IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 562 OF 2019

BETWEEN

LUCAS MKOLOMI ..... APPLICANT

VERSUS

HOLIDAY INN HOTEL ..... RESPONDENT

JUDGEMENT

Date of Last Order: 17/05/2021

Date of Judgement: 01/07/2021

Aboud, J.

The applicant, LUCAS MKOLOMI filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (herein CMA) delivered on 10/05/2019 by Hon. Nyagawa, P., Arbitrator in Labour Dispute No. CMA/DSM/ILA/R.578/2016/865. The application is made under section 91 (1) (a) (b), 91 (2) (a) 94 (1) (b) (i) of the Employment and Labour Relations Act [CAP 366 RE 2019] (herein referred as the Act); Rule 24 (1) 24 (2) (a) (b) (c) (d) (e) (f) 24 (3) (a) (b) (c) (d) of the Labour Court Rules GN. No. 106 of 2007 (herein referred as the Labour Court Rules).

Briefly, the applicant was employed by the respondent as a Security Officer on 07/10/2009, thereafter he was promoted to the position of Security Supervisor. On 07/06/2016 the applicant was terminated from the employment on the reason that he violated the companies' rules. It was alleged that, the applicant allowed the respondent's customers to enter in a restricted area, which is the basement floor and had sexual intercourse therein. Aggrieved by the termination the applicant referred the dispute at the CMA claiming for unfair termination. The CMA dismissed the applicant's claims. Again, being dissatisfied by the CMA's decision the applicant filed the present application.

The matter was argued by way of written submission. Mr. Kassim Said Massimbo, Trade Union representative was for the applicant while Mr. Omega Emmanuel Juael, Learned Counsel represented the respondent.

Arguing in support of the application Mr. Kassim Said Massimbo adopted the applicant's affidavit to form part of his submission. He submitted that, the Arbitrator was wrong to hold that the respondent had valid reason and observed fair stipulated procedures to terminate the applicant which was contrary to the evidence tendered by the

parties. It was strongly submitted that, the Arbitrator ignored evidence tendered by the parties, he added that, the applicant was terminated without being served with a charge sheet.

It was contended that, the witness (Sonia) was neither summoned to appear at the Disciplinary Hearing nor in the CMA as a principal witness to testify on the alleged incident. It was also stated that, the security officer on duty Mr. Gabnus Mathayo did not testify at the CMA as the one who was given Tshs. 20,000/= from the lady Sonia and that no any other evidence connecting the applicant to be seen in the questioned area.

It was further submitted that, the applicant was terminated on undisclosed and uncharged offence which was introduced in the termination letter contrary to the principles of natural justice. It was argued that, the Arbitrator erred in law and in fact for failure to analyse briefly in his award the substantive part which would have answered the disputing issues of whether there was fair reason to terminate the applicant's employment.

As regard to termination procedures it was submitted that, the same were not followed by the respondent in terminating the

applicant. It was further submitted that, the applicant was condemned unheard contrary to Article 13 (6) of the Constitution of the United Republic of Tanzania, 1977. It was strongly argued that, the applicant's termination was unfair both substantively and procedurally.

It was also submitted that, the award was delivered out of the prescribed time without any justifiable reason. It was stated that, the applicant filed the final submission on 29/03/2019, therefore the award was supposed to be delivered within 30 days that is on 28/04/2019, hence, the same was delivered after 69 days. He therefore prayed for the award to be set aside.

Responding to the application Mr. Omega Emmanuel Juael submitted that, the applicant was employed as a security officer whom at the material date he allowed the respondent's customers to enter in a restricted area, which is at basement floor and had sexual affairs therein contrary to hotel rules and moral values. It was stated that, the alleged place is open and is for management use and is strictly prohibited for an unauthorized person to enter therein.

It was also submitted that, before termination of employment contract the applicant was called for disciplinary hearing whereof, he was afforded with the right to defend his case. However, the remedy available was to terminate his employment contract. It was further submitted that, there is no reason adduced to fault the Arbitrator's award. It was strongly submitted that, the applicant was afforded a chance to defend his allegations but failed to convince the CMA to deliver an award on his favour.

It was further submitted that, all termination procedures were observed. It was stated that, the reasons and arguments from the applicant were not sufficient to prove his case. It was also argued that, the cited provisions of law are not relevant to the matter at hand. He therefore prayed for the application to be dismissed.

In rejoinder the applicant's representative reiterated his submission in chief. He strongly argued that, his charges were not proved because, the principal witness (Sonia) was not summoned to testify on the alleged incident. To cement his submission, he cited the case of **Paul Mahindi & Athumani Dimwe V. Williamson Diamond Ltd.**, Rev. No. 09/2014. He therefore prayed for the application to be allowed.

Having gone through parties' submissions, Labour laws, CMA and Court records with eyes of caution I find the court is called upon to determine the following legal issues; whether the respondent had valid reason to terminate the applicant's employment, whether the termination procedures were followed and what reliefs are the parties entitled.

I have noted the applicant's submission with the effect that, the award was delivered out of time. The CMA record shows the respondent's final submission was filed on 29/03/2019 and the award was delivered on 10/05/2019. I fully agree the award is supposed to be delivered within 30 days from the date of the closing submissions as correctly submitted by applicant's representative supported by section 88 (9) of the Act. This relevant provision is to the effect that:-

> *'Within thirty days of the conclusion of the arbitration proceedings, the arbitrator shall issue an award with reasons signed by the arbitrator.'*

In this case the award was delayed for almost 10 days. Now the question to be asked is what would be the remedy of this faulty? Is it to set aside the award and allow the arbitration proceeding to start afresh? The answer is no. It is understandable that the law has

to be followed as it is. In my view in some circumstances the court need to go further and examine whether the contravened provision occasioned any injustice to the parties? Though the award was delivered contrary to such provision of the law but no injustice was caused to the parties. In my view the essence of such provision is to limit Arbitrator's to deliver awards timely as justice delayed is justice denied. However, I do not find it reasonable to fault an award just because it was delivered out of the prescribed time because that will even necessitate more delays and cause inconvenience to the parties. Therefore, I find such reason to be insufficient to fault the Arbitrator's award in this case.

On the first issue as to whether there was valid reason to terminate the applicant's employment, it is on record that the applicant was terminated for allowing a customer to have sexual affairs in the restricted area and for failure to take proper handover as indicated in the termination letter (exhibit D2). As stated above the applicant's termination resulted from the incident that occurred on 23/04/2016 where the applicant was found guilty of allowing one of the customers to have sexual intercourse in the restricted area (basement). The question before this court is whether there is

sufficient evidence to prove the alleged misconduct committed by the applicant.

In his award, the Arbitrator was of the view that the respondent tendered sufficient evidence to prove the alleged misconduct. It is an established principle that in determining fairness of termination for misconduct of the employee, some factors have to be considered. This position is clearly provided under Rule 12 (1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. 42 of 2007 (herein GN 42 of 2007) which is to the effect that:-

> *'12. - (1) Any employer, arbitrator or judge who is required to decide as to termination for misconduct is unfair shall consider:-*
>
> *(a) whether or not the employee contravened a rule or standard regulating conduct relating to employment;*
>
> *(b) if the rule or standard was contravened, whether or not:-*
>
> *(i) it is reasonable;*
>
> *(ii) it is clear and unambiguous;*
>
> *(iii) the employee was aware of it, or could reasonably be expected to have been aware of it;*

(iv) it has been consistently applied by the employer; and

(v) termination is an appropriate sanction for contravening it'.

Coming back to the case at hand, it is true that the respondent did not tender the disciplinary code or the rule which was contravened by the applicant. However, in my view, even under normal circumstances no person is allowed to have sexual intercourse in an open place like a basement for it is considered as an act against moral values. Moreover, considering the nature of the respondent's business it is totally against morality to allow a customer to do such an indecent act. So, the applicant was reasonably expected to have been aware that such action was forbidden at the work place. The applicant alleged that there was no sufficient evidence to prove the alleged misconduct. At the disciplinary hearing, the respondent summoned the security officer who was on duty (Emmanuel Daudi Mageza - DW1) to testify on the incident occurred. The applicant did not challenge the testimony of such witness instead he insisted that the principal witness namely Sonia, (the person who was caught having sexual intercourse with the respondent's customer) was not summoned to testify on the same. In my view it was impracticable to

summon the alleged witness to testify on the circumstances of this case because the record shows that she was just a prostitute from the street. In my view, the security officers on duty was a key witnesses to testify on the alleged incident as he did.

I have noted the applicant's submission that, there is no evidence connecting him to the scene of crime. The record shows that on the fateful date the applicant was seen twice with the customer who had sexual affairs at the basement as testified by DW2. Even at the disciplinary hearing such evidence of DW2 was not disputed by the applicant that, the incidence occurred and he was on duty on such day.

Therefore, on the basis of the foregoing discussion it is my view that the respondent had a valid reason to terminate the applicant's employment. Considering that the applicant was the Security Officer in charge he was supposed to lead others by example but not allowing customers to do prohibited conducts. The applicant did not dispute the fact that the alleged incident occurred and he did not report the same which shows that, he conspired with the customers for the commission of such misconduct. In the circumstance, without any hesitation I say the Arbitrator's decision that there was valid

reason to terminate the applicant was based on the available evidence and laws applicable. Hence, the respondent had substantive reason to terminate the applicant.

On the second issue of procedural fairness in terminating the applicant, the applicant alleged that he was condemned unheard. In his submission the applicant's representative alleged that, the applicant was terminated on undisclosed charges and the charge sheet was not served to him before termination. The termination procedures on the ground of misconduct are provided under Rule 13 of GN. 42 of 2007. In this application it is on record that; on 02/06/2016 the applicant was served with a notice to attend disciplinary hearing (exhibit D1). In the relevant notice the applicant was informed with his charges and he was advised to bring his own witness at the disciplinary hearing but he did not do so. Therefore, I find the allegation that he was not served with the charge sheet is baseless and devoid of merit.

The applicant also alleged that he was terminated on unfound charges. This allegation is also not true because the misconducts charged with was the ones in which the applicant was terminated with. I have carefully examined the exhibits tendered

and observed that all the termination procedures as stipulated under Rule 13 of the Codes reads together with guideline 4 of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures were followed. The applicant was afforded with the right to be heard and he had a chance to cross examine the witness brought by the respondent both before the disciplinary hearing and at the CMA.

In the result I find that the application has no merit because the applicant's termination was both substantively and procedural fair. The CMA award is hereby upheld and the application is dismissed accordingly.

It is so ordered.

I.D. Aboud
JUDGE
01/07/2021