IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 125 OF 2020

FERUZI HANZURUNI ....APPLICANT

AND

SUPPER SERVICE CENTRE CO. LTD ....RESPONDENT

JUDGMENT

Date of Last Order: 9/08/2021

Date of Judgment: 27/08/2021

B. E. K. MGANGA, J.

The applicant was employed by the respondent under permanent terms. In January 2001 he was holding the position of sales assistance but later on he was promoted to the position of branch manager. In 2016 his duty station was at Masaki area within the district of Ilala. On 23 December 2016, his employment was terminated by the respondent on ground that he was absent from work without permission and that caused the respondent to suffer loss. The applicant was aggrieved by the decision of termination as a result, on 3rd January 2017 he filed a complaint at the Commission for Mediation and Arbitration hereinafter referred to as CMA challenging termination of his employment on ground that it was unfair. At

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CMA, the applicant prayed for reinstatement, payment of twelve (12) months salary for unfair termination, declaration that termination was unfair, payment of salaries and other benefits from the date of termination to reinstatement date. On 17th February 2020, Hon. Msina. H.H., Arbitrator delivered an award holding that termination of employment the applicant was both substantively and procedurally fair. Being aggrieved by the said award, on 27th March, 2020, the applicant filed this revision application on ground that:-

(i) That, the Commission erred by relying on the allegations of abscondment or absence from job as a reason for termination while the record of attendance at work were not tendered as exhibit before the Commission to justify the said allegation.

(ii) That the Commission erred by relying on the allegations of abscondment or absence from job as a reason for termination without evaluating the evidence to the effect that the Applicant was at work at all material times save when he was removed from office by the Respondent upon handing over the office to PW2 at the instruction of the Respondent.

(iii) That the Commission erred in awarding a one month salary in lieu of notice without considering that there was a no valid reason for termination and that the procedures for termination were adhered to.

(iv) That the Commission failed to consider that since the applicant was not accorded with the right to be heard during the disciplinary hearing by the Disciplinary Committee and then its ruling was tainted with material irregularities.

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The Notice of Application in support of the application was supported by an affidavit of the Applicant. On the other hand, the application was resisted by the respondent through the counter affidavit affirmed to by Amani Juma, the Principal officer of the respondent. When the application was called for hearing, the applicant enjoyed the service of Ngemera Sixbert advacote while the respondent enjoyed the service of Saulo Kusakala Advocate. Both counsels adopted affidavit and counter affidavit in their respect submissions.

Arguing the application for the applicant, Mr. Sixbert, submitted that there were no documents that were tendered at CMA to prove that the applicant was absent from work without reasons. That the respondent failed to tender attendance register to prove absence of the applicant from work. He submitted that, the arbitrator erred to base his decision on absence from work to hold that termination was fair and without evaluating evidence adduced. He submitted further that the applicant, at all time, was at work save for the days he was removed from office and ordered by the respondent to hand over the office to Sudi Rashid (Pw2). He argued that the applicant did not abscond from work, but he was forced to hand over the office. Counsel insisted that abscondment of the applicant from work was taken to run from the date he was ordered to hand over the office to

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PW2. Counsel pressed on me to hold that the applicant did not abscond from work and that termination was unfair.

Mr. Kusakala, counsel for the respondent submitted that it was proved that applicant absconded from work for five months. He argued that there was no need of tendering documents while there was no dispute that applicant absconded. He concluded that respondent was right to terminate employment of the applicant based on abscondment from work and that the arbitrator did not err as abscondment is a valid reason for termination.

In rejoinder, counsel for the applicant submitted that in Exh. R3 applicant disputed the allegation of abscondment. That reading exh. R3 and R8 together, one has to conclude that applicant did not abscond. He submitted further that abscondment was not properly established as persons who were supposed to attend disciplinary proceedings were not called.

Having heard submissions of both counsels and examined CMA record, I am of the settled mind that, the complaint relating to absence of documents to prove abscondment of the applicant is, but without substance. With due respect to counsel for the applicant, it is not a requirement of the law that every fact in dispute has to be proved by

documentary evidence. Oral evidence can, depending on each case and the fact in issue, sufficiently prove the issue in controversy. The applicant himself while on cross examination admitted that he did not go at work for five months allegedly after being so ordered by his boss one Nassoro Seif. He admitted also that he had no documentary to that effect, but that the said order was given in presence of Soud Rashid Mohamed (Pw2). Insistence by counsel for the applicant that it was crucial for documentary exhibits to be tendered as a proof of absence of the applicant from work on one hand, and on the other, that he was ordered not to attend at work but in also absence of documentary exhibit, was, in view, an invitation to the court to apply double standard. This being a court of law, with the main duty of doing justice to all, come rain, come sun, that invitation cannot be accepted. It is illogical to invite the court to disbelieve evidence of the respondent for reasons that no documentary exhibit was not tendered, but on the other hand, asking the court to believe him that he was ordered not to work without also tendering a documentary exhibit. The rule is, whatever you don't want to be done onto you, should also not be done to others. The applicant has raised the issue of absence of documentary exhibit in forgetfulness that the same may also apply against him. Whatever the case, the evidence of Pw2 who took over office duties

from the applicant testified the applicant told him that he (applicant) was told to report at headquarters. He was therefore prevented from going at work as he alleged. This was also confirmed by the applicant while under cross examination when he testified;-

> "...***Mkurugenzi aliniambia nikabidhi ofisi kwa Soud Rashid niripoti makao makuu mpaka hapo pesa itakapopatikana.***"

The evidence relating to abscondment from office was adduced by DW and D2. There is no reason as to why PW2 who was called by the applicant himself as his witness should not be believed. Taking into consideration evidence of PW2 and the applicant's evidence quoted above, I am therefore contentedly that the arbitrator did not err to hold that the applicant absconded from work. In terms of guideline 9(1) of the Employment and Labour Relations (Code of Good Practice), GN. No. 42 of 2007, absence from work for five days without permission or acceptable reason is a serious misconduct warranting to termination. In the application at hand, applicant was absent from work for more than five months. It is my opinion that much as employees needs protection, the same also need to be extended to employers otherwise their business will be affected by none attendance at work by employees who, in turn, will demand salaries of which they have not worked for. This may lead to unfair enrichment by

employees to the detriment of their employers. I am of the view that, courts are not there to enrich employees who, internationally breach terms of their employment or employers who use their economic powers to frustrate employees by hiring and firing at their will. Therefore, the courts are there to balance the situation by doing justice to all as I hereby do.

Counsel for the applicant further submitted that, during disciplinary hearing, the applicant was not afforded fair hearing as he was not afforded right to cross examine the respondent rather, he was only asked questions. He argued that the respondent did not bring witnesses to prove allegations that were levelled against the applicant. He insisted that, disciplinary proceedings Form (exh. R8) that was tendered by the respondent, shows that the respondent did not present his case at all, but it is only the applicant who was asked questions. Counsel cited the cases of ***Elia Kasalile and 17 others v. Institute of Social Works, Civil Application No. 187/18 of 2018***, CAT (unreported) and ***Tanzania Telecommunications Company Ltd v. Augustine Kibandu, Revision No. 122 of 2009***, High court (unreported) and invited the court to hold that the applicant was denied right to be heard at the disciplinary Committee. He invited me to hold that termination of the applicant was unfair and invoke the provisions of section 40(10(a) of the Employment

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and Labour relations Act, [Cap. 366 R.E. 2019] and order reinstatement of the applicant and further hold that applicant is entitled to payment of 12 months for unfair termination.

These arguments were resisted to by counsel for the respondent who submitted that the applicant was afforded right to be heard as he was asked to defend the allegations against him (exh. R1) and defended himself (exh. R3) and thereafter called to appear before the disciplinary committee for disciplinary proceedings (exh. R8) that was admitted without objection. Counsel for respondent concluded that termination was fair substantively and procedurally. He submitted that the cases of ***Tanzania Telecommunications Company Ltd*** and that of ***Kasamile*** cited by counsel for the applicant are distinguishable as in the said cases, it was conceded that procedure was not adhered to while it is not the case in the application at hand. In alternative, he submitted that if, this court finds that termination was unfair, then, reinstatement is not a good option, because applicant was terminated five years ago as such; his position cannot be open for all that long period.

In rejoinder, counsel for the applicant conceded that applicant was not denied right to call witnesses but he insisted that termination was unfair and prayed the award be revised and an order of reinstatement be issued.

I should right away point out that the cases of ***Elia Kasalile*** *and that of* ***Tanzania Telecommunications Company Ltd*** are distinguishable as correctly submitted by counsel for the respondent. In Kasamile's case, no notice was served to the employee at all and there was no disciplinary hearing and in the ***Tanzania Telecommunications Company Ltd*** it was conceded that the procedure was flowed unlike the application at hand. The applicant admitted in his evidence that he was served with allegation and required to give explanations or reasons as to why disciplinary should not be taken against him. He admitted further that he was called to attend at the disciplinary hearing and was given an option to be accompanied with the representative. The complaint of the applicant in his evidence was that disciplinary hearing was supposed to be conducted by people who are not working in the same employment. I think this complaint is unjustified. I have gone through Exh. R1, a letter requiring the applicant to answer allegations relating to abscondment, the response thereof by the applicant (Exh. R4), a letter relating to allegation of causing loss of TZS 17,330,500 to his employer ***(Exh. R3)*** and the response thereof (exh. R6) together

with disciplinary hearing form (Exh. R8) and form an opinion that the procedure was followed. it is my settled opinion that he was afforded right to a fair hearing. In CMA form No. 1, the applicant indicated that there was no hearing before his termination and that he was not afforded a right to representation. This is untrue as it can be discerned from his evidence and that of the respondent that there was hearing and that he was afforded right to be heard. I therefore hold that termination was fair both on substantive and procedurally. Having so held, the complaint relating to payment of one month salary in lieu of notice lacks legs on which to stand. I therefore proceed to dismiss it. The complaint that evidences was not evaluated by the arbitrator is without substance as the arbitrator evaluated the same and reached to the fair conclusion. The same is hereby also dismissed.

For the foregoing, I hereby uphold the decision of the arbitrator that termination was fair both substantively as the reasons for termination was valid and procedurally and proceed to dismiss the application without costs.

It is so ordered.

B.E.K. MGANGA

JUDGE

27/08/2021