IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 102 OF 2021

BETWEEN

CONSOLATA LEKULE ..... APPLICANT

VERSUS

PCCI TANZANIA LIMITED ..... RESPONDENT

JUDGEMENT

S.M. MAGHIMBI, J.

The application beforehand is lodged under the provisions of Section 91(1)(a) and (b), Section.91(2)(b) and (c), Section.91(4)(a),(b) and Section.94(1)(b)(i) of Employment and Labour Relations Act, No. 6 R.E 2019 ("ELRA") and Rule 24(1), 24(2)(a),(b),(c),(d),(e) and (f) and 24(3)(a),(b),(c), and (d), and Rule 28(1)(c)(d) and (e) of the Labour Court Rules, 2007 ("The Rules"). The applicant is moving the court for orders in the following terms.

(1) That this honourable Court be pleased to call for records, revise and set aside the whole Award of the CMA on dispute No. CMA/DSM/KIN/259/2020/20 by Hon. Mayale, D, Arbitrator dated

9th day of February, 2021, on the grounds set forth on the attached affidavit in support of this application.

(2) That this honourable court be pleased to determine the dispute in the manner it considers appropriate.

(3) That this honourable court be pleased to give any other relief it deems fit and just to grant.

The application was supported by an affidavit of the Applicant dated 17/03/2021. The application was disposed by way of written submissions. The applicant's submissions were drawn and filed by Mr. Adolf Temba, learned advocate representing the applicant while the respondent's submissions were drawn and filed by Mr. Waisaka Waisaka, learned advocate representing the respondent.

Brief background of the dispute is that the applicant was employed by the respondent as customer Service Agent on a fixed term contract of one year renewable where the last contract was starting 07th January 2020 and expected to end January 2021. On the 03rd March 2020 the applicant was terminated from employment on ground of absenteeism, a termination which she alleges to be unfair both substantively and procedurally. The applicant moved the CMA to make a finding that her termination was

unfair, a move which was in vain hence the current revision application on the following grounds:

(i) The arbitrator erred in laws and fact by failure to put into consideration that the Applicant was not charged.

(ii) The arbitrator erred in law by failure to consider no any exhibit was tendered to prove the reason/absenteeism for termination therefore reached the erroneous decision based on mere words.

(iii) The arbitrator erred in law and fact by failure to consider that the DW1 and DW2 admitted that there was no any proof to proved the reasons for termination.

(iv) The honourable arbitrator failed to put into considerations that the duty to prove reasons for termination lies to the respondent instead of the advocate for the applicant.

On those grounds the applicant tabled the following issues for determination by this court:

1. Whether applicant was terminated fairly substantively and procedural

2. Whether applicants are entitle for compensation as provided under form No. 1
3. Any other remedies.

I will start with the fairness of the reasons for the termination of the applicant. In his submissions to support the application, Mr. Temba submitted that the arbitrator failed to take into consideration that the duty to prove reasons for termination lies to the respondent instead of the applicant. He argued that in his decision particularly on page 13, the arbitrator emphasized that the procedure for termination was not adhered to without putting much efforts on the reasons of termination contrary to Section 39 of the ELRA. That the respondent failed to prove that the reason for termination was fair as no exhibit was tendered to prove the misconduct of abseentism. That DW2 admitted that there was no any proof of charges admitted at the CMA or disciplinary hearing.

Mr. Temba submitted further that the termination letter (EXD8) show that the applicant was terminated on the ground of misconduct arguing that misconduct does not justify termination; rather it is gross misconduct that justifies termination. That EXD2, D3 and D4 which are show cause letters are that D2 indicate allegation of misconduct, D3 is abseentism and

D4 is misconduct. He then submitted that the exhibits are not clear between two offences of insubordination and abseentism which was the applicant charged with and that one of the offences was not proved as there was no exhibit tendered.

In reply, Mr. Waisaka submitted that in the award of the tribunal, it was clearly stated that the advocate for the applicant spent more time arguing on the procedural fairness leaving the critical issue on whether the applicant was absent or not. he argued that although the law dictates that in labor disputes especially in issues of unfair termination, the onus to prove the fairness of the termination lies with the employer, the said onus must be discharged on balance of probabilities as stated under Rule 9(3) of the Employment and Labor Relations (Code of Good Conduct) Rules, 2007 ("the Code"). He supported his arguments by citing the case of **Tanzania International Container Services (TICTS) Limited Vs. Shabani Kagere, Misc. Application No. 188 of 2013** where the said position was held. He then submitted that considering the testimony and evidence by both parties, the arbitrator rightly arrived to the conclusion that on balance of probabilities, the respondent's narrative of the events leading to the termination of employment was more probable that the applicant's.

He submitted further that the Applicant herein was absent from work from 28th December 2020 up to 4th February 2020, a period of eight (8) days without justification, therefore granting the Respondent enough reason to terminate the Applicant's employment contract. He supported his submission by citing the case of Amina Ramadhani v Staywell Apartment Limited Revision No. 461 of 2016, in which Nyerere J held;

> *"It is the finding of this Court that the applicant did not establish her reasons for absent from work from 29/08/2012 to 19/09/2012. Therefore, absenteeism stands here as a valid reason to terminate the applicant as the applicant was failed to provide sufficient evidence."*

He then submitted that considering the nature of the Applicant's employment (Customer Service Agent), her absence from work for more than five (5) days without notice or justification constituted a misconduct so serious as to render any continued employment relationship between the Applicant and the Respondent intolerable as provided under Rule 12 (2) of the Code. His conclusion was that basing on the arguments herein advanced, it suffices to say that the Respondent satisfied the requirement

of proving that there was reason enough for terminating the Applicant's employment.

Having gone through the records of the application and the submissions of the parties, I am satisfied that during arbitration, the respondent proved that the termination of the applicant was substantively fair. This is evidenced by several correspondences that were made between the parties and the instances at which the applicant admitted to have been absent at work without any notice. According to the EXD6, the hearing form shows that the disciplinary meeting was held on 16/03/2020 and the applicant was accused of abseentism from 31/12/2019 to 08/01/2020. In the hearing proceedings, there is no place that the applicant denied to have been absent. The applicant's termination was based on Rule 1(9) of the Code which elaborates that absence from work without permission or acceptable reason for more than 5 working days is a serious misconduct which justifies termination. It was therefore the applicant's duty to counter the allegations and prove that her absence was not contrary to the Item 9 Rule 1 of the Code. In the absence of any evidence to counter the respondent's evidence of the applicant's misconduct, the termination of the applicant remains substantively fair.

The next issue is on the procedural fairness where the applicant challenges the procedure taken to terminate the applicant on the ground that the she was not served with notice to appear in the disciplinary hearing. Mr. Temba's submission was that at page 5 of the award, DW1 tendered EXD5 which was a notice to appear in disciplinary hearing via email. He argued that the email correspondence was not tendered at the CMA to prove the same. Further that the notice was never signed by the applicant. Referring to the fact that the applicant was never suspended meaning she was at work, proof of notice to appear to the disciplinary hearing was important and since there was evidence to prove the service, then the notice was contrary to Rule 4(3) of the Code which requires the notice to be in writing.

Mr. Temba also challenged the fact that the respondent failed to show that they have conducted investigation to ascertain the grounds of disciplinary hearing to hold that the applicant has committed a misconduct that warrant termination. That under Rule 13(1) of the Code, investigation is a mandatory requirement so as to ascertain if the applicant had really committed what was alleged.

In reply, Mr. Waisaka submitted that Rule 13 of the Code is clear in setting out the procedural requirement leading up to a disciplinary hearing, which shall include; an investigation to ascertain whether there are grounds for a hearing, notification of where the hearing is to be held using a language and a form that an employee understands, allowing the employee reasonable time to prepare and finalizing the hearing within a reasonable time. he argued that the Respondent has adhered to these requirements, to wit; investigating Respondent's biometric system and attendance registry, issuing Show Cause Letters and then summoning the Applicant to a disciplinary hearing through a notice communicated via the Applicant's officially recognized email since the Applicant was not physically present at the workplace. Despite the Applicant's nonappearance, submitted Mr. Waisaka, the Respondent showed enough consideration and goodwill by notifying the Applicant of another hearing date through a notice to appear.

He submitted further that our labour laws do not provide an exception to conducting a disciplinary hearing, that Rule 13 (6) of the Code permits an employer to proceed with the hearing when an employee refuses to attend a hearing unreasonably. Quoting the famous maxim

"vigilantibus Et Non Dormientibus Jura Subveniunt" which means "the law assists those that are vigilant with their rights and not those who sleep thereupon", he submitted that the Applicant herein slept on her rights and is now placing the consequences thereto squarely on the feet of the Respondent.

On the question of whether the procedures laid down by Rule 13 of of the Code are mandatory requirements and should be used as checklist, Mr. Waisaka drew the Courts attention to the recent decision in **Kilimanjaro Plantation Limited V Nicolaus Ngowi, Labour Revision No. 40 Of 2020** where Mutungi J. referred to the decision in **Sharifa Ahmed vs. Tanzania Road Haulage 1980 Ltd, labour Division, DSM Revision No. 299 of 2014,** held;

> *"What is important is not the application of the code of checklist fashion, rather to ensure that the process used adhered to basics of a fair hearing in the labour context depending on circumstances of the parties, so as to ensure that act to terminate is not reached arbitrarily,"*

I will start my determination of the issue where Mr. Waisaka ended, the cited case of **Kilimanjaro Plantation Limited** (Supra). Indeed as

held by my Sister Judge, the aim of the Rule 13 of the Code is not adherence in a checklist manner, but to establish adherence to the process sufficient enough to show that the basics of a fair hearing in the labour context was achieved. Therefore the extent upon which the Rule was adhered to will depend on circumstances of each case, the expected end result of the process remaining to ensure that termination of the employee was not reached arbitrarily. As for the case at hand, the applicant was charged with the misconduct of abseentism, therefore physical service of notice under the circumstances may not be possible.

As for the investigation report, there is on record the EXD2, EXD3 and EXD4 which show that the applicant was involved in the step by step process of dealing with the misconduct. She was given several notices to show cause which established that she had a habit of being absent from work. In the case of **Standard Chartered Bank V. Anitha Rukoijo (Revision Application 470 of 2020) [2022] TZHCLD 122 (08 March 2022)** this court held:

Under Rule 13(1) of the Code, the purpose of investigation is to ascertain whether there are grounds for a hearing to be held and not to see whether, the employee is guilty of misconduct because that will be done in due course of hearing On that note, it is also important that investigation in labor disputes involves any concerted efforts to establish a shortfall

Looking at the records as stated earlier, there is on record the EXD2, EXD3 and EXD4 which show that the applicant was involved in the step by step process of dealing with the misconduct. The applicant was aware that her conducts were under scrutiny and had firsthand information every time she was absent. In this case, the relevancy of the cited case of **Kilimanjaro Plantation** comes in play; there are no hard and fast rules to adherence of Rule 13 of the Code because the employer needed not conduct investigation to establish facts which the applicant had been previously aware of vide EXD2-EXD4. At the time she was served with a notice of hearing she was aware of all the previous times that the same misconduct occurred.

On Mr. Temba's allegation that the notice of hearing was not given, there is an EXD5 tendered by DW1 which was a notice to appear in

disciplinary hearing via email. Unless the applicant disputed that the email address that the mail was sent was not hers, the email correspondence is sufficient to show that the applicant was served with a notice of hearing. In conclusion, the respondent succeeded to prove that the procedure for termination of the applicant was also fair.

On those findings, I see no reason to interfere with the findings of the arbitrator. The termination of the applicant was fair both substantively and procedurally. The application is therefore dismissed.

Dated at Dar es Salaam this 16th day of May, 2022

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S.M MAGHIMBI
JUDGE