IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

APPLICATION FOR REVISION NO. 149 OF 2020

KUNDUCHI BEACH HOTEL & RESORTS..... APPLICANT

VERSUS

BONIFACE GABRIEL..... RESPONDENT

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

(**William**: Arbitrator)

Dated 17th March 2020

in

Labour Dispute No. CMA/DSM/KIN/R.1341/17/118

JUDGEMENT

25th November & 8th December 2021

Rwizile, J

This application arises from the decision of Commission for Mediation and Arbitration (CMA) dated 17 day of March, 2020 in Dispute No. CMA/DSM/KIN/R.1341/17/118. The applicant was the employer of the respondent, since 6th October 2009 as a laundry attendant.

The respondent's employment ceased on 20th February 2017 after being terminated by his employer for the reason of misconduct of dishonesty and

negligence. Dissatisfied by termination, he referred the dispute to the Commission for Mediation and Arbitration which delivered the award in his favour. The applicant was not satisfied with the award hence this application. The Notice of application is supported by his affidavit. The issues for determination in the view of the applicant are as hereunder;

1. Whether or not an admission of the misconducts by the accused employee cannot justify termination of his/her employment.
2. Whether or not the first offence and/misconduct of an employee cannot justify termination of his/her employment contract.

Mr. Luoga, learned advocate represented the applicant, but the respondent obtained services of Mr. Mrema, learned advocate at the time of writing submissions.

In the written submissions, regarding the first issue, Mr. Luoga applicant's counsel submitted that the applicant's admission is in two exhibits, which are exhibit D1 and D2, which are the respondent's written explanation in reply to misconducts. He went on saying that applicant's admission was done two times. In the circumstances, he was of the view that his admission justifies employer's action of terminating the respondent's employment. Bolstering

his stand, he referred this Court to the case of **Levina Kasenene & Another v Chodawu Makao Makuu,** Revision No. 302 of 2010.

On the second issue, as to whether the first offence falling under misconduct may warrant termination, the applicant's counsel submitted that since all charges levelled against him were serious in nature as per rules, the same destroyed employer-employee relationship as there was no trust. Therefore, termination, was a proper sanction considering the nature of this case. For that reason, he was of the view, that the arbitrator's findings on disputed issues lacks legal stance. He thus prayed for the application to be granted.

Submitting for the respondent, Mr. Mrema argued that there is nowhere in the disciplinary hearing or at Commission's proceedings, it is shown that the respondent admitted the offences he was charged with. Therefore, this ground for revision lacks merit.

On the second ground of revision, Mr. Mrema argued that the arbitrator was right in his findings by directing herself to Rule 12(2) of the Employment and Labour Relations (Code of Good Practices) G.N No. 42 of 2007.

The same directs that for the first offence to attract termination, it must be grave to the extent of creating employment relationship intolerable. It was further averred that as the applicant failed to honor his legal duty of proving

those two offences against the respondent, it was contrary to section 110 and 112 of the TEA, [Cap 6 R.E 2019]. Therefore, the arbitrator was right by holding that termination was unfair. He prayed for the application to be dismissed.

After reading the submissions from both sides and the CMA's record this court finds that there are two major issues for determination. The issues are as follows;

i) Whether there was any offence admitted by the respondent after being charged for misconduct?

ii) Whether there was a valid and fair reason for terminating the respondent's employment?

In deciding the first issue, the applicant argued that the applicant's admission is proved two exhibits, D1 and D2, the respondent's written explanation in reply to misconducts level against him. Basing on the exhibits, he was of the view that the applicant admitted offences level against him.

On the other hand, the respondent maintained that nowhere in the disciplinary hearing or Commission proceedings which show that the respondent admitted to the offences he was charged with. Therefore, this ground of revision lacks merits.

On perusal of the record especially exhibit D1, the respondent's explanation, does not show the respondent admitted to be dishonest or negligence but the same justifies the respondent received a trouser from his co-employee namely Bimwisa as supported by exhibit D2. Again, exhibit D4 which is a hearing form, justifies that he misplaced clothes belonging to Mr. Kibwana in room 226. The same was rented by the customer namely Engineer Kibwana. I am of view therefore that, the evidence available reveal nothing about respondent's admission. Therefore, applicant's allegation is baseless.

In addressing second issue, as the issue of procedure was not disputed by the parties, then this Court has been placed with a duty of determining the validity and fairness of reason in terminating respondent's employment.

The termination is said to be fair, if it complies to section 37 of the Employment and Labour Relation Act, [Cap 366 R.E 2019] which provides that: -

"*Section 37 (2)*

A termination of employment by an employer is unfair if the employer fails to prove-

(a) that the reason for the 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.

(c) that the employment was terminated in accordance with a fair procedure"

In this matter the respondent was terminated for misconduct which are acts of negligence and gross dishonesty. This is in accordance with exhibit D5 a termination letter. Basing on nature of applicant's business which needs high level of customer care, in serving customers the same was supposed to be observed by the respondent. Inspection on whether the alleged customer was still in room 226 was a crucial fact. Therefore, the applicant acted negligently by misplacing clothes to the same room while the customer has been transferred to another room. However, the same doesn't amount to gross negligence as there was a likelihood of confusing rooms as it was testified by the respondent in exhibit D4 which is a disciplinarily hearing form. That the said customer whose clothes were misplaced was staying in room 226 before shifting to another room and the same was not disputed by the applicant.

Regarding gross dishonesty, the evidence available reveal that the trouser alleged to be lost was not used by the employee, like exhibit D2, which shows

that the trouser alleged to be taken by the respondent was not needed. Apart from that, the respondent's good will was justified when he admitted to take the trouser. He was ready to return the same as per exhibit D1. On such prevailing circumstances, it is unwise for someone to believe that the respondent's act amounted to gross dishonesty.

From the above findings, this Court directed itself to Rule 12 (3) (a) and (d) of the Employment and Labour Relations (Code of Good Practice) GN 42/2007 to satisfy itself as to whether there was a valid and fair reason in terminating respondent. The Rule provides that; -

"Rule 12(3)

The acts which may justify termination are-

(a) gross dishonesty;

(d) gross negligence.

From the above cited provision, a misconduct is a good ground for termination if it amounts to gross dishonesty or gross negligence.

In the instant matter there is no doubt that the applicant was terminated for gross dishonesty and negligence as per exhibit D5, his termination letter. However, this court differs with arbitrator's findings in one aspect as there was negligence on the part of the respondent in performing his duty. But the

same does not amount to gross negligence, however the applicant's allegation of gross dishonesty has neither been proven nor existed

Therefore, as the respondent acts does not fall under Rule 12 (3) (a) and (d) of the Employment and Labour Relations (Code of Good Practice) GN 42 of 2007, I am of the view that termination of the respondent's employment was not a proper sanction. In such circumstance, I have to say that termination was unfair. Regarding reliefs, I find no need to fault the award. Therefore, the application is dismissed, each party to take care of its own costs.

A.K. Rwizile

JUDGE

8.12. 2021