IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 458 OF 2021

(Originating from the award issued on 22/10/2021 by Hon. Kiangi, N, Arbitrator in Labour dispute No. CMA/DSM/KIN/513/19/243 at Kinondoni)

BETWEEN

ANGELINA SAFE .....APPLICANT

AND

MANAGING DIRECTOR, MARKIM CHEMICALS CO. LTD..... RESPONDENT

JUDGMENT

Date of last order: 20/04/2022
Date of judgment 20/5/2022

B. E. K. Mganga, J.

It is alleged that on 1st February 2010, respondent employed the applicant as Receptionist cum Secretary. In April 2019, respondent changed duties of the applicant from Receptionist cum Secretary to Store Keeping. It is further said that, few days after applicant was transferred to store department with store keeping duties, loss was reported, as a result, applicant and her fellow employees were arrested and detained at police custody, but later bailed out. It is alleged further that; applicant and her fellow co-employees were required to report monthly at Oysterbay police. It is also alleged that, due to existence of

a criminal case that was pending at police, respondent stopped to pay salary to the applicant and thereafter called the applicant to the disciplinary hearing committee and terminated her employment. Applicant was aggrieved by both non-payment of her salary by the respondent and termination of her employment, as a result, on 30th July 2019 she filed labour dispute No. Labour dispute No. CMA/DSM/KIN/513/19/243 before the Commission for Mediation and Arbitration hereinafter referred to as CMA at Kinondoni claiming to be paid TZS 30,621,538 for unfair termination.

On 22nd October 2021, Hon. Kiangi, N, arbitrator, having heard evidence of the applicant and after respondent has failed to enter appearance and adduce evidence, closed the case for the respondent and issued an award in favour of the respondent. In the said award, the arbitrator held that there was no termination of employment of the applicant and further that applicant referred the dispute at CMA prematurely.

Further aggrieved by the said award, applicant filed this application seeking the court to revise the said award. In the affidavit in support of the application, applicant raised thirteen (13) grounds namely: -

1. *That the arbitrator erred in law and in fact by failure to consider the evidence adduced by the applicant to have an oral contract.*
2. *That the arbitrator erred in law and in fact by not holding that an act of the employer holding salaries does not amount to constructive termination.*
3. *That the arbitrator erred in law and in fact by failure to consider that an outcome of the Disciplinary hearing being announced out of five working days invalidated the decision.*
4. *That the arbitrator erred in law and in fact by failure to consider that there is a pending criminal case against the applicant.*
5. *That the arbitrator erred in law and in fact by failure to consider that the applicant is no longer at work without any relief as to his employment entitlements provided to him (sic) rather than an appeal.*
6. *That the arbitrator erred in law and in fact by failure to consider that there is no any disciplinary action taken to him as they knew her whereabouts.*
7. *That the arbitrator erred in law and in fact by failure to consider that there is no evidence or defense presented by the respondent.*
8. *That the arbitrator erred in law and in fact by failure to consider that there has never been any proof as to whether the employee is still under employment and the award issued does not provide justice as to which both parties are entitled to while it was not dispute that applicant was orally terminated.*
9. *That the arbitrator erred to hold that the dispute was filed prematurely.*
10. *That the arbitrator erred in law and in fact by not going into the merit of the dispute while respondent withheld salary for two months' hence constructive termination.*
11. *That the arbitrator erred in law and in fact by failure to consider that applicant filed a list of documents with the notice to produce which*

required the respondent to produce original documents, but the arbitrator did not order production of the original rather held that applicant failed to prove her case.

12. *That the arbitrator erred in law and in fact by holding that applicant did not prove that she was terminated on 30th June 2019.*

13. *That the arbitrator erred in law and in fact by considering the undisputed evidence of the applicant as hearsay.*

In resisting the application, respondent filed the counter affidavit sworn by Peter Joseph Lyimo, her learned counsel.

By consent of the parties the application was disposed by way of written submissions. Applicant enjoyed the service of Mr. Anthony Nyiwala Kalinga, her personal representative while respondent enjoyed the service of Peter Joseph Lyimo, her learned counsel.

In his written submission Mr. Kalinga on behalf of the applicant submitted that, the arbitrator erred in law and fact for not considering evidence of the applicant that both her employment and termination was done orally. He went on that; arbitrator did not consider that respondent withheld salary of the applicant for two months' that amounted to constructive termination. Mr. Kalinga submitted that constructive termination started when respondent transferred applicant from Receptionist cum Secretary position to Store Keeping in April 2019 orally without taking her to induction or training relating to store

keeping. He added that, this amounted to unfair treatment of the applicant and cited Rule 7(2)(b) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007. He went on that, as a sign of ill motive, respondent denies that there was no criminal case pending at police. Mr. Kaling submitted further that, since there was a criminal case pending at police, respondent was barred to take disciplinary action against the applicant and cited the case of ***Chai Bora Limited v. Allan Telly Mtukula, Revision No. 38 of 2017*** to support his argument.

Mr. Kalinga submitted further that, the arbitrator erred in law and fact by failure to consider that the Disciplinary hearing was invalid because the Chairperson of the disciplinary hearing committee failed to pronounce the outcome within five days as provided for under Rule 9 of the Guideline for Disciplinary Incapacity and Incompatibility Policy Procedures made under GN. No. 42 of 2007 (supra). He went on that the disciplinary hearing was conducted on 9th May 2019 and the outcome was issued on 22nd June 2019 showing that it was dated 17th May 2019.

Mr. Kalinga also submitted that, arbitrator erred for not holding that there was termination of employment that was done orally and

further that, arbitrator erred to hold that there is no proof that applicant was terminated on 30th June 2019.

Mr. Lyimo, counsel for the respondent responding to submissions made on behalf of the applicant conceded that the outcome of the disciplinary hearing was issued out of the five days provided for under Rule 12(9) of GN. No. 42 of 2007 (supra). Counsel was quick to submit that the law is silent as to the effect of delivering the outcome of the disciplinary hearing committee out of the five days provided. Counsel went on that the disciplinary hearing committee was not final because applicant had a room of appealing hence there was no termination of her employment. Counsel submitted further that, instead of appealing, applicant filed the dispute at CMA while there was no final termination order. He concluded that the dispute was filed prematurely.

Counsel for the respondent submitted further that, arbitrator was justified to hold that applicant did not prove that she was terminated on 30th June 2019. He went on that, in her evidence, applicant testified that she was terminated on 30th June 2019 as she indicated in CMA F1, but under cross examination, she stated that she had no evidence to prove that she was terminated on that date. Counsel for the respondent

submitted further that, in final submissions, it was submitted on behalf of the applicant that applicant was terminated on 27th May 2019.

In failure of the arbitrator to consider that there is a pending criminal case, counsel for the respondent submitted that there is no pending criminal case against the applicant.

I have carefully examined evidence of Angelina Iddi Safe (PW1) and submissions of the parties in this application to reach a sound decision. In her evidence, PW1 testified that, her employment relationship with the respondent started on 1st February 2010 when she was employed orally at the salary of TZS 400,000/=net to the position of Secretary. She testified further that, on 2nd March 2019, she was directed by Bahia, her in charge, to perform store duties because one Steve was taking leave. It is evidence of PW1 that, on 6th April 2019 she took inventory and found some items valued at TZS 2,000,000 missing and reported the incidence to Mr. Bahia. That, on the following day, herself and other four people who were working in the store, were summoned, and taken to Oysterbay Police on allegation that they stole property valued TZS 5,000,000/=. She testified further that, they remained in police lock up for three days until when they were bailed out. That, she continued to attend at work, but her boss told her to go

back home. PW1 testified further that, on 15th April 2019, Mr. Urio, the accountant of the respondent, refused to pay her advanced salary on ground that it was an order of their boss (the respondent). PW1 went on that, while continuing to attend at work, she was served with disciplinary charge (exh. P1) and later served with the notice of the disciplinary hearing committee (exh. P3). That, on 9th May 2019, she attended the disciplinary hearing committee and that on the same date Mr. Urio, the accountant, refused to pay her salary on ground that it was an order of the respondent. She testified further that; non-payment of salary amounted to constructive termination. She also testified that; on 22nd June 2019, she was served with the minutes of the disciplinary hearing committee (exh. P5 and P6) and that a criminal case is pending. While under cross examination, she maintained that she was served with the minutes of the disciplinary hearing on 22nd June 2019 and admitted that she did not appeal against the discission of the disciplinary hearing committee. She testified further that, employer had not served her with termination letter and that she was told orally to go back at home.

It is worth to point out that no evidence was adduced at CMA on behalf of the respondent as she failed to appear after closure of the applicant's case and did not call witness until when the arbitrator closed

her case. I should also point that, there has not been any attempt by the respondent after closure of her case for non-appearance to ensure that she can be allowed to call witnesses. That being the position, the only evidence available is that of the applicant that remains to be unchallenged. The arbitrator was supposed to consider that evidence and deliver an award. It is worth further to point out that, most of the grounds raised in the affidavit in support of the application are irrelevant because what was complained of are not reflected in the award. I will therefore not consider them because the arbitrator is being criticized for most things that is not reflected in the award.

In the award, the arbitrator held that during cross examination applicant (PW1) admitted that there is no proof that she was terminated on 30th June 2019. With due respect to the arbitrator, I have carefully read evidence of the applicant (PW1) and find that nowhere in her evidence she stated so. The arbitrator imported words that were not spoken by the applicant. In fact, in her evidence while under cross examination, applicant (PW1) testified that she had evidence to show that respondent terminated her employment. She admitted that she was not served with a termination letter. She refuted the claim that she absconded from employment. It was further submitted by counsel for

the respondent that in final submissions at CMA, it was submitted on behalf of the applicant that she was terminated on 27th May 2019 and that it was not proved that applicant was terminated on 30th June 2019. With due respect to counsel for the respondent, submissions are not evidence but merely elaborations of what the parties considered how strong or how weak the case of the other side is. Therefore, submissions cannot be considered as evidence for the purposes of proving or disproving the opponent's case.

I have read the so-called minutes of the disciplinary hearing Committee (exhibit P6) and find that the chairperson was Bakari Juma, who according to the award at page 7, respondent tried to call him as a witness, but the arbitrator found that the same person had appeared in the same proceedings as an advocate for the respondent. The said Bakari Juma is not a Senior Manager. Therefore, the disciplinary hearing was conducted in violation of paragraph 4(1) of the Guideline for Disciplinary Incapacity and Incompatibility Policy Procedures made under GN. No. 42 of 2007 (supra) that requires a Senior Manager to be appointed as chairperson of the disciplinary hearing Committee. Not only that but also, it is not shown in the said exhibit P6 that applicant was afforded right to cross examine witnesses for the respondent. It is

also not shown as who presented the case on behalf of the respondent in the disciplinary hearing committee. More so, it is not shown the names of persons who attended the said disciplinary hearing. In terms of subparagraph 7 of paragraph 4 of the said Guideline, the chairperson is required to decide on balance of probability whether an employee is guilty or not and sub paragraph 8 of paragraph 4 of the said Guideline requires a penalty to be issued after considering mitigation and aggravating factors. Exhibit P6 does not show that applicant was afforded right to state her mitigation and the respondent to state aggravating factors, if any. The chairperson of the disciplinary hearing committee merely made proposal that the disciplinary authority should take measures in accordance with Rule 12(3)(a) of GN. No. 42 of 2007 after finding the applicant guilty. In my view, this is wrong. An employee is supposed to know exactly the verdict, which is why, applicant stated in her evidence that she remained confused as she did not know what exactly the decision was. Yet, the chairperson of the disciplinary hearing committee purported to give right to the applicant to appeal within five days. In my view, this was a mockery, because how could she appeal against unclear decision. Appealing for what punishment? From the cited Rule, applicant was terminated for gross dishonest.

It was argued by counsel for the respondent that, applicant filed the dispute prior to appealing or prior to a final decision for termination being made by the respondent. In my view, the arbitrator had a similar notion, which is why, she held that the dispute was filed prematurely. With due respect, that position is not correct. In terms of Rule 10 of the Labour Institutions (Mediation and Arbitration) Rules GN. No. 64 of 2007, a dispute relating to fairness of termination can be filed thirty days from either date of termination or the date the employer made a final decision to terminate or uphold the decision to terminate. In my view, it is not mandatory for the employee to wait until the appeal is dismissed.

The charge that was laid against the applicant is gross dishonest contrary to Rule 12(3)(a) of GN. No. 42 of 2007 (supra). The particulars of the said charger are that, on 6th April 2019, it was discovered that property of the respondent valued at TZS 287,046.80 were missing from the store. The particulars did not show that the applicant is responsible for the missing of the said property or that has connection with it. In the alleged minutes of the disciplinary hearing (exh. P6) it was recorded that Bahiyya, who is shown to have testified on behalf of the respondent in the disciplinary hearing committee as DW1, informed the disciplinary

hearing committee that, missing of the said property was reported to him by the applicant. The said exhibit P6 shows further that, applicant was told by one Hassan Bhongo about missing property, but the said Hassan Bhongo did not disclose to the respondent. It was concluded in the said exhibit P6 that, the said Hassan Bhongo knew how the said property went missing but did not disclose until when he informed the applicant who decided to report to Bahiyya. In my view, considering what was recorded in the disciplinary hearing committee, there was no valid reason for termination of employment of the applicant leave alone of sending her to police where she was locked in, for three days and thereafter served with disciplinary charge. I am of that view because, applicant acted as informer to the respondent as to what has happened. In my view, she found herself in hot soup simply because she disclosed missing of the property. The likelihood is that the person to whom applicant reported, might have been involved and therefore, as a way of silencing her, it was decided that she should be removed from the office. Without speculations, and in considering the evidence of the applicant that was uncontradicted by any other evidence, I hold that there was no valid reason for termination. In short, termination of her employment was both substantively and procedurally unfair.

Since applicant was unfairly terminated, I hereby revise the award and order that applicant is entitled to be paid TZS 4,800,000/= as 12 months' compensation for unfair termination, TZS 400,000/= being one month salary in lieu of notice, TZS 400,000/= being annual leave pay and TZS 969,230.77 being severance pay because she worked for nine years. In total, the respondent is hereby ordered to pay TZS 6,569,230.77.

Dated at Dar es salaam this 20th May 2022

B. E. K. Mganga
JUDGE

Judgment delivered on this 20th May 2022 in the presence of Anthony Kalinga, the personal representative of the applicant and but in the absence of the respondent.

B. E. K. Mganga
JUDGE