

**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION NO. 154 OF 2020**

**RESORT WORLD LIMITED..... APPLICANT**

**VERSUS**

**NATALIA M. SENGU..... RESPONDENT**

(From the decision Commission for Mediation & Arbitration of DSM at Ilala)

(Massay, A: Arbitrator)

dated 17<sup>th</sup> April 2020

in

**REF. No. CMA/DSM/ILALA/335/19/183**

**JUDGEMENT**

19<sup>th</sup> November & 24<sup>th</sup> December 2021

**Rwizile, J**

The applicant was an employer of the respondent. The relation between the parties went sour. As a result, on 6<sup>th</sup> April 2019, the applicant terminated the employment of the respondent for misconduct of absenteeism. Aggrieved by termination, the respondent filed a labour dispute No. CMA/DSM/ILALA/335/19/183, dated 17<sup>th</sup> April 2020. The arbitrator, issued an award in favour of the respondent. On 28<sup>th</sup> April 2020 applicant filed this application with a view of seeking this Court to revise the said award.

The application is supported by the affidavit of Mariam Abas Koja the applicant's Principal Officer.

Opposing the application, the counter affidavit of the respondent was filed.

When the application came for hearing, Mr. Abubakar Salim, learned advocate, appeared for the applicant, while Mr. Saulo Kusakala, learned advocate appeared for the respondent.

Arguing the application Mr. Salim submitted that before the commission three issues were framed, one was if there were valid reasons for termination. The evidence, according to him was given by Dw1 and Dw2 who proved the respondent did not attend her duty for over 13 days. She did not dispute the same as per exhibit D8, which are text messages showing she was absent. The extract messages from her phone were sent to the table leader, it was submitted. The learned advocate submitted further that, the use of text messages was not a formal communication to her employer. He stated that the table leader was not even called to testify. The commission, in his view did not take trouble to investigate who was that person. It was said, the alleged person is not among the management team.

It was argued, that the case of **Marim Mkonje v Commercial Printing and Packaging Ltd** Rev. No. 226 of 2006 as cited in the award at Page 4, was not considered while the decision of this court is binding on the commission. He added that the CMA disregarded the binding decision of this court. It was further submitted that the evidence shows that she was sick following her absence on duty on 17.01.2019, 14.02.2018 and 25.02.219. In the said dates, the same did not have any excuse from duty. In the view of the learned counsel this was not proving her case.

She did not prove at CMA whether she had a good cause for her nonattendance. For the reasons stated, the learned advocate was of the view that there was fair reason for termination.

Secondly Mr. Salim submitted that the respondent was afforded an opportunity of being heard as proved in exhibit D5-D10. According to him, the same was fairly heard and terminated in procedure. The learned advocate was clear that because termination was fair, the respondent ought to have no terminal benefits. Thus, he prayed for the award to be quashed.

Disputing the application Mr. Saulo submitted that the respondent has never failed to attend her duty for 13 days consecutively. He said, respondent did not admit doing so and it was not proved so. The learned



counsel argued that the respondent was sick, it was proved before CMA by evidence and it was not disputed that the Human Resource officer was informed. The applicant did not dispute the same. Therefore, it was not proved that she absented herself from duty for over 5 days.

It was further argued that since the matter was a breach of contract, therefore the commission was right to award the remaining period of the contract. It was correct to do so, the learned counsel added.

In the rejoinder the applicant's counsel reiterated his submission in chief but added that the respondent did not testify that she did not come to work for over 15 days consequently. He said, she admitted that she had a good reason for not attending his duty. The documents from hospital did according to him, not excuse her from duty. Indeed, there was no problem with hospital documents, Mr. Salim commented.

Lastly, he insisted that there is no evidence showing the text messages were sent to the Human Resource office informing the officer about her sickness. To him, the communication about sickness must be formal as it was in **Mariam Mnkonge's** case (Supra). Thus, he prayed, the award be quashed.

Having considered parties submissions and records subject of this Court, I am called upon to determine the following issues; -

- i) Whether there was a breach of employment contract?
- ii) To what reliefs parties are entitled to?

Dealing with first point of determination, there is no dispute that the applicant was charged for misconduct of absenteeism. Under rule 12(3) misconducts that may merit termination even if it is the first offence include, gross dishonesty and gross negligence. But under the Code of Good Practice, rule 12 (4), dismissal imposes a number of requirements on an employer who is contemplating dismissing an employee for misconduct. The employer should first consider factors such as the employee's length of service, his employment records, previous disciplinary record, as well as personal circumstances.

Having gone through the record like employment contract which is exhibit D1, clause 2 provides that the last new contract started on 1<sup>st</sup> January 2019. By that time, it is when the respondent started to be sick as evidenced by exhibit P4, the text messages print out, supported by exhibit P2 and P3 which are medical reports. The reports are clear and do not clear show what was the problem of the respondent. The reports do not show how serious she was to extent of failing to come to work.

It has been further shown that the text messages were sent to someone perhaps she was reporting to but they do not show or refer who was that

person. From the text messages, it shows, the respondent was going to work at her pleasure. She used to text, "*I am sick, not ok, or problems of rain, transport very hard*"

I agree with the applicant that despite communicating via text messages, which has not been proved that they were directed to the responsible officer. Still there is no evidence that the same means of communication was authorised and accepted. Further, it is as well shown that the dates he attended the hospital are not the dates she reported sickness by text messages.

I have to say here that absenteeism especially for several days as the respondent admitted in exhibit D6, D7 and D8 are clear that the respondent was not seriously taking her work.

The commission held that the respondent was sick and it was due to pregnancy problems. It further said, she tendered credible evidence to prove so from the hospital. I have gone through the documentary evidence tendered by her. It is clear to me that she indeed attended the hospital but the hospital did not certify the extent of her sickness and whether she was exempted from duty. Above all, she never attempted to seek for any permission from her supervisor. Being absent from duty is



not problem here, the problem is, was she permitted to do so and did she have valid and proved reasons.

In normal cases of pregnancy problems, she had to attend a clinic periodically. That is not something sudden that she would simply wake up in the morning and decide to go to the hospital.

She had to plan the same and have arrangement with her employer. That being the case, I am bound to hold that termination of the respondent was grounded on valid reasons. I therefore agree that the respondent did not prove her case. It ought to be dismissed. That being the case therefore, this application has merit. It is allowed. the award is set aside. I make no order as to costs.



  
**A.K Rwizile**

**JUDGE**

**24.12.2021**