IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 108 OF 2021

YUSRA JAGNA.. APPLICANT

VERSUS

KUKU FOOD TANZANIA LIMITED ....RESPONDENT

(From the decision of the Commission for Mediation and Arbitration at Ilala)

(Chuwa; Arbitrator)

Dated 26th August 2020

in

REF: CMA/DSM/ILA/1046/18/461

JUDGEMENT

10th May & 30th June 2022

Rwizile J

This application emanates from the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/ILA/1046/18/461. This Court has been asked to call for the records of the CMA so as to revise the proceedings and the award

Brief facts to this case can be stated that; the applicant was the employee of the respondent from 2013 to 2018 when she was terminated for allegations of gross misconduct.

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Being aggrieved by termination, she filed a labour dispute at CMA, claiming for terminal benefits due to unfair termination as the following; payment of unpaid one month salary, notice of termination, unpaid leave cycle, severance allowance and twelve months salary compensation. After a hearing, she was awarded a notice, 23 days salary and unpaid leave. Other claims were dismissed for the reason that she was fairly terminated.

She was again aggrieved and filed Revision No. 399 of 2020 which was struck out on 09th March, 2021 for technical reasons and was granted leave of 14 days to refile. The said order gave rise to the present application.

The application was supported by the applicant's affidavit which was opposed by filing of the counter affidavit sworn by Marco Frank Mkumbo, Principal Officer of the respondent. Grounds for revision are: -

i. *The Hon. Arbitrator erred in law and facts for holding that the reasons for termination were justified while the entire body of evidence adduced by the respondent was completely different from what is stated in the termination letter as reasons for termination.*

ii. *The Hon. Arbitrator erred in law when she deliberately declined to consider the provision of Rule 12(2), (3) (a, b, c, d, e and f) and (4)*

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(a and b) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007.

iii. *The Hon. Arbitrator erred in law and facts by relying on mere words that the applicant committed the alleged misconduct without taking trouble to order production of the CCTV footage that would otherwise show the applicant committing the misconduct as asserted by the respondent's witness.*

iv. *The Hon. Arbitrator erred in law when she relied on the answers of the applicant during cross examination only to hold that the applicant had admitted to the charges while the records do not show anywhere that the applicant had admitted to the charges as stated in the termination letter.*

v. *The Hon. Arbitrator erred in law by holding that the procedures for terminating the applicant were fair while there is nowhere in the CMA's record showing the respondent complied with the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedure as well as Part I of the Schedule to G.N. No. 42 of 2007.*

The application was heard by way of written submissions. The applicant was represented by George Kawemba Mwiga, learned Advocate whereas

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the respondent was represented by Kennedy Steven Sangawe, learned Advocate.

Mr. Mwiga submitted on the issue of reasons for termination that what was testified by Dw1 and Dw2 was different from the reasons stated in the termination letter. He stated further that the reasons for termination presented by the respondent was basing on failure to comply with the Standard Operating Procedure policy (SOP), which is exhibit D2 and conducting personal business at the place of work. He then stated that Dw1 and Dw2 did not show which specific policy in the SOP was not complied by the applicant.

He continued to argue that based on exhibit D7- minutes of a disciplinary hearing, the arbitrator would have known that the applicant did not act contrary to the SOP. In his view, the reasons for termination as reflected in the termination letter were not proved and never existed at all.

On failure to observe the provisions of the law, rule 12(1), (3) (a)- (f) and (4) of G.N. No. 42 of 2007, it was submitted that what was proved at the trial was contrary to what formed basis for termination. He argued that Dw1, and Dw2 testified on something different from the reasons for termination as stated in the termination letter. He stated further that there

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was no proof of a serious misconduct to render the work place intolerable as per rule 12(2) of the rules.

Mr. Mwiga continued to submit that, the respondent did no prove gross dishonest as under rule 12(3)(a), wilful damage to property as per rule 12(3)(b), wilful endangering the safety of others as under rule 13(c), gross negligence which is as per rule 12(3)(d), assault on a co-employee, supplier, customer or a member of the family and any person associated with in accordance with rule 12(3)(e)) and gross insubordination contrary to rule 12(3)(f) of G.N. No.42 of 2007.

In his view, the arbitrator failed to comply with rule 12(1)(a) and (b)(i) – (v) and also failed to consider that the alleged misconduct though not proved could not warrant termination as per rule 12(4) (a) and (b) of the rules. He stated that the applicant was not seen dealing with the customer or do personal business at work place. It was also stated that at disciplinary hearing, she denied charges placed against her. The proceedings, however was turned on the applicant giving a meal package to the security guard.

Arguing further, he said, that the arbitrator's decision based on mere words while Dw2 stated that he saw the applicant in a CCTV video footage giving a meal without a receipt. He said, the CCTV video footage was not

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tendered as evidence since it was the only evidence which led to termination. In his view, failure by the respondent to tender the only proof, a CCTV video footage renders the testimony baseless. The award, the learned counsel held the view, was founded on mere words and beliefs. He supported his submission by citing the case of **Christina Thomas v Joyce Justo Shimbo** PC. Civil Appeal No. 84 of 2020 at page 7-8 (unreported) in which the High Court faulted the trial Court findings which did not consider proper tendering of the electronic evidence.

On the issue of admission of the charges, he submitted that the applicant did not admit the charges during cross examination. He stated that the applicant only admitted to give a meal package to the security guard after being requested to do so by her colleague, one Christina which was not among the charges preferred against her.

On fairness of procedure, Mr. Mwiga commented that Guideline 9 of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedure read together with Part1 of the Schedule to G.N No. 42 of 2007, was not followed. He stated, that the purported hearing was not supported by a complete form filled by the manager. In his view, it was impossible to the CMA to ascertain whether the purported hearing was indeed conducted by the people required to constitute the coram. He

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stated further that the arbitrator did not substantiate as to how rule 13(1)-(13) of G.N. No. 42 of 2007 was observed.

He continued to argue that the applicant was summoned to attend a hearing without due procedure such as availing her with enough time to prepare her defence. He stated further that the arbitrator failed to consider the fact that the applicant was suspended before being formally charged.

Furthermore, he submitted that the procedure for termination has to be fair but this was not proved. To support his submission, he cited the case of **Edwin Kasena v Enza Zaden Africa Ltd**, Labour Revision No. 70 of 2017 at page 5 which quoted the High Court's holding in **NBC Co. Ltd Mwanza v Justa B. Kyaruzi**, Labour Revision No. 79 of 2009 and in the case of **Mussa Andrew Mtunga v Tanesco**, Labour Revision No. 6 of 2015. He finally asked this court to grant the application.

In reply Mr. Sangawe submitted that, it was testified that the applicant was terminated for gross misconduct which is failure to comply with SOP (exhibit D2). He stated further that the applicant's letter of suspension and of termination stipulated the reason for termination as gross misconduct. He supported his submission by citing cases of **Tanzania Revenue Authority v Andrew Mapunda**, Revision No. 104 of 2014

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[2015] LCCD 1 at page 1 and **Tarcis Kakwesigaho v North Mara Gold Mine Ltd,** Revision No. 6 of 2014 [2015] LCCD 1 page 66.

On the second ground, the learned counsel argued that the applicant's actions were both gross negligence and insubordination for failure to adhere to the SOP and choose to listen to a fellow employee. He stated that, when food is distributed without following SOP, it endangers the respondent's relationship with the customer. He submitted that the applicant failed to act in good faith. To cement what had been submitted, he cited the case of **National Microfinance Bank v David Bernard Haule**, Revision No. 5 of 2013, H.C Labour Court at Sumbawanga (unreported).

Mr. Sangawe submitted on the third ground that the applicant admitted to have given food to the security guard and the CCTV video footage would only show the fact which was not disputed. To support the submission, he cited section 60 of the Evidence Act, [CAP 6 R.E. 2019].

On the fourth ground, he stated that it is the general principle of law that failure to challenge an important fact amounts to admission. To support the point, he cited the case of **Damian Ruhele v R**, Criminal Appeal No. 501 of 2007 (CAT) unreported. He submitted that the advocate for the applicant failed to challenge the fact during re-examination. It means

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therefore, that fact is true, as held in the case of **Freight in time (T) Limited & Another v Rahabu Njeri Wanga**, Revision Application No. 92 of 2018 H.C Labour court at Arusha.

Mr. Sangawe, submitted on the fifth ground that the applicant was fairly terminated. The procedure followed the Guidelines for Disciplinary, Incapacity and Incompatibly Policy and Procedure as well as Part I of the Schedule to the ELRA (Code of Good Practice), as supported by the decision of the court in the case of **National Microfinance Bank Plc v Alzack Amos Mwampukule**, Lab. Division Revision No. 6 of 2013 [2015] LCCD 1. Mr. Sangawe stated that the applicant failed to avail her with a chance for defence. The applicant, finally prayed, the application to be dismissed for want of merit. In a rejoinder, Mr. Mwiga reiterated his submission in chief.

After going through the pleadings and records, I find, the court is called upon to determine following: -

i. *Whether there were valid reasons to terminate the applicant*
ii. *Whether there was procedural fairness in terminating the applicant, and*

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Dealing with the first issue, the law under section 37(2) of the Employment and Labour Relations Act [CAP 366 R.E. 2019] provides that there must be fairness in terminating the employment. It states as hereunder: -

> *A termination of employment by an employer is unfair if the employer fails to prove-*
>
> *a) that the reason for the 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."*

In the CMA proceeding, the first witness of the respondent stated that the applicant gave the product without following the laws set at her workplace. It is evident at page 10 and 16 of the typed proceedings, that;

> *"S. Sasa hebu ielezee tume nini ambacho mlalamikaji alifanya akavunja procedure.*

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J. Mlalamikaji alitoa bidhaa ya kampuni bila kufuata sheria ya kazi zake.

S. Kwenye SOP kuna sehemu gani iliyoeleza kosa hili kwenye barua ya kuachishwa kazi

J. Haiwezi kuwepo kwasababu inaelezea procedure inavyotolewa

S. Kwahiyo unakubaliana na mimi kwamba Yusra kafukuzwa kazi kwa general breach of SOP na siyo specific? Kweli au sikweli

J. Hapana

S. Nitajie hiyo aliyobreach

J. Hii ni mwamvuli uliotolewa na kampuni inaoeleza "how to do the job". Hatuelezi "how not to do the job".

Nevertheless, I have to say that, Rule 12(3) of the Employment and Labour Relations (Code of Good Practice) [G.N. No. 42 of 2007] provides:

"(3) The acts which may justify termination are;

a) gross dishonest;

b) wilful damage to property

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c) wilful 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"

According to exhibit D8, it shows the reasons for termination to be failure to comply with SOP policy and conducting personal business at a place of work. In her testimony, the applicant stated that she gave food to their security guard and was asked to do so by a co-worker (Christina).

On cross examination the applicant stated at page 65 of the typed proceeding: -

"S. Je kumpa mlinzi chakula ni moja ya kazi zako?

J. Hapana"

Which means, it was not her duty to supply food to the security guard. Based on exhibit D2, it does not show anything relating to the reason used to terminate the applicant. But in exhibit D1 which is an employment contract under clause 2.1 and 2.1.2.2.7, it states:

2.1 "The conditions contained in this agreement will come into effect on 1st July 2016 and it is specified that this Agreement

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shall terminate on either party giving the other the required written notice"

2.1.2.2.7 "the Employee commits or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of the Employer or the Employer's property."

By looking at the employment contract, the respondent business is food stuff. The reason for termination was doing personal business at the workplace, which is not allowed by the respondent. Again, the record at page 66 of the typed proceeding, has it that: -

"S. Pale ofisini mlikuwa mmeajiriwa nani?

J. Na Kuku Food

S. Je kuku food aliwaruhusu mtoe chakula kwa mlinzi?

J. Hapana...

S. Ilikuwaje ukafuata maagizo ya Christina na si Kuku Food?

J. Kwa sababu chakula ni cha Christina

S. Sehemu lilipofanyika hilo tukio ilikuwa ni eneo la kazi au sio eneo la kazi?

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J. Eneo la kazi"

It follows therefore that the food she gave to the security guard was for her own personal gain and not the employer's. In order to justify the applicant's action of terminating the respondent, I have to consult the law. Thus, Rule 12(4) of G.N. No. 42 of 2007 provides thus: -

> *"In determining whether or not termination is the appropriate sanction, the employer should consider-*
>
> *a) 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 the repetition; or*
>
> *b) the circumstances of the employee such as the employee's employment record, length of service, previous disciplinary record and personal circumstances."*

It is not disputed that the respondent does food business and the applicant had food at the work place which is forbidden. For that reason and what has been stated in the employment contract the employer proved that the termination was for valid reasons as provided for under section 39 of ELRA. It is held, therefore that the arbitrator's finding on the presence of the reason for termination was justified.

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In dealing with the second issue of whether there was procedural fairness in terminating the applicant. Rule 13 of G.N. No. 42 of 2007 provides for the procedures for termination. Rule 13(1) of the G.N. 42 OF 2007 states clearly that "the employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held."

But the law does not state how should investigation be done. In my view it is enough to look at the evidence of the employer to see if it is clear and followed the law. The evidence by the first witness of the respondent was that he conducted an investigation. He said the CCTV cameras showed the act was done. The applicant admitted to have supplied food out of the instructions of the employer. From the employer, it is clear to me that the evidence was sufficient to show that the procedure was done as per the law. As the CMA, I find no fault in the action of the respondent. The application is therefore dismissed. No order as to costs.

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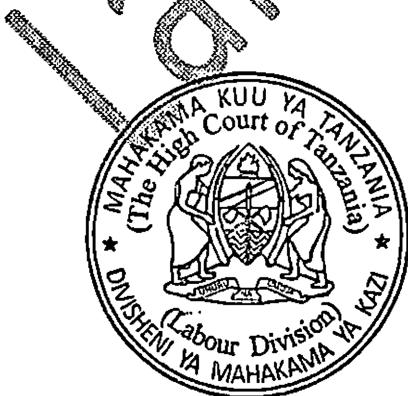

A.K. Rwizile

JUDGE

30.06.2022