**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGITRY OF ARUSHA**

**(LABOUR DIVISION)**

**AT ARUSHA**

**REVISION NO. 100 OF 2020**

**(Originating from Dispute No. CMA/ARS/225/19)**

**NEEMA IBRAHIM MKONYI..... APPLICANT**

**VERSUS**

**VILLAGE SUPERMARKET LTD..... .... RESPONDENT**

**JUDGMENT**

***2.12.2021& 11.03.2022***

**MZUNA, J.:**

The applicant, **Neema Ibrahim Mkonyi**, is seeking for a revision by this court after the Commission for Mediation and Arbitration (CMA) in labour dispute No. CMA/ARS/225/2019 ruled that her termination was fair and therefore against her favour. The application is supported by an affidavit sworn by the applicant and strongly resisted by a counter affidavit sworn by Mr. George Lupindo, Legal and Human Resource Officer for **Village Supermarket Ltd,** the respondent herein.

Briefly stated, facts giving rise to this application reveal that, the applicant was employed by the respondent on 1st of May, 2018 as a balister (loading items at the supermarket). She was terminated on 9th of

September, 2019. Reasons for termination according to the respondent was due to misconduct allegedly that she received Tshs 10,000/- as a tip from the customer and pocketed it while using the cashier's desk without permission from the management.

Dissatisfied, she referred the matter to the CMA whereby the Arbitrator ruled that termination was both substantively and procedurally fair. Aggrieved, the applicant preferred the present application.

At the hearing of this application, Mr. Herode Bilyamtwe, Personal Representative appeared on behalf of the applicant whereas the respondent was represented by Mr. George Lupindo, Legal and Human Resource officer. Hearing proceeded by way of written submissions. I propose to start with the first issue on whether *the applicant's termination was with valid reasons?*

The evidence which was adduced before the CMA was that of Peter Simon (DW1), a Supervisor of the supermarket, the only witness. He said that the applicant was seen in the CCTV camera receiving Tshs 10,000/- and used the cashier without permission from the management. It was a rule of practice that if one receives a tip, he/she has to notify the management. Further that the applicant who was also working at the cafeteria was not allowed to receive money at the cashier's desk. She was

warned before on 23/12/2018 (exhibit D2) and promised not to interfere in any cash related matter. The contract of employment (exhibit D1) was also tendered.

Following such misconduct which was seen through the CCTV camera, the applicant made an apology as evidenced by exhibit D3. Subsequently thereafter, she was notified to attend at the disciplinary meeting (exhibit D4). That she was paid her terminal benefits. It was therefore his view that termination was appropriate based on misconduct.

The applicant Neema Ibrahim Mkonyi (PW1), was also the only witness who defended her case. She said that she was a permanent employee on a renewable yearly contract. She insisted that although she attended at the disciplinary hearing, all the same there was no investigation which was conducted. Further that even the alleged letter of apology, exhibit D2, does not bear her signature. She insisted that termination was unfair and therefore asked for her entitlements as she was unfairly terminated.

The trial Arbitrator when making his finding on whether the termination was substantively fair, he reasoned that the respondent proved that he had ill intention towards the money of the employer as she

agreed to receive Tshs. 10,000/= without informing the management the act which violated the rule regulating conduct of her employment.

Mr. Bilyamtwe, the applicant's representative in his submission says, the applicant violated a certain rule but there was no supportive document of the said employer's rule as required by Rule 11 (3) of the Employment and Labour Relations (Code of Good Practice) GN 42/2007 (GN 42/2007). That, in the absence of a set out form and content on the policies and procedures governing a benchmark as provided under Rule 11(1)-(5) of (GN/2007), the purported termination preceded on an immaterial irregularity and is therefore revisable. Similarly, there ought to have been at least a warning before such termination as the misconduct was not grave and intolerable. Such form/document, according to the applicant, ought to have been tabled from the disciplinary hearing stage up to the arbitration hearing stage where the applicant disputed the alleged misconduct. The applicant alleged that the money was received from the customer as a tip not money from customer bill as per exhibit D2. Further the allegation by the respondent in exhibit D3, that the applicant admitted to have operated the cash counter without permission was not admitted by the applicant.

On his part, the respondent says, exhibit D1, the contract of employment contained the company's policy and Rules collectively which was signed by the applicant but violated it. It was therefore his view that the applicant contravened a standard regulating the conduct of employee at work place which is a common law. He referred this court to the case of **Ditrick Rweyemamu vs 1ST Medical Clinic Nyerere**, Revision No. 403 of 2016 (HC-Unreported).

That the findings of the CMA were correct as the applicant was charged with misconduct of gross dishonest and lack of trust using cashier's counter without permission (referring to Exhibit D4); That, she pocketed some money without authorization from her Manager.

In his rejoinder submission, Mr. Bilyamtwe insisted that the documents which were tendered during Arbitration proceedings were not brought to the attention of the applicant during disciplinary proceedings and argues that she was not accorded a right to be heard. That the said exhibit D2, D3 and D4 are contradicting to each other whether it was for receiving a tip of Tshs 10,000/- at the cafeteria or taking the money Tshs 10,000/- from counter and then kept in the pocket? He urged the court to revise the award.

I have revisited the record of the CMA. It is apparent from the records that the reason for termination of the applicant's employment as per exhibit D5 (termination letter) is using the cashier's desk without the employer's permission and pocketing Tshs. 10,000/=. The purported act took place on 31st day of August, 2019 where she was seen via the CCTV camera. It was described as lack of honest with the employer's property which is a gross misconduct. Part of the evidence of DW1 reads, and I will quote;

> ***"Mwajiriwa alionekana katika CCTV Camera akipokea pesa na kutumia cashier bila ruhusa ya Manager wake."***
>
> ***"...Alipewa nafasi ya kujieleza na akakiri kutenda kosa (exhibit D3)"***
>
> ***"Taarifa ya kikao cha nidhamu (D4) alipewa..."***

Termination as a matter of law must be with valid reasons and fair procedure as well provided for under Section 37 (2) (a) and (b) of Employment and Labour Relations Act (No.6/2004) herein after (ELRA). That provision reads:-

> *"37 (2) A termination of employment by an employer is unfair if the employer fails to prove-*
>
> *(a)* ***That the reasons for 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.***" (underscoring mine).

It is undisputed fact that the applicant did use the cashier's desk to attend the customer and did pocket money Tshs 10,000/- without permission of the management. Rule 11 (3) of the GN 42/2007 imposes counselling and warning for first offenders as well provided in the Rules and Regulation (see Exhibit D1 collectively) both in English and Swahili versions that;

> "*If the staff is not following Rules and Regulations, the first warning given verbally by the Floor Manager and if he repeats again then second warning will be given in the writing letter. If he/his (staff) rejects to sign the warning letter, which is not acceptable then on behalf of he/the witness member, Committee member and management will take action.*"

During her evidence, PW1, the applicant replied some questions put to her as follows:-

> ***"QN: Ulishawahi kukatazwa kutumia counter na kupokea pesa?***
>
> ***ANS: Ndiyo."***

The above quoted words proves that indeed the applicant was warned before on 23rd December, 2018 as can be seen in exhibit D2. Definitely there was a misconduct which was committed. That was a warning so to

speak. Above all, a warning prior to employee's termination will depend on the nature and gravity of the offence/misconduct. According to the employment contract which the applicant signed (exhibit D1), item 18 (e) on matters which may necessitate termination includes:-

***"(e) Tabia ya kutokuwa mwaminifu kama wizi na kadhalika."***

(underscoring mine).

The applicant was unfaithful and therefore breached the terms of her employment. It was held in the case of **G.4 Security Services (T) Ltd v. Peter Mwakipesile,** Labour court Digest 109/2011 that:-

> ***"In deciding the gravity of a particular misconduct, one has to bear in mind the type of the employer's business and the importance of honest in the said business."*** (Underscoring mine)

Misconduct in law is covered under Rule 11 and 12 of GN 42/2007 (supra). Under Rule 12 (3) (a), the acts which may justify termination are (among others), **"Gross dishonesty"**. The employee who pockets 10,000/- from the counter where she was not supposed to be is a gross misconduct. In the evidence she admitted was once warned and that she knew there were special assigned employees at the counter. She acted in dishonest manner.

The submission by Mr. Bilyamtwe is that the offence which she committed is not clear whether it was receiving a tip from a customer or taking money from the counter as shown in two documents [exhibit D3 (an apology letter) and D4 (notification to attend at the disciplinary hearing) respectively].

In my view, that defect though apparent is minor. It does not go to the root of the matter as the rules provided that she ought not to have gone at the counter and even if it was a tip, ought to have reported to the manager. In other words, she was not allowed to be at the cashier desk. Her apology was that she promised would never go to the cashier's counter again.

There is also an issue as to whether she signed apology letter (exhibit D3). In my view, that point ought to have been discussed at the CMA as it touches on reliability and credibility of evidence. The Chairperson believed it and therefore I have no reason to doubt it. There were therefore valid reasons for the termination. The first issue is answered in favour of the respondent/employer.

I revert to *the second issue as to whether the applicant's termination was procedurally fair?* It is the applicant's contention that there were some procedural defects during the disciplinary hearing like

the absence of investigation report as required by Rule 13 (1) of GN 42/2007.

In his reply, the representative of the respondent was of the view that even if this court assumes that investigation is mandatory, which is not the case in the circumstances of this case, yet cannot nullify the hearing where an employee admitted wrong doing. He also cited the case of **NBC vs Justa B. Kyaruzi**, Revision No. 79 of 2009 (HC- Unreported) where the court said what is important is not application of the code in "checklist fashion." That every case has to be treated according to its peculiar circumstance.

Admittedly, the CMA found that there was such an irregularity of lack of investigation which however could not vitiate the termination regard being had on the refusal of the applicant to act on the instructions of her supervisor. It was his view that there was no need of investigation.

It is true that Rule 13 (1) of the GN. 42 of 2007 requires the employer to conduct an investigation to ascertain whether there are grounds to charge the employee concerned and thereafter conduct disciplinary hearing. That provision reads:-

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

The respondent alleged that the applicant received Tshs. 10,000/= illegally and went to the counter without permission from the Manager , a fact which was admitted by the applicant. The applicant admitted the offence and therefore there was no need for investigation which is an exception under Rule 13(11) of GN 42/2007. That provision reads:-

> *"In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with them. An employer would not have to convene a hearing if action is taken with the consent of the employee concerned."*

While interpreting that provision, Nyerere J (as she then was) held in the case of **Nickson Alex v. Plan international**, Revision No. 22 of 2014 (HC) that:-

> *"Even if the employer would not have conducted the disciplinary hearing the position would have been the same as the applicant admitted the offence he committed."*

I associate myself with that holding. Similarly, absence of investigation cannot outweigh the termination as the applicant admitted the offence at the disciplinary hearing. Case laws are abundant that procedural unfairness cannot vitiate substantive fairness for grave offences like this where just like a Bank, control of cashier's desk is indeed a backbone of

the organization. No employee should be allowed to temper with a rule governing its modalities of control. This issue would also fail.

Lastly, I should say though in passing that merely because a termination letter had the heading "TAARIFA YA KUACHISHWA KAZI" Exhibit D5, it cannot be said with any stretch of imagination that it was not a termination letter but a notification for termination and terminal benefits as alleged. I am not prepared to buy such an argument as the applicant was not prejudiced in anyway. She even received the terminal benefits.

I therefore find that the applicant's termination was both substantively and procedural fair and the CMA award is hereby upheld.

Application stands dismissed.

**M. G. MZUNA,**

**JUDGE.**

**11.03.2022**