

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 276 OF 2022

(Arising from an Award issued on 5/8/2022 by Hon. Lucia Chrisantus Chacha, Arbitrator, in Labour dispute No. CMA/DSM/KIN/495/20/288 at Kinondoni)

EDSON NDIBALEMA.....APPLICANT

VERSUS

THE ATRIUMS HOTEL.....RESPONDENT

JUDGMENT

*Date of last Order: 25/10/2022
Date of Judgment: 11/11/2022*

B. E. K. Mganga, J.

Applicant was employed by the respondent hotel as Human Resources officer(HR). His employment commenced on 7thJanuary 2017 at the monthly salary of TZS 400,000/= . It is alleged that on 2nd April 2020, applicant and his girl friend occupied a room in the respondent hotel and spent a night there and that, on 3rd April 2020, they were served with breakfast, in fact, they enjoyed the breakfast, but left without paying. It is alleged further that, acts of the applicant violated rules of the respondent and led relationship between the two into enmity.

On 19th June 2020, applicant filed Labour dispute No. CMA/DSM/KIN/495/20/288 before the Commission for Mediation and

Arbitration (CMA) at Kinondoni complaining that he was unfairly terminated. In the referral Form (CMA F1), applicant indicated that he was claiming to be paid TZS 42,310,000/= being 48 months' salary compensation, one month salary in lieu of notice, severance pay, unpaid leave, salary for the days worked for in the last month he was in office, general damages and be issued with a certificate. Applicant indicated further in the said CMA F1 on fairness of procedure, that he was denied right to be heard. On fairness of reason, he indicated that no reason for termination of his employment was given by the respondent.

On 5th August 2022, Hon. Lucia Chrisantus Chacha, Arbitrator, having heard evidence of both sides, issued an award that applicant absconded from duty after being summoned to appear before the disciplinary committee and dismissed the dispute filed by the applicant. Applicant was aggrieved with the said award hence this application for revision. In his affidavit in support of the application, applicant raised the following issues: -

- 1. Whether termination was substantively and procedurally fair.*
- 2. Whether arbitrator evaluated evidence of the parties.*

Respondent filed the Counter affidavit sworn by Veneranda Ephraim to resist the application.

When the application was called on for hearing, applicant appeared in person and argued his case while respondent enjoyed the service of Melania Mashaguri, learned Advocate.

Arguing his application, applicant submitted that his employment with the respondent commenced on 05th February 2015 and that the same was for unspecified period. He went on that, on 12th June 2020, respondent terminated his employment. Applicant submitted further that, respondent was making NSSF deductions from applicant's monthly salary without remitting contributions to NSSF and that respondent did not give him NSSF membership card. He went on that denial of NSSF card and failure to remit contributions to NSSF sparked enmity and finally led to termination of his employment. He concluded that, termination of his employment was unfair and prayed the application be allowed by granting reliefs prayed in the CMA F1.

In resiting the application, Ms. Mashaguri, learned counsel for the respondent submitted that applicant was never terminated, but he absconded for more than five days. She went on that, applicant was summoned to attend the disciplinary hearing but he did not. Briefly as she was, she prayed that the application be dismissed for want of merit.

In rejoinder, applicant submitted that, it was alleged by the respondent that he committed misconducts and further that he was served with a notice to attend the disciplinary hearing while already he has filed the dispute at CMA. He added that, he was terminated on 12th June 2021 and filed the dispute at CMA on 18th June 2021.

I have examined the CMA record and considered submissions of the parties and find that the main issue is whether, applicant's employment was terminated by the respondent or not. In disposing of this application, I am duty bound to evaluate evidence adduced by the parties at CMA because it was complained by the applicant that the arbitrator did not evaluate evidence.

It was evidence of Agness Paul(DW1) that on 2th April 2020, applicant spent a night enjoying love with his girl friend in a room of the respondent and in the morning, applicant and his girlfriend enjoyed breakfast but did not pay for the room or the breakfast. The same story was given by Irene Seti Mwakitega (DW2) in her evidence. DW2 testified further that, applicant was served with the notice to attend the disciplinary hearing and notice to show cause (exh. D1 collectively)but did not respond or attend, instead, applicant stopped attending at work and filed the dispute at CMA. DW2 testified further that, applicant was not terminated, rather, he is the one who stopped attending at work. The same evidence that applicant stopped attending at work was given by Diana Gofrey Minja (DW3).

In his evidence, Edson Ndibalema(PW1), applicant testified that on 12th June 2020 one Diana called him over the phone inquiring whether, he (applicant) prayed to be supplied with NSSF card or not and that from there, the said Diana informed him that his employment has been terminated. Applicant tendered NSSF Registration as exhibit P2, contract of employment

as exhibit P1 and Sms messages (handwritten) allegedly, sent by Veneranda Kavishe and Diana Minja from mobile phone No. +255 765035069 and +255 655026463 respectively as exhibit P3. During cross examination, applicant (PW1) is recorded testifying as follows :-

"Nilipopewa barua kujieleza na ya kikao cha nidhamu nilikataa nisingeweza kujieleza na kuja hicho kikao kwani mlalamikiwa asingetenda haki sikufanya kosa. Niliachishwa kazi."

It is my considered opinion that employment of the applicant was not terminated, rather, upon being served with both a notice to show cause and a notice attend disciplinary hearing, he rushed to file the dispute at CMA as testified by DW1 and confirmed by his evidence quoted hereinabove. It was evidence of DW1 that applicant after being served with both notice to show cause and to attend disciplinary hearing stopped attending at work. I find that evidence as credible as corroborated by applicant's own evidence while under cross examination. It is my view that, the complaint by the applicant in CMA F1 that he was terminated without being afforded right to be heard is unjustifiable. From the fore going, it is clear that he refused to attend the disciplinary hearing where he was supposed to be heard. The argument that respondent could not do justice to him in the said disciplinary hearing was just imaginary. Applicant was supposed to go and hear the result thereof and thereafter, if aggrieved, file the dispute at CMA. In my view, applicant denied

himself an opportunity to be heard and cannot be heard now complaining that he was not heard.

That said and done, I hereby uphold CMA award and dismiss this application for want of merit.

Dated in Dar es Salaam on this 11th November 2022.



B. E. K. Mganga
JUDGE

Judgment delivered on this 11th November 2022 in chambers in the presence of Edson Ndibalema, Applicant and Hassan Mwemba, Advocate holding brief of Melania Mashaguri, Advocate for the Respondent.



B. E. K. Mganga
JUDGE