IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 265 OF 2021

(Arising from an Award issued on 28th August 2021 by Hon. Mwakipesile I.E, Arbitrator in Labour dispute No. CMA/DSM/KIN/R.1168/16/25 at Kinondoni)

BETWEEN

SILVIA KIFANYI..... APPLICANT

AND

VICTORIA SERVICE STATION..... RESPONDENT

JUDGMENT

Date of the last Order: 19/07/2022
Date of Judgment: 29/7/2022

B. E. K. Mganga, J.

Silvia Kifanyi, the herein applicant was an employee of the respondent as pump attendant at Kijitonyama branch. It is said that employment relationship between the parties started on 13th November 2015. It was alleged by the applicant that the respondent verbally terminated her employment on 27th October 2016. Based on that allegation, on 23rd November 2016, applicant filed labour dispute No. CMA/DSM/KIN/R.1168/16/25 before the Commission for Mediation and Arbitration (CMA) at Kinondoni claiming to be paid TZS 6,500,000/= being 12 months' salary compensation, one month salary in lieu of

notice, maternity leave, annual leave, 6 overtime, night allowance and to be issued with a certificate of service on ground that she was unfairly terminated. At CMA, the respondent claimed that there was no termination of employment of the applicant, rather, she was suspended for one week but thereafter she stopped attending at work.

On 28th August 2017, Hon. Mwakipesile I.E, Arbitrator, having heard and considered evidence of the applicant and the respondent issued an award that there was no unfair termination because applicant was not terminated by the respondent, rather, there was misunderstandings. The arbitrator ordered that applicant be re-engaged in terms of section 40(1)(b) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] and be paid TZS 200,000/= as salary for October 2016.

Applicant was aggrieved by the said award hence this application for revision. In her affidavit in support of the application, applicant raised three (3) issues namely:-

1. *Whether the burden of proof in this matter lies on the employer or the employee.*
2. *Whether applicant was unfairly terminated or suspended from duty.*
3. *Whether applicant is entitled to the relief(s) claimed at CMA and before this court.*

In resisting the application, respondent filed the Notice of Opposition and the counter affidavit sworn by Lameck Herlod Matemba, her principal officer.

In the written submissions applicant enjoyed the service of Donald Philip, her personal representative while respondent enjoyed the service of Francis Mwita, learned Advocate.

In his written submissions in support of the application, Mr. Philip, the personal representative of the applicant argued that respondent terminated employment of the applicant, which is why, she(respondent) did not respondent to the letters (exh. V1 and V2) written by the applicant demanding to be given reasons for termination. Mr.Philip, submitted that in terms of Rule 27(2) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007, it is mandatory that when an employee is suspended, should be issued with a written suspension letter and that respondent did not comply with this Rule. He submitted further that; respondent was supposed to prove beyond reasonable doubt that she suspended the applicant including tendering a suspension letter. He strongly submitted that applicant was terminated, and that the arbitrator had the same conclusion in mind, which is why, she ordered applicant be reengaged. The personal representative of the applicant went on that, if the relationship between

applicant and respondent was bad or there was misunderstanding, then, it was illogical for the arbitrator to order reengagement.

Mr. Mwita learned counsel for the respondent, in his written submissions opposing the application submitted that refusal to respond to applicant's letters per se, does not amount to termination. Counsel maintained that on 27th October 2016, respondent suspended the applicant due to misconducts. Counsel for the respondent submitted further that applicant overreacted and wrote emotional letters (exh. V1 and V2) following her suspension on disciplinary measures. Counsel supported the conclusion reached by the arbitrator that applicant was not terminated, rather, was suspended. Mr. Mwita submitted that Rule 27(2) of GN. No. 42 of 2007(supra) cited by applicant's personal representative is irrelevant in the application at hand because applicant committed minor misconduct. He went on that there is no rule requiring a written suspension letter for a minor misconduct.

Counsel for the respondent conceded that the burden of proof is on the employer but was quick to submit that the respondent discharged that duty in the application at hand. Responding to submissions relating to the order of reengagement, counsel for the respondent argued that the arbitrator used his discretionary powers based on policy of keeping employment environment harmonious.

In rejoinder, Mr. Philip, the personal representative of the applicant, maintained that in terms of Rule 27(2) of GN. No. 42 of 2007(supra), respondent was supposed to prove by a letter, that she suspended the applicant. He reiterated that respondent terminated employment of the applicant and stopped paying her salary. Responding to the submission that the arbitrator used discretionary powers, Mr. Philip submitted that discretion should be used judiciously and cited the case of ***Transit Military Shop Ltd v. Kavula Mkenganyi***, labour Revision No. 177 of 2018, HC, (unreported).

I have examined the CMA record and considered submissions made on behalf of the parties in this application. It is undeniable that employment relationship between the applicant and the respondent turned sour on 27th October 2016. The contention between the parties is whether applicant was unfairly terminated, or she was merely suspended. While applicant is claiming that her employment was unfairly terminated, respondent claims that she was only suspended. This contention prompted me to closely examine evidence adduced by the parties at CMA.

In his evidence, Lameck Harold Natemba (DW1) the operation manager of the respondent, testified that applicant was suspended for one week due to bad /offensive language she used to one of the

customers of the respondent who complained in the office on 27th October 2016 that is the date of incidence. It was evidence of DW1 that after the said one week of suspension, applicant did not report back to work, instead, she served the respondent with two letters (exh. V1 and V2) demanding to be given reasons for termination of her employment. In his evidence, DW1 admitted that respondent did not respondent to the said two letters (exh. V1 and V2). He admitted further during cross examination that he was neither present at the time the respondent's customer complained against the applicant nor at the time applicant was verbally suspended. In my view, evidence of DW1 in relation to the alleged complaint against the applicant and verbal suspension is hearsay. I should also point that, in his evidence, DW1 testified that applicant worked for about three months' only. But in her evidence, Silvia Kifanyi (PW1), testified that she was verbally terminated on 27th October 2016 by Harold Elisamehe Natemba who is the Manager of the respondent and further that no reasons were assigned which prompted her to write exhibit V1 and V2 demanding to be given reasons. It was further testified by the applicant (PW1) that her employment with the respondent commenced on 13th November 2015. Apart from evidence of the applicant (PW1) that her employment commenced on 13th November 2015, there is no evidence showing as to when she was employed by

the respondent. In fact, respondent was duty bound to prove the date applicant was employed. I have examined evidence of the applicant and find that her evidence was not shaken during cross examination. In fact, applicant was not cross examined in these aspects. I therefore hold that employment of the applicant commenced on 13th November 2015 and that she worked more than the time DW1 wants the court to believe. The CMA record is clear that DW1 did not state as to when applicant was employed to enable both the arbitrator and the court to believe him that applicant worked for about three months' only. In my view, DW1 lied with an intention of circumventing the law because he was aware that an employee who has worked less than six months' is not entitled for the relief of unfair termination as it is provided for under section 35 of Cap. 366 R.E. (supra).

I have pointed hereinabove that DW1 testified that the incidence leading to the alleged suspension of the applicant occurred in his absence and that his evidence in this aspect is hearsay. Since apart from DW1 there is no any other witness for the respondent, then, there is no evidence to counter what was testified by the applicant (PW1) that she was unfairly terminated. I therefore conclude that applicant was terminated without being given reasons thereof. The evidence that applicant was not given reasons is supported by the two letters (exh. V1

and V2) that were tendered by the respondent. In fact, both exhibit V1 and V2 are evidence of the respondent. I have read the two exhibits and find that applicant was demanding to be given reason for termination of her employment and not for suspension from employment for one week as DW1 wants the court to believe and as it was wrongly believed by the arbitrator.

It was submitted by Mr. Philip on behalf of the applicant that respondent failed to prove that she suspended the applicant. He correctly, in my view, submitted that respondent was supposed to tender a suspension letter because Rule 27(2) of GN. No. 42 of 2007 (supra) requires an employer to issue a suspension letter to the employee giving reasons for suspension. On the other hand, it was submitted by Mr. Mwita, learned counsel for the respondent that there was no need of a suspension letter because applicant committed a minor misconduct and that there is no requirement of issuing a suspension letter for a minor misconduct. With due respect to counsel for the respondent, DW1 did not testify that applicant committed a minor misconduct not warranting issuance of a suspension letter. At any rate, these are submissions from the bar hence not evidence. see the case of ***Dr. A Nkini & Associates Limited v. National Housing Corporation***, Civil Appeal No 75/2015, ***Republic v. Donatus Dominic***

@ Ishengoma & 6 Others, Criminal Appeal No. 262 of 2018, ***Morandi Rutakyamirwa v. Petro Joseph*** [1990] T.L.R 49] and ***the Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman Bunju Village Government,*** Civil Appeal No. 147 of 2006 to mention but a few.

As pointed hereinabove, in his evidence, DW1 did not testify that applicant was suspended for a minor misconduct that does not warrant issuance of a suspension letter. More so, a minor misconduct does not warrant suspension, rather, it warrants verbal warning which is not the case in the application at hand. Even if it can be assumed that applicant was suspended, of which it is not the case, as I have pointed hereinabove, respondent was required, in terms of Rule 27(1) of GN. No. 42 of 2007(supra) to prove that there was a serious allegations of misconduct committed by the applicant for a suspension to be issued. Again, in terms of Rule 27(2) of the said GN, the suspension must be in writing, stating reasons thereof, and any other terms for the said suspension. The purpose of suspension is provided for under Rule 27(3) of GN. No. 42 of 2007 (supra) as to give room for investigation in respect of the alleged misconduct committed by an employee to be conducted and that presence of the employee may obstruct investigation. In the application at hand, there is no iota of evidence

suggesting that respondent was conducting investigation in respect of the misconduct alleged to have been committed by the applicant and that presence of the latter was likely to obstruct the said investigation to warrant suspension. This fortifies my above conclusion that applicant was not suspended, rather, was terminated without being given reasons thereof.

It was submitted on behalf of the applicant that arbitrator had in mind that applicant was unfairly terminated which is why, she issued an order of reengagement of the applicant under the provision of section 40(1)(b) of Cap. 366 R.E.2019(supra). But counsel for the respondent argued that the arbitrator used his discretionary powers to issue that order after considering the policy of maintaining harmonious environment in employment relationship between the two. With due respect to counsel for the respondent, the order of reengagement is issued after CMA or the Court has satisfied itself that there was unfair termination of employment. It cannot be just issued as a discretion from the blue. As correctly submitted by Mr. Philip for the applicant, discretion, must be used judiciously. In the application at hand, I find nothing implying that it was so used. In the upshot, I find that there is substance in the submission of Mr. Philip in this issue.

For all pointed hereinabove, I hold that termination of employment of the applicant was both substantively and procedurally unfair. I therefore, allow the application by revising, quashing and setting aside the CMA Award.

In her evidence, applicant testified that her monthly salary was TZS 200,000/= and there is nothing contradicting that evidence. I therefore order that applicant be paid TZS. 2,400,000/= being 12 months' salary compensation, TZS. 200,000/= being one month salary in lieu of notice, TZS. 200,000/= one month salary as leave pay and TZS. 200,000/=being salary for October 2016 all amounting to TZS 3,000,000/=. I further order that applicant should be issued with a Certificate of Service. It is so ordered.

Dated at Dar es Salaam this 29th July 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 29th July 2022 in chambers in the presence of Mathew John, Advocate holding brief of Francis Mwita, Advocate for the Respondent but in absence of the applicant.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) (Labour Division) MAHAKAMA YA KAZI

B. E. K. Mganga
JUDGE