted to agreeing to attend to work on 9th June 2018 is correct because if the applicant was not able to go to work on 9th June 2018 he would have said so as other security guards did. He went on submitting that the applicant had been previously called several times to attend to work on his days off in case of emergency and had never complained. His failure to attend to work on 9th June 2018 upon being requested by the supervisor and accepted the request amounted to insubordination.

Furthermore, Mr Mohamed argued that the reasons for termination were clear, not ambiguous and valid. The procedure for termination was well adhered to and the applicant did not challenge the same as stated by the Arbitrator in his decision.

In this application the following things are not in dispute;

i) That the applicant was called by his supervisor and requested to attend to work on 9th June 2018, which was his day off due to an emergency that had arisen at the work place.

ii) That the applicant responded to the supervisor's request by the word "*tutaona*"

iii) On 9th June 2018, at around 5.00 am the applicant informed the supervisor that he was not able to go to work on that day on the reason that he had family problems.

iv) The applicant's was terminated from employment on the reason of misconduct because he did not go to work on 9th June 2018.

The issue which has to be determined by this court is whether or not the applicant committed any serious misconduct. First of all I wish to point out on the onset that the applicant's argument that there was no contract between him and his employer for double payment for working on his day off is misconceived and unfounded as it was not raised at hearing of this matter at the CMA ,and the applicant did not demand for such a

contract when he was requested to work on his day off . Therefore, it is obvious that this is a pure afterthought. The evidence adduced also has shown that it was not the first time the applicant was requested to work on his day off. The normal arrangement in the Company was that if an employee goes to work on his days off then those days have to be compensated. For avoidance of doubts, the provisions of the law cited by the applicant are not applicable in this matter.

The key question in this matter is; By saying " *tutaona*" did the applicant agree to go to work on 9th June 2018? In my understanding and looking at the circumstances of this matter, the word " *tutaona*" gave an implication that the applicant was capable of going to work on 9th June 2018,though he did not give any assurance of doing so. In my considered opinion the supervisor was right to include the applicant in the roster of security guards for the 9th June 2018 because the applicant did not state that he was not ready to go to work on 9th June 2018. Unfortunately, the evidence adduced by both parties does not show the time at which the applicant was called by the supervisor. Whatever the case, I am of the view that it was not correct for the applicant to wait until the 9th June 2018 in the morning to inform the supervisor that he was not able to go to work. After all the fact that the applicant's wife was pregnant was known to the applicant. It was not something new. The fact that the

applicant told the supervisor in the morning that he was not able to go to work on the fateful day proves that the supervisor construed the applicant's response correctly, that is, he agreed to go to work on 9th of June 2018. It leaves a lot to be desired on, why didn't the applicant say outright that he was not able to go to work on 9th June 2018.

The applicant's argument that the respondents had an opportunity to hire private guards cannot hold water and proves the misconduct alleged by the respondents, because an obedient employee cannot purposely put his boss in a dilemma whilst quite aware of the emergency he is facing. Indeed, the applicant committed a serious misconduct.

In the upshot, I do not see any plausible reasons to fault the decision of the CMA. Thus, I am constrained to dismiss this application as I hereby do. This application is dismissed in its entirety.

Dated this 25th day of January 2022

B. K. PHILLIP

JUDGE