IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO.679 OF 2018

WENDE ADAMS NYAGAWA.....1st APPLICANT
JOYCE MEINHARD MWAMBA.....2nd APPLICANT

VERSUS

DAR ES SALAAM SERENA HOTEL.....RESPONDENT

JUDGMENT

Date of last Order: 04/06/2019
Date of Judgment: 08/06/2020
Z.G.Muruke,J.

The two applicants filed present revision to challenge CMA award dated 30th March, 2017, that upheld employers decision to terminate the applicants way back 27th November, 2015 for assaulting an intern (Queen Leopard). Application is supported by an affidavit of the two applicants. Respondent filed counter affidavit sworn by Sophia Mketo her principal officer. Hearing was conducted by way of written submission.

According to the pleadings, records of CMA, and submission by both parties, court will adopt issues as raised by applicants and respondent by Dar es Salaam Serena Hotel as follows.

(i) Whether investigation was conducted before terminating applicants.

(ii) Whether arbitrator considered applicants evidence, or hearsay evidence.

(iii) Whether applicants are allowed to use minimum force in cause of their performance of their duty.

(iv) Whether applicant termination was an excessive punishment

(v) Whether hearing form was forged.

(vi) Whether there are applicants unpaid reliefs.

Applicant being represented by Mr. Michael Deogratius Mgombozi their personal representative from (TUPSE) submitted, on issue number one that, respondent was duty bound to make through investigations as per Rule 13(1) and (5) of the Employment and Labour Relations (Code of Good Practice) GN 42 of 2007 to be able to ascertain whether there was a reason for termination, or that the offence was so grave to warrant termination. Responding to the issue, advocate N. Nyaisa for the respondent admitted that, no investigation was required because the veryday the victim mother made a complaint to the respondent, in which Wende Adams 1st applicant, admitted in writing exhibit D2 to have beaten Queen. The admission by Wende Adam investigation was redundant and unnecessary.

This court, upon Perusal of exhibit D2 at page two revels that, Wende Adam admitted to have said:-

> **While interrogating her she was very rude and I slapped her without even thinking twice.**

Furthermore, in the disciplinary hearing exhibit D7 at page 2, Wende Adam is quoted to have said:-

> **Ndiyo nikampiga kofi kidogo la kumtuliza... hiyo ilikuwa namna yangu ya kumtuliza ..... mimi nikawaeleza kina Shophia kwamba nadhani nilimslap.**

On the other hand, Joyce Mwamba second applicant on her testimony as reflected in her evidence at CMA dated 1st November, 2016, she admitted when she said, **ndiyo kumpiga kibao na kumdhalilisha mfanyakazi mwenzangu na kusukuma.**

The above piece of evidence is corroborated by the evidence of CCTV Camera footage showing Joyce Mwamba pushing an intern Queen Leopard. The above piece of evidence incriminate the two applicants for the offences charged at disciplinary hearing. Thus, the evidence was therefore did not require investigation as correctly submitted by Advocate Nyaisa counsel for the respondent.

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 employees admitted wrong doing. Every case has to be treated according to its' circumstances. In the case of **NBC Vs. Justa B. Kyaruzi** Revision Number 79/2009, Mwanza registry court held that:

> "What is important is not application of the code in checklist fashion, rather to ensure that the process used adhered to basics of fair hearing in the labour context depending on circumstances of the parties, so as to ensure the act to terminate is not reached arbitrary. I am also in agreement with this stance as every case has to be treated according to its circumstances."

From the evidence on records of two applicants admitting the offences that they were charged at disciplinary hearing, and evidence of DW1 Queen Leopard Mfupi, DW2, Seraphini Midana Lusala, and DW3 Grace Anthony Mgata, It is clear that, the two applicants committed the offence charged and proved not only at respondents disciplinary hearing, but also at CMA. Thus issue

number one is answered that, applicants evidence proved that, they committed the offence charged thus investigation was not necessary.

Second issue:- whether arbitrator considered applicant's evidence. Applicant representative submitted that Respondent was duty bound to bring important witnesses such as the officer in control and monitoring of the CCTV Camera to prove the alleged assault. This has prejudiced the rights of the applicants because arbitrator went on to decide the dispute while she still had some doubts as started at page 9 of the Award that **Sijabaini kama mlinzi anapaswa kutumia minimum force kwa mfanyakazi mwenzake au mwanafunzi.**

Respondent on the other hand, submitted that, there was enough evidence particularly on admission by applicants themselves in terms of disciplinary hearing minutes. Same is supported by evidence in the CMA proceedings.

This court perusal of the CMA proceedings shows that Wenda Adam Nyagawa in her evidence while being cross-examined by respondent counsel she admitted at page 45 of CMA typed proceedings as follows:-

S: Umesema kwenye mahojiano mlikuwa askari watatu

J: Ndiyo

S: Na ulisema alipofanya fujo ulimsukuma

J: Ndiyo

S: Katika maelezo yako wewe ulisemaje

J: Nilismea nilimslap

S: Mbona sasa unabadilisha

J: Sijabadilisha

S: Kwa hiyo kuslap na kusukuma ni sawa.

J: Sikupata neno zuri la kuandika

S: Wapi ulisema umemsukuma

J: Nilisema kwenye kikao cha nidhamu"

Further evidence is found under exhibit D4 CCTV Camera to stage in which is seen to push Joyce Mwamba (2nd applicant) while being cross examined she replied that, **"Ni yeye aliyeonekana kwenye CCTV Camera akimsukuma Queen."** Not only three witnesses from respondent proved that applicants misconducted themselves, but also evidence of the applicants in terms of exhibit **D7, D4** and CMA proceedings as quoted above. Equally respondent's employees Handbook Exhibit **D5** which the applicants through Exhibit **D6** admitted to have understood and undertook to adhere to, expressly prohibited assault against a fellow employee, quest, visitor, and so forth. Article 22 at page 27 of Exhibit **D5** provides acts that constitute gross misconduct, as follows:-

> **"Fights, physical assault, use of obscene or abusive language, singing, whistling and shouting unreasonably in the company premises."**

Also the collective Bargaining agreement entered between Serena Hotel and Conservation, Hotel, Domestic and Social Services and consultancy Workers Union (CHODAWU) –Exhibit A8 tendered by the applicants themselves, under the Disciplinary Code and Procedures (Annexture 1) Section D, at page 14 provides **first offences or misconducts regarded as gross misconducts for which an employee may be terminated**. Unit 9 provides ***"showing a behavior of threatening or intimidating, fighting or assaulting fellow employees, guests, customers, clients, or members of the Pubic"*** While unit 13 reads "***Offensive or unacceptable behavior towards*** *guests, clients,* ***fellow employees or members of the public."*** The agreement

between the Hotel and CHODAWU binds the applicants and they were well aware of the same. From the above, it is clear assault even if first offender is gross misconduct warranting termination as punishment. If therefore does not need investigation to determine the punishment. Its punishment is already provided under the law, employees handbook and collective Bargaining Agreement.

Wende 1st applicant admitted to have slapped the victim whereas Joyce admitted she is the one seen in the CCTV footage punishing the victim. Slapping and pushing are both acts amounting to physical assault which is prohibited under the law, employees' handbook and collective bargaining agreement. At the CMA the respondent lined three witnesses to support its case. If the applicant thought it was important to bring an officer in control and monitoring CCTV Camera as a witness they were at liberty to do so. They should have asked the CMA to summon such a witness which they did not. Each side had the right to bring witnesses to prove their case. Thus, arbitrator considered evidence lined up by both parties, to reach at the decision sought to be challenged, there was nothing like hearsay evidence.

Thus, it is not hearsay evidence that were relied by the Arbitrator in his decision, but rather, concreate evidence that proved accusation against the applicants. In totality arbitrator considered all the evidence including that of applicant themselves, and in the cause found that they committed the offence alleged.

Third issue as whether applicant are allowed to use Minimum force-in cause of their employment.

Applicant representative submitted that, arbitrator failed to consider that the nature of the applicant's duties among others was to take care of safety, security and protection of the employer's property, employee, customers and to arrest anyone who will be a suspect in the respondent's workplace. In performing the above task, use of minimum force is justified. It is not an assault and the arbitrator had no right to ignore this evidence.

Respondent on the other hand submitted that, applicants claims that while executing their duties the use of minimum force when apprehending an accused who is not cooperative is justified and does not amount to assault. They were not able to support this claim by any authority, neither a job description nor company policy. According to the evidence, there is nowhere Queen refused apprehension, she was cooperative. The fact that, they decided to take her to the CCTV room contrary to instructions given was their own wanting and what happened there is against employer's instructions. Wende slapping happened there and Joyce's pushing happened when she was taking Queen from CCTV.

Having heard both parties in this issue, it is worth revisiting evidence of DW2 Seraphini Midana Lusala Director of Marketing Serena Hotel at page 15 of CMA typed proceeding that read as follows:-

> **Taratibu zetu ni kwamba security wakihisi au mfanyakazi yoyote akihisi kuna kosa linatendeka wanapeleka vielelezo vile kwa Mkuu wa Idara husika au kwa Rasilimali watu ambao wanalichukua na kufanya upepelezi zaidi.**

Walalamikaji kwa kumpiga Queen walivunja sheria ya Kampuni inasema hairuhusiwi kupigana au kutumia nguvu au ku gossip kwa mfanyakazi mwenzako. Hii ipo katika ukurasa wa 27 na kitabu hicho hii ni employment hand book.

As correctly submitted by respondent counsel that should have been followed. Same is supported by 1st applicant Wende Adams Nyagawa testimony at paragraph 1 of page 6 of the award that:-

> Kwamba alimwambia Joice ampeleke Queen katika ofisi ya mahusiano kwamba alimpigia simu Mkuu wa Idara ya Queen ilia je asikilize lakini mkuu huyo alimwambia awaite watu wa Idara ya Mafunzo ambapo ndugu Peter Mhina alimwambia Queen arudishe sare za kazi au Queen arudi baada ya wiki tatu.

Equally in the proceedings dated November, 2016 Joyce testified that, she was instructed to take Queen to the changing room and escort her to the gate. Instead, they took her to CCTV room where they assaulted her, an act that was done at their own volition. On being cross examined by respondent counsel, Wende replied as follows.

S: **Kama msaidizi wa mafunzo alisema Queen akabadilishe nguo aende nyumbani wewe kwa nini ulimpeleka kwenye CCTV Play Back.**

J: Yule msaidizi wa mafunzo alipondoka mkuu wangu mkuu wa kitengo cha ulinzi aliniambia nimpeleke akaangalie kwa sababu Queen analalamika.

S: Unakubali kuwa mkuu wa kitendo hakukwambia wewe na mkuu wa kitego cha ulinzi mmpeleke kwenye CCTV Camera

J: Ndiyo hakutuambia.

From the above evidence of 1st applicant on admission, it is clear that, issue having been reported to the head of Training Department as required, they were instructed to take Queen's name tag and escort her to the gate. Applicants should have complied with this directives. Instead, at their wanting they took her to the CCTV room to assault her contrary to the instructions given. Had the applicants instructions given assault would not have happened and the question of minimum force does not arise. Thus, in totality, there is no truth on the use of minimum force.

Forth issue: Termination was excessive punishment.

Applicant representative submitted that, applicants could just be warned instead of being terminated. Applicants have right to work and the said right is conditional as provided under Article 22 of the constitution of the United Republic of Tanzania. ILO convention on termination of employment. Importance of protection of the right to work under the labour parlance and practice is so much advocated that termination of an employee must be substantively fair, with fair and valid reasons, regard being had to the fact that right to work as a component of human rights is so fundamental and cannot be easily and arbitrarily taken away.

This issue should not detain this court. It is as correctly argued by respondent counsel that, assault is one of the offence that warrant termination even if it is the first time. Exhibit A8 – the collective Bargaining agreement between Serena Hotel and Conservation, Hotel, Domestic and Social Services and Consultancy Workers Union (CHODAWU), under the Disciplinary Code and Procedures (Annexture1), section D, at page 14 provides ***first offences or misconducts regarded as gross misconducts for which and employee***

may be terminated. Unit 9 provides "Showing a behavior of threatening or intimidating, fighting or assaulting fellow employees, guests, customers, clients, or members of the public" which Unit 13 reads "Offensive or unacceptable behavior towards guests, clients, fellow employees or members of the public." The agreement between the Hotel and CHODAWU binds the applicants and they were well aware of the same. Additionally, exhibit D5 – Employees Handbook which the applicants through Exhibit D6 admitted to have understood and undertook to adhere to, expressly prohibited assault against a fellow employee, guest, visitor and so forth. Article 22, at page 27 of Exhibit D5 provides acts that constitute gross misconduct:

> ***"Fights, physical assault, use of obscene or abusive language, singing, whistling and shouting unreasonably in the company premises."***

Thus the offence applicant committed warranted termination, therefore there is nothing like excessiveness of punishment.

Firth issue is on hearing form being forged.

From applicant submission and respondent there is no dispute that exhibit D9 was received in court without any objection. More so, issue of forgery is a criminal case. Forgery need to be proved seriously in criminal court. Cannot just be alleged. Applicant cannot just allege without proof of the same. Applicant should have tendered different minutes to disapprove exhibit D9. The said exhibit was received without any objection. This court cannot say hearing disciplinary form were forged now without any proof of the same. Thus, hearing disciplinary form were not forged.

Sixth issue is on unpaid reliefs. Having heard both parties submission, it is clear that both Wende and Joyce admitted to have properly paid in their testimonies they said they were paid all their dues. The above holding is supported by the applicants evidence as shown below.

Looking at the typed proceedings particularly Wende's testimony of 28th October, 2016, she admitted during cross examination as follows:-

S: ***Ulilipwa nini?***

J: ***One-month notice, likizo na extra days off, severance pay nililipwa pia***

Joyce on the other hand, in the proceedings dated 1st November, 2016 she admitted during examination in chief the following:

"Nilipoachishwa kazi nililipwa, mshahara niliofanyia kazi, extra day off, one –month notice, siku za likizo na severance pay....."

With the above admissions, applicant's allegation that they were not paid terminal benefits are blatant lies. Moreover, ***Exhibit D11*** which is proof of final dues payments was admitted without objection and shows payments made. In the case of **Pangea Minerals Limited Vs. Ernest Wililo Revision No. 161 of 2013**(unreported) Wambura, J at page 5 held that;

" I believe it is a matter of practice that once a person has been paid his terminal benefits then he or she cannot re-open a claim against the same. .....In the case of BULYANKULU GOLD MINE LTD VS. CHAMA STANSLAUS NGELEJA Revision No. 12/2011 (unreported) the court indicated clearly and I quote:- " If the respondent has received the said payment then the matter should end...."

From the award, repatriation costs and substance were refused, first, for not being included in CMA From No. 1 and second because it was not proved. Applicant employment contracts showed they were recruited in Dar es Salaam and they so admitted. In the Award the CMA noted applicant's employment contract Exhibit A1 showed they were employed in Dar es Salaam and their address was also in Dar es Salaam. Further, in the proceedings dated 01st November, 2016 during cross examination, Joyce testified as follows:

S: Ni wapi uliposaini mkataba wa ajira.

J: Nilisaini mkataba Dar es Salaam.

From the above piece of evidence, it is clear that, applicant was recruited and signed contract at Dar es Salaam. Their employment came to an end in Dar es Salaam, thus repatriation costs cannot be paid under Section 43(1) of the Employment and Labour Relations Act No. 6 of 2004. Repatriation is only applicable where an employee's contract of employment is terminated at a place other than where the employee was recruited. From the above arguments, this ground lacks merits. In totality applicant case is devoid of merits. Accordingly dismissed.

Z.G.Muruke
JUDGE
08/06/2020

Judgment delivered in the presence of applicant, their personal representative Mr. Mgombozi from TUPSE, and David Chilo advocate for the respondent.

Z.G.Muruke
JUDGE
08/06/2020