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

**LABOUR DIVISION**

**AT ARUSHA**

**LABOUR REVISION NO. 68 OF 2020**

(Originating from the award of Commission for Mediation and Arbitration at Arusha Dispute No. CMA/ARS/545/2019/264/19)

**SIMON DANIEL .....1ST APPLICANT**

**FRANSIS KWASLEMA .....2ND APPLICANT**

**VERSUS**

**NGORONGORO OLDEANI MOUNTAIN LODGE ..... RESPONDENT**

**JUDGMENT**

28/10/2021 & 27/01/2022

**KAMUZORA, J**

The applicants Simon Daniel and Francis Kwaslema, 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) (b), and section 94(1) (b) (i) of the Employment and Labour Relations Act No. 6/2004, Rule 24(1) (2) (a) (b) (c) (d) (e) and (f), (3) (a) (b) (c) &(d) and Rule 28(1) (a) (c) (d) & (e) of the Labour Court Rules G.N No. 106/2007. The applicants pray for this Court to be pleased to call for the records and revise the decision in CMA/ARS/545/2019/19.

The facts of the dispute between the parties as indicated in the CMA records as well as this application are such that, the 1st and 2nd applicant were employed by the respondent as gardener on 12/10/2018 and 28/03/2016 respectively. They were terminated from their employment on 02/09/2019 and 17/09/2019. Being aggrieved by the said termination, the applicants lodged a complaint at the CMA for unfair termination of their employment. They claimed that there existed no reason for termination hence craved for an order of reinstatement of their employments.

Hearing of the matter at the CMA proceeded ex-parte against the respondent. The decision by the CMA was to the effect that there was no unfair termination of the applicants. Being aggrieved by the CMA decision, the applicants preferred this revision application on four reasons which are here under rephrased into three reasons: -

a) That, the CMA was wrong not to order the award for remuneration, terminal benefits and reinstatement of the applicants who were paid monthly salary below the minimum wages.

b) That, the CMA misdirected itself by deciding in favour of the respondent who did not present his evidence to discharge the burden of proof for fair termination towards the applicants.

c) That, the commission took in extraneous matter to disembark at the verdict by not direct itself on the substantive issues and procedural issues as per Regulations of Employment and Labour Relations (Code of Good Practice) GN No. 42 of 2007.

When the matter came up for hearing, the applicant was represented by Mr. Lawrence Mathayo the secretary of CHODAWU while the respondent enjoyed the service of Mr. Stephano who was holding brief for Mr. Asubuhi Yoyo.

Submitting in support of the application, Mr. Lawrence stated that, the applicants were terminated from their employment without being paid their entitlements and as for the 1st applicant he was terminated without being heard. He also submitted that there was no evidence proving that the 1st applicant did not perform his work as a gardener. While applicants' representative acknowledges the fact that the 2nd applicant was given a right to be heard, he insisted that he was not paid his entitlements after termination. He contended that, the respondent did not follow the

termination procedure he thus prayed for the respondent to reinstate the applicants to their work or pay them their entitlements.

Contesting the application Mr. Stephano, counsel for the respondent submitted that, the contention that Simon Daniel was terminated without being heard was not correct. He referred page 3 of the CMA decision which indicates that the 1st applicant confirmed to CMA that he was heard on 01/09/2019. That, the reason for their claim not being allowed is because they failed to prove their claims. He referred Rule 28(2) GN No 67 of 2007 which requires the applicants to prove the claims for unfair termination. That, the hearing of the complaint was done ex-parte still the applicants failed to prove their claims as they failed to prove that the reason for termination was not clear and that the procedure for termination was wrong.

Regarding the issue of reinstatement, the counsel for the respondent submitted that, since the applicants failed to prove their claim then, the CMA award was correct. Regarding the issue of payment of terminal benefits the counsel submitted that, there is no proof that there were rights indicated in the applicant's termination letters which were not paid. He insisted that if so, the same is a new fact that was not discussed at the CMA.

Regarding the 2nd applicant Francis Kwaslema, the counsel for the respondent submitted that, he admitted that he was heard as per the procedures. That, the reason for termination was clear and his evidence before the CMA reveal that he even wrote a letter for apology. He added that, at the CMA the 2nd applicant did not tender any evidence showing that the allegation against him was wrong. The counsel was of the view that the CMA award was correct as the applicants failed to prove their claim at the CMA.

In a brief rejoinder by Mr. Lawrence added that, on 17/09/2019 the respondent issued a termination letter to the applicants, and their entitlements were listed in those letters but the same were never paid to the applicants.

After a thorough reading of the records of the CMA, the present application, affidavit in support of the application and the submissions from the applicants' representative as well as the counsel for the respondent, the issue that need court determination is whether the CMA was correct to conclude that the applicants failed to prove their claims.

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. But where the case is being heard in the

absence of an employer the burden shift to the employee to prove that the termination was unfair. The law has placed a burden of proof on the person who alleges existence of any facts. This is provided under section 110 of the Tanzania Evidence Act, Cap 6 R.E 2019 which states that: -

> *" Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist".*

Again, under section 60(2) of the Labour Institutions Act Cap. 300 [RE 2019] it provides that: -

> *"60 (2) In any civil proceedings concerning a contravention of a labour law-*
>
> *(a) the person who alleges that a right or protection conferred by any labour law has been contravened shall prove the facts of the conduct said to constitute the contravention unless the provisions of subsection (1)(b) apply; and*
>
> *(b) the party who is alleged to have engaged in the conduct in question shall then prove that the conduct does not constitute a contravention."*

The applicants claimed for unfair termination against the respondent. The matter was heard ex-parte and the applicant adduced what they considered proof of their claims. The applicants contended that their right to be herd was violated and terminal benefits was not paid

despite the same being listed under the termination letter issued to the applicants.

I have revisited the proceedings of the CMA and at page 7 of the typed proceedings the evidence by the 1st applicant reveal that he was employed on 13/10/2018 as a gardener. He was not issued with any contract and upon termination he was not informed the reason for termination and not paid anything. When he was questioned, he responded that they were informed that they were being terminated because their working places were unattended/not clean. The 2nd applicant at page 8 of the proceedings claimed that he was employed on 01/03/2016 as a gardener but he was not issued with a contract until 01/05/2019 when he signed the contract. He was summoned by the disciplinary committee and terminated because his place of work was unattended/not clean. He was not paid anything upon his termination. When he was questioned, he added that he requested to be reinstated.

From the CMA records there is no dispute that the applicants were employed by the respondent and their employment were duly terminated on allegation of failure to perform the assigned duties and gross negligence. Now the question is whether there was good reason for termination. Rule 12 of the Employment and labour Relations (Code of

Good Practise) Rules G.N No 42/2007 provides for the misconduct which can justify termination and among them being contravention of the rule and standard relating to employment and gross negligence.

It was alleged that the applicant being gardener failed to perform their duties resulting to the unclean environment irritating the respondent clients at the Lodge. There is evidence revealing that even the 2nd applicant apologised and promised to work hard. It is my considered view that as the applicants were aware of their job description but intentionally or negligently did not attend their workplace, there was good reason for their termination. From the records and in considering Rule 12 (3) of GN No. 42 of 2007, failure to perform duties or gross negligence is a good reason for termination. In considering the requirement under Rule 17 of GN No. 42 of 2007, it is in my view that the applicants were aware of what was to be done but neglected their duties. I therefore agree with the CMA findings that the applicants were fairly terminated thus, not entitled to the prayer for reinstatement.

As regarding the procedure for termination, the applicants claimed that they were not heard. However, the records shows that they were heard and informed on the reason for termination of their employment. The first applicant in his evidence before the CMA revealed such fact.

Likewise, the second applicant confirmed that he was summoned by the disciplinary committee before he was terminated. Thus, the contention that they were not heard is unfounded. In my view, the applicants were fairly terminated and the procedures for termination as per Rule 13 of the Employment and labour Relations (Code of Good Practise) Rules G.N No 42/2007 were adhered to.

It is, however, the requirement of the law that where there is fair termination of employment, the employee is to be paid all his entitlements associated with termination. The applicants claimed before the CMA for payment of leave, extra duty allowance and salary arrears. The CMA however ruled that the applicant failed to prove those claims.

While I agree with CMA that no evidence proving that the applicant performed extra duties on the days, they were off duty, I do not agree with the CMA conclusion that the applicants were not entitled for leave and salary arrears. Under section 44 of the Employment and Labour Relations Act, apart from annual leave and salary due, there are other entitlements for the employee after termination and they include payment for work done before termination, payment in leu of notice, severance pay and transport allowance to the place of recruitment. However, severance pay will not discussed in considering the requirement under section 42

that the termination was fair. Similarly, the transport allowance will not be discussed as there is no claim that the applicants' place of recruitment was different from the place of work.

For the rest of entitlements, I have reviewed the termination letters issued to the applicant and among the entitlement listed to be paid to the applicants include salary for the month of September, arrears if any, leave pay if any and employment certificate. The termination letter also indicates that all payment of the entitlements was to be effected upon handling of all employers properties by the applicants. The employer admitted that there were arrears of salary for the month of September but did not state categorically if the leave was already paid for that year. Although the respondent was not heard before the CMA, but they filed the opening statement which does not indicate if any entitlement was paid to the applicants after termination. There is no document attached to the respondent's pleadings as a proof of payment and in this application the respondent claimed before this court that the applicants' entitlements were paid but no document was attached as proof of payment. That being the case, it remains that the applicants were fairly terminated but no proof that they were paid all their entitlements.

It is my considered view that upon termination, the applicants were entitled to payment in leu of notice, salary arrears and annual leave as per the provision of section 44 of the Employment and Labour Relations Act, No 6 of 2004. In their evidence before the CMA the applicant stated that they were paid Tshs. 120,000/= as monthly salary which was later upgraded to Tshs 150,000/=. The respondent is therefore liable to pay to each applicant; Tshs. 150,000/= as salary for the month of September, Tshs. 150,000 as one-month salary in leu of notice, Tshs. 150,000/= as annual leave for the year 2019. The applicants however were unable to prove other arrears claimed.

The application is therefore partly allowed to the extent explained above. No order for costs.

**DATED** at **ARUSHA** this 27th Day of January 2022


D.C. KAMUZORA

JUDGE