IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 276 OF 2020

BETWEEN

PIZZA AND SPICE LIMITED.....APPLICANT

VERSUS

HELLEN MRAMU.....RESPONDENT

JUDGMENT

Date of Last Order: 26/07/2021

Date of Judgment: 06/08/2021

I. ARUFANI, J.

It is on record that on 18th August, 2017 the respondent, Hellen Mramu was employed by the applicant as a cook. She worked until 1st May, 2018 when she alleged, she was unfairly terminated by the applicant. Being resentful with the termination, the respondent referred the dispute to TUICO and thereafter to the CMA.

The matter was heard by the CMA and the decision was made in favour of the respondent. The Arbitrator awarded the respondent 12 months' salary as compensation, 1 month salary in lieu of notice and ordered the certificate of service be issued to the respondent. The applicant was aggrieved by the award issued by the CMA and

filed the present application in this court to challenge the award basing on the following grounds:-

i. That, the Arbitrator erred in law and in fact by being bias in evaluation of the evidence and ignored the evidence adduced by the applicant without any reason.

ii. Whether it is legally correct for the Arbitrator to consider the dispute was preferred by the complainant challenging unfair termination contrary to section 38(1) of the Employment and Labour Relations Act, CAP 366 RE 2004.

iii. Whether it was proper for the Arbitrator to ignore and failed to consider documentary evidence tendered by the applicant and admitted by the Commission.

The application was supported by the affidavit of Robert Lukindo, the applicant's Principal Officer and it was challenged by the respondent's counter affidavit. During hearing of the matter both parties were represented by advocates. While the applicant was represented by Ms. Victoria Mgonja, learned advocate, the respondent was represented by Mr. Prosper Mrema, learned advocate.

The counsel for the applicant prayed to abandon the second ground of revision and jointly submitted on the remaining grounds. She stated that, the Arbitrator ignored the evidence and exhibits tendered by the applicant before the CMA. She said the evidence of DW1 was to the effect that, on 1st May, 2018 the applicant quarrelled with her fellow employees and on the same date she referred the matter to TUICO where the applicant was summoned.

She argued that, after the respondent took the summons from TUICO to the applicant they sat and discussed the matter and entered into an agreement whereby the respondent was given a loan of Tshs. 200,000/= as a condition for the respondent to resume to her work as indicated in exhibit D3 (loan form). The counsel for the applicant argued that, the stated fact shows the respondent was never terminated from her employment by the applicant as she alleged.

It is the submission by the counsel for the applicant that, the termination letter tendered before the CMA by the respondent and admitted in the matter as exhibit A1 was forged as it is neither in headed paper nor has the applicant's stamp. She said that issue was raised at the CMA but it was ignored by the Arbitrator. She thus

prayed the court to revise the award of the CMA and set it aside for being bias.

Responding to the submission made by the counsel for the applicant, the counsel for the respondent prayed to adopt the respondent's counter affidavit to form part of his submission. He argued that, the arbitrator was not bias as she considered the evidence adduced by both parties as reflected in the award dated 20th April, 2020. He said there is no any issue raised by the applicant at the CMA when exhibit A1 (termination letter) was tendered by the respondent.

The counsel for the respondent refuted the argument by the counsel for the applicant that the respondent was not terminated by the applicant. He referred the court to the first paragraph of the applicant's opening statement filed before the CMA on 9th August, 2018 where the applicant admitted that the respondent was terminated from her employment. He said there is no any agreement signed by the parties on 1st May, 2018, and said the respondent neither resumed her work nor took any loan from the applicant.

He asserted that, the Arbitrator considered the evidence from both parties and arrived to a just and fair decision. The counsel for the respondent prayed the court to dismissal the application. In her rejoinder the counsel for the applicant reiterated her submission in chief and insisted her prayer that, the CMA's award be revised and be set aside.

After considering the rival submission from both sides and after going through the record of the CMA the court has found that, as the respondent alleged she was unfairly terminated from her employment by the applicant and the applicant contended the respondent was not terminated from her employment but she decided to quit herself from her employment and went to lodge the dispute before the CMA, the court is required to see whether the Arbitrator properly evaluated the evidence adduced before the CMA in determining whether the respondent was terminated from her employment or she quitted herself from the employment.

If it will be found she was terminated by the applicant from her employment the court is required to be satisfied termination of her employment was made on valid reason and fair procedures for termination of employment of an employee provided under the law

were properly observed. The above raised issues are based on section 37 (2) of the Employment and Labour Relations Act and the holding made by this court in the case of **Tanzania Railways Limited V. Mwinjuma Said Semkiwa**, [2015] LCCD 3 where it was held inter alia that, it is the established principle that for the termination of employment to be considered fair it should be based on valid reason and fair procedure.

The court has also found that, a party casted with a duty to prove termination of employment of an employee was made on valid and fair reason and the fair procedure was followed as provided under rule 9 (3) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 is the employer. The employer is required to prove on balance of probabilities that termination of employment of an employee was made on fair reason and fair procedure was observed.

While being guided by the position of the law stated hereinabove the court has found in relation to the first issue that, the record of the CMA shows Christopher Mumanyi who testified for the applicant as DW1 told the CMA that, the respondent was not terminated from her employment by the applicant. He said the

respondent quitted herself from her employment after quarrelling with her fellow employees who were blaming her for not cooking their food properly and went to complain before the TUICO office that she had been terminated from her employment.

After considering the above stated evidence of DW1 and the submission made to this court by the counsel for the applicant and after going through the record of the CMA the court has found the evidence of DW1 did not manage to prove the respondent quitted herself from the employment and she was not terminated from her employment by the applicant. The court has arrived to the above finding after seeing that, as rightly argued by the counsel for the respondent the evidence of DW1 which was required to prove the respondent was not terminated from her employment by the applicant is clouded with several doubts which make his evidence to be seeing it has not proved on balance of probability that the respondent was not terminated from her employment by the applicant.

The court has arrived to the stated finding after seeing that, what was stated before the CMA by DW1 is quite different from what was stated in the opening statement of the applicant filed in the CMA

on 9th August, 2018. The court has found that, while DW1 stated before the CMA and the counsel for the applicant argued before this court that the respondent was not terminated from her employment by the applicant but the opening statement of the applicant states the respondent was terminated from her employment by the applicant after entering into an agreement of terminating her employment following the hardship the applicant was facing in its business.

Although rule 24 (2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. No. 67 of 2007 states the opening statement of a matter before the CMA is not evidence but as provided under subrule 4 of the same rule the opening statements of the parties in a matter are used to assist Arbitrators in framing issues to be determined in a matter. To the view of this court the opening statement of a matter before the CMA is not expected to differ with the evidence adduced before the CMA to the extent stated hereinabove. If the opening statement is not tallying with the evidence adduced before the CMA it will not only mislead Arbitrators in framing proper issues to be determined in a matter but also it will

contradict the evidence adduced to prove issues required to be determined in a matter.

The court has also found that, despite the fact that DW1 and the counsel for the applicant stated the respondent was not terminated from her employment by the applicant but the respondent produced before the CMA the letter which was admitted in the matter as exhibit A1 which shows the applicant was terminated from her employment from 1st May, 2018 on ground of poor performance of work.

Although the counsel for the applicant challenged the letter by stating it was forged as it was neither made on headed paper nor stamped by the applicant's stamp but the court has found that, as rightly argued by the counsel for the respondent the proceedings of the CMA is not showing there is any objection raised by the applicant side when the letter was being admitted in the matter as exhibit A1 to show the letter was not issued by the applicant and it was forged. That makes the court to find the argument by the counsel for the applicant that the issue of forgery of the letter of termination of the respondent's employment was raised before the CMA but ignored is

not supported by the record of the CMA and that caused the court to find that argument is an afterthought.

The court has considered another argument made by the counsel for the applicant that, after the respondent served the applicant with a summons from TUICO they discussed the matter and reached an agreement that the respondent would have continued with her work and she was given a loan of Tshs. 200,000/= to solve her problems as a condition of withdrawing the matter she had referred to TUICO but find that, there is no evidence adduced before the CMA to support the evidence of DW1 and the argument made before this court by the counsel for the applicant that the parties discussed the matter and entered into the alleged agreement.

In the premises the court has failed to see any reality in the evidence given by DW1 and argument made to the court by the counsel for the applicant that the respondent was not terminated from her employment but she decided to quit herself from the employment. The court has arrived to the stated finding after failing to comprehend what caused the applicant to decide to enter into the alleged agreement and gave the respondent the alleged loan if the applicant had not terminated the employment of the respondent. To

the view of this court it is nothing else than what was stated before the CMA by the respondent that, she referred the matter to TUICO and later on to the CMA after being terminated from her employment by the applicant.

The court has also gone through the documentary evidence adduced before the CMA to prove the parties entered into the agreement for the respondent to resume to her work and she was granted loan which the counsel for the applicant argued were not considered by the Arbitrator but find it is not true that the documentary evidence adduced before the CMA by the applicant were not considered by the Arbitrator. The court has arrived to the stated finding after seeing the award of the CMA shows all the documentary exhibits tendered before the CMA by DW1 and admitted in the matter as exhibits D1, D2 and D3 were extensively considered by the Arbitrator.

The court has found that, even if it would have been said the stated documentary evidence were not considered by the Arbitrator but still the court cannot use them to alter the award issued by the CMA. This is because there is nowhere indicated in the said exhibits that the applicant and the respondents entered into an agreement

with the respondent that she would have returned to the work after her employment being terminated.

The court has also found that, even the loan of Tshs. 200,000/= alleged was given to the respondent through exhibit D3 is not indicated in the said exhibit that the respondent was given and received the alleged loan. What is indicted in the said exhibit is an insertion of the figure Tshs 200,000/= in the exhibit as a loan without insertion of anything else to show the alleged loan was given and received by the respondent.

To the view of this court and as provided under section 110 of the Evidence Act, Cap 6 R.E 2019 the applicant was required to adduce sufficient evidence before the CMA to prove to the standard required by the law that, the respondent was not terminated from her employment by the applicant but she quitted herself from her employment and resumed to the work after entering into the alleged agreement.

That make the court to find that, the argument by the counsel for the applicant that the Arbitrator failed to evaluated the evidence adduced before the CMA to find the respondent was not terminated

from her employment but she decided to quit herself from her employment after quarrelling with her fellow employees has no merit as is not supported by the evidence adduced before the CMA by the applicant. As a result, the court has found the Arbitrator did not error in finding the respondent did not quit herself from her employment but she was unfairly terminated from her employment by the applicant.

The court has also found that, as rightly found by the Arbitrator the fair procedures for terminating employment of the respondent was not complied with. The court has arrived to the above finding after seeing that, the respondent stated before the CMA that she was called by Kapinga who was the applicant's Assistant Manager and handed to her exhibit A1 which states the respondent was terminated from her employment from 1st May, 2018 because of poor performance of her work.

If that was the reason for termination of the employment of the respondent, the court has found the procedures provided under Rule 18 (1) to (9) of GN. No. 42 of 2007 were supposed to be complied with before termination of employment of the respondent. The court has found that, as the procedures provided in the above cited rule for

termination of employment of an employee on a ground of poor work performance were not complied with it cannot be said the respondent was fairly terminated from her employment. As the respondent was unfairly terminated from her employment the court has found she is entitled to the remedies provided under section 40 of the Employment and Labour Relations Act which the court has found were properly analysed and calculated by the Arbitrator to the extent of making the court to fail to see any reason moving it to make any alteration in the impugned award.

In the light of all what I have stated hereinabove the court has found the applicant has not managed to satisfy it there is any material error made by the Arbitrator in the determination of the dispute which the applicant is praying the court to revise its award. Consequently, the application filed in this court by the applicant is hereby dismissed in its entirety for want of merit. It is so ordered.

Dated at Dar es Salaam this 6th day of August, 2021.

I. ARUFANI

JUDGE

06/08/2021

Court:

Judgment delivered today 6th day of August, 2021 in the absence of the applicant and her counsel who is well aware the matter is coming for judgment today as the counsel for the applicant was present in the court when the judgment date was set. The applicant is present in person.

Right of appeal to the Court of Appeal if fully explained.

I. ARUFANI

JUDGE

06/08/2021