IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT DAR ES SALAAM

REVISION NO. 971 OF 2019

(Originating from labour dispute No. CMA/DSM/KIN/R. 1453/17/14) BETWEEN

MICHAEL ANDREW_____APPLICANT

VERSUS

DOUGH WORKS_____RESPONDENT

JUDGMENT

Date of Last Order: 25/06/2021

Date of Judgment: 19/8/2021

T.N Mwenegoha, J.

This Application emanates from the Commission of Mediation and Arbitration (CMA) Award issued against complaint no. CMA/DSM/KIN/R.1453/17/18 dated 04th November, 2019 by Honorable Faraja Johnson Lemurua, Arbitrator.

The Applicant is applying for revision after being aggrieved by the said Award advancing the following grounds:

a) That the Honorable Arbitrator erred in law and in fact for failure to rule that the Respondent had no valid and fair reasons for terminating the Applicant from employment.
b) That the Honorable Arbitrator erred in law and fact for failure to rule that the Respondent had terminated the service of the Applicant without following the required procedures.
c) That the Honorable Arbitrator erred in law and in fact in deciding the matter without adducing reasons for the same in all the issued framed.

For the grounds advanced by the applicant, he prayed for following reliefs;

a) That this honourable court be pleased to set aside the arbitrator award made against the Applicant by the Commission for Mediation and Arbitration of at Dar es Salaam, Honorable Faraja, Arbitrator, in labour dispute Number CMA/DSM/KIN/R.1453/17/18 dated on 04th November, 2019, and having analyzed the evidence on record and the circumstance of this case be pleased to order a fair compensation to the Applicant as damages for unfair termination.
b) Any other order that this court may deems fit and just to grant.

It is noted that in their written submission, the applicants decided to drop the third ground and hence are left with two grounds.

Submitting on the first issue, that the honorable arbitrator erred in law and fact for failure to rule that the respondent had no valid and fair reasons for

terminating the applicant from employment, it was the applicant's submission that the respondent has not approved any valid and fair reasons for terminating the employment of the applicant according to the evidence on record the applicant was terminated from employment basing on allegations of negative negligence and failure to follow working procedures for not issuing a receipt of 6500 Tanzania shillings to one of the respondent's customer.

The applicant argues that the respondent made such an inference after just observing the movement of the customer, however, he alleges that the customer was never called to testify before the disciplinary hearing committee and that a CCTV footage was not tendered to prove the allegations.

The applicant argues further that even if the applicant did not issue the receipt as alleged that alone could not have legally justified termination of the applicant. He further contended that there were no loss that was occasioned as the amount was featured in their account. The respondent added that first offence of an employee shall not justify termination unless it is proved that the misconduct is serious. He argued furthermore that the respondent has not tendered any policy or procedure that is clear regarding the alleged misconduct by the applicant. The respondent had tender his code of conduct that was admitted as exhibit D1 but the same is not clear on the alleged misconduct and its penalty thereto. It was the applicant's argument therefore that the termination was not legally justified and pray that the application be allowed.

In arguing on the second ground, the applicant submitted that he was not terminated as per the required procedures as according to the evidence on record the respondent did not conduct any investigation as to whether the applicant did commit the alleged misconduct or not and whether there's a ground conduct a hearing or not. The applicant alleged that the respondent just summoned the applicant to the disciplinary hearing without even charging him for the alleged misconduct. It was his contention therefore that the respondent did not follow the required procedures before terminating the applicant from employment.

In replying to the applicant's submission, it was the respondent's contention on the first ground that it is on record that, Defence Witness number one (DW 1) one Emmanuel Njitango testified that he is working at Pizza Hut, the respondent's work place as a supervisor whose duties among others are to counter check whether the menu is correct, whether orders made by customers are being pressed and inserted into the system, to supervise the kitchen and services rendered to the customers. That DW 1 testified further that on 27th day of November 2017 at around 9 p.m he and the applicant who was a cashier were at work. He was doing inventory in the kitchen and witnessed a pizza being made without seeing the order in the system, when he asked the person who was making that pizza that person told him that the Applicant gave him instructions to do so. That DW 1 also told the CMA that when he asked for the explanations the applicant told him that he pressed the order but DW 1 didn't find any receipts.

The respondent submitted further that apart from that, in his evidence the applicant told the CMA that as per the rules of procedure which are applicable at Pizza Hut, once the order has been placed it has to be inserted and seen in the system whereby two receipts are issued. One receipt goes to the Kitchen for the preparation of the food whilst the other one is given to the customer as proof of payment of the food that has been ordered.

Respondent added that in cross examination, the applicant himself had admitted the facts not only that he did not press the order and inserted it in the system as per the rules of procedure but also he did not issue receipts. As a corroboration to the fact that the order was not pressed Exhibit D-5, the applicant's appeal letter in which he is clearly admitting that fact is very relevant in this case.

The respondent further argued that it is also on record that, Defence Witness number two (DW 2) Ms. Susane Fajilan, training manager at the respondent's work place, Pizza Hut testified to CMA that the applicant committed two misconducts of dishonesty and breach of trust contrary to the respondent's code of conduct (hereinafter to be referred to as the Code) which was tendered and admitted by the CMA as Exhibit D-1. The respondent further told this Court that DW2 specifically had referred the CMA to Clause 1.20 and 1.78 of the Code which provides for the misconducts committed by and led to termination of the applicant in this matter.

He stated that Clause 1.78 of the Code stipulates that, "every employment relationship is governed by the common law principle of trust and confidence.

An employee who acts in any manner which materially destroys this relationship of trust and confidence may be disciplined in accordance with this clause of code of conduct. If trust and confidence has been found to be broken, it will be deemed that the employment relationship has become intolerable."

He also stated that Clause 1.20 of the Code provides that, "Any person who tells lies or cheats or acts in an unscrupulous and/or deceptive manner in an attempt to enrich or advance himself/herself and/or others, at the expense of the Company, or to circumvent any of the Company's rules, regulations, policies and/or procedures, will be considered to have acted in a dishonest manner. Disciplinary action will be taken against the Employee up to and including dismissal.

It was the contention of the respondent that the applicant in this matter was charged of being dishonesty and untrustworthy contrary to Clause No. 1.20 and 1.78 of the Code. He further argued that this is supported by Rule 12 (3) of G.N No. 42 of 2007 which states that, "the acts which may justify termination are-

(a) gross dishonesty;

(b) willful damage to property;

(c) willful endangering the safety of others;

(d) gross negligence;

(e) assault on a co-employee, supplier, customer or a member of the family of, and any person associated with, the employer; and

(f) gross insubordination."

The respondent also referred to **Rule 12 (1) of The Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007** (*hereinafter to be referred to as G.N. No. 42 of 2007*) which states that, *"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."

It is respondent's further contention that the charges leveled against the applicant in this matter constitute a valid and fair reason(s) for his termination since they are directly reflected on sub- rule (1) (b) (i)-(v) of Rule 12 of G.N No. 42 of 2007.

The respondent argued that these rules had been contravened by the applicant and that the applicant himself admitted in cross-examination that he

recognized the Code and the purpose it serves, i.e regulating the conducts of the employees at the respondent's work place. He added that the applicant in this matter was charged of being dishonesty and untrustworthy contrary to Clause No. 1.20 and 1.78 of the Code.

The respondent told this Court that applicant admitted that he did not press the order and issue receipts on 27th day of November, 2017 as required by the rules of procedure applicable at the Respondent's work place, the Pizza Hut. That this admission was made at the level of appeal against the recommendations of the Disciplinary Hearing Committee, instead of the applicant disclosing the at the time when he was asked for explanation by his Supervisor, DW 1.

It was further argument of the respondent that dishonesty and untrustworthy are very serious misconducts in any kind of employment relationship because any employment relationship is based on trust and confidence, especially as per nature of the applicant's job as a cashier.

It was the respondent's submission that the applicant therefore did not act in good faith towards the employer and was thus not promoting the employer's business in that regard. Hence, the employer lost faith and trust in him as a result of his gross dishonesty and hence, this constitute a valid and fair reason for termination of his employment contract.

The respondent referred to this Court a South African case of Council for

Scientific and Industrial Research Vs. Fijen [1996] 17 ILJ 18 (A) at 26 D-E [Per Harns J.A] aruing that thee South African Labour Laws are in parimateria with our Labour Laws. He provided that in the said case the South Africa Court of Appeal held [Per Harns J.A]:

> *".....it is well established that the relationship between the employer and employee is in essence one of trust and confidence and that at common law, conduct clearly inconsistent therewith entitled the "innocent part" to cancel the agreement....it does seem to me that, in our law, it is not necessary to work with the concept of an implied term. The duties referred to simply flow naturalia contractus..."*

In addressing the second ground that, the Honourable Arbitrator erred in law and in fact for failure to rule that the respondent had terminated the service of the applicant without following the required procedures, it was the respondent's arguments that the applicant's allegations contained in CMA Form No. 1 is that he was not afforded opportunity to be heard before the decision to terminated his employment and that no investigation was conducted by the respondent prior to the disciplinary hearing are not true.

He argued that the testimonies of all the witnesses including that of the applicant himself shows the contrary. DW1 told the CMA that he demanded explanations from the applicant as to why pizza was being prepared without seeing the order pressed in the system and the receipt issued to the Chef in the Kitchen and the to the customer. The answer

was simply that the order was pressed in the system and the receipt was duly issued to the customer. However, the applicant could not explain as to where was receipt that was supposed to be issued to the person who was ordered by the applicant to prepare the pizza.

That a failure by the applicant to give reasonable and/or satisfactory explanations to the management of the respondent regarding that incident led to an invitation of the applicant to appear before the disciplinary hearing committee as evidenced by Exhibit D-3 and D-4 respectively.

It was respondent's submission therefore that termination was fair and prayed for this Court to reject this application for it is hopelessly unfounded.

The Court has considered carefully the arguments advanced by both parties and records provided. The Court found itself with one issue to determine; that is whether the applicant's termination was substantively and procedurally fair.

In analyzing the arguments of the applicant, it is clear that he is arguing on unfair termination hence his being aggrieved by the Arbitral award which held that the termination was fair.

It is evident from the record that dispute arose regarding the employee's conduct of authorizing preparation of pizza without pressing an order in the system and the receipt issued to the Chef and the to the customer. Evidence tendered in this Court revealed that the allegations are true. The question is whether such allegations are enough to cause termination of employment.

This question was very well answered by the arbitrator in the Award, where at page 10 he went forward and analysed whether dishonest is a valid reason for termination. In doing so he quoted Le Roux and Van Niekerk, The South African Law of Dismissal (1994) where at page 131 it states as follow:

> *"any form of dishonest conduct comprises the necessary relationship of trust between employer and employee and will generally warrant dismissal. Dishonest conduct by definition implies an element of intent. It is necessary therefore, to demonstrate some deception on the part of the employee which may assume a positive form for example by making a false statement or representation, or a negative form, for example by failing to disclose an interest in a corporate entity with which the employer does business"*

The Arbitrator, at page 11 of the Award went further and quoted John Grogan, in Workplace Law, seventh edition at page 154 where it is stated :

> "dishonesty in the employment context can take various forms including theft, fraud and other forms of devious conduct."

At the same page, the Arbitrator quoting Andre Van Niekerk, Unfair dismissal, second edition at page 43 it was stated:

> *"dishonesty manifests itself in the number of forms including providing false information, non-disclosure of information, pilfering, theft and fraud. The fiduciary duty owed by an employee to the employer generally renders any dishonest conduct a material breach of the employment contract justifying summary dismissal."*

In quoting John Grogan's work at page 12 of the Award it is stated:

> *"Dishonesty is a generic term embracing all forms of conduct involving deception on the part of employees. In employment law, a premium is placed on honesty because conduct involving moral turpitude by employees damages the trust relationship on which the contract is founded. The dishonest conduct of employees need not therefore amount to a criminal offense. It can consist of an act or omission which an employer is morally entitled to expect an employee to perform or not to perform. This may include withholding information from the employer, making a false statement or misrepresentation with intention of deceiving the employer."*

I am as well going to borrow a case of National Microfinance Bank Plc v Aizack Amos Mwampulule, Labour Division, Lindi, Revision No. 6 of 2013 as quoted at page 13 of the Award. Of interest for is Mipawa J's holding that

> "The fact that a certain rule is not covered in employer's disciplinary code or in any other documentation dealing with employees conduct does not prevent the employer from acting against the employee who was committed a misconduct because ..... employer's disciplinary powers are well developed in the terms implied in the employment of contract. Even if nothing is put into express terms of contract, the employer's disciplinary control is carefully preserved in the employee's duty to obey as an implied term of the contract."

At this juncture, I will go back to the question whether allegations facing the applicant are enough to cause termination of employment. The applicant was charged by the respondent for being dishonesty and untrustworthy contrary to Clause No. 1.20 and 1.78 of the Code.

Rule 12 (4) (a) of The Employment and Labour Relations (Code of Good Practice) Rules, G.N.No. 42 of 2007 (G.N. No. 42 of 2007) states that, in determining whether or not termination is the appropriate sanction, the employer should consider:

> "the seriousness of the misconduct in the light of the nature of the job and the circumstances in which it occurred, health and safety, and the likelihood of repetition..."

The Applicant admitted that he did not press the order and issue receipts on 27th day of November, 2017 as required by the rules of procedure applicable at the Respondent's work place, the Pizza Hut.

The above analysis clearly reveals that a conduct that involves moral turpitude damages the trust relationship on which the contract is founded. It is noted that in the appeal letter (Exhibit D5), the applicant confirm to have forgotten to press the order of the said Pizza of 6500/- in the system and issuing of the receipt to the chef and customer. However, the same was disputed before, hence raising mistrust. The applicant's conduct, whether by doing or not doing, amounts to dishonesty and untrustworthy conduct. Dishonesty and untrustworthy are serious misconducts as argued above. Hence a valid reason for termination. I am in agreement with the Arbitrator that the termination was fair.

In responding to the fairness of the termination procedure, the records clearly shows through exhibit D3 and D4 that the applicant was summoned before the disciplinary committee. This Court is satisfied therefore that termination procedure was followed.

Section 37 (2) of The Employment and Labour Relations Act, No. 6 of 2004 stipulates that

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

(a)that the reason for 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, and

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

It is the view of this Court that the termination was fair and in accordance with a fair procedure. On the basis of the discussion above, the CMA was right to hold that termination was fair.

I hereby uphold the CMA's decision and dismiss this application accordingly.

No order as to costs.

It is so ordered.

T. N. Mwenegoha

JUDGE

19/08/2021