IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 11 OF 2022

(Arising from an Award issued on 8th December 2021 by Hon. Makanyaga, A.A, arbitrator in Labour dispute No. CMA/DSM/ILA/139/21/40/21 at Ilala)

BETWEEN

MSALE TOWER HOTEL..... APPLICANT

AND

SUZANA SELEMANI KAKULU ..... RESPONDENT

JUDGMENT

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

B. E. K. Mganga, J.

On 31st May 2021, Suzana Selemani Kakulu, the herein respondent, filed a dispute before the Commission for Mediation and Arbitration (CMA) claiming on 25 May 2021 her employment was unfairly terminated by Msale Tower Hotel, the herein applicant. In the Referral Form (CMA F1) she indicated that her employment with the applicant started on 24th November 2020. In the CMA F1, respondent indicated further that she was claiming to be paid one month salary in lieu of

notice, one-month unpaid salary, compensation of twelve months and a certificate of service.

Having heard evidence of both parties, on 8th December 2021, Hon. Makanyaga A.A, Arbitrator, awarded the respondent to be paid TZS. 3,600,000/= being twelve (12) months salaries compensation, 300,000/= as one month salary in lieu of notice, TZS. 300,000/= as leave pay all amounting to TZS. 4,200,000/=.

Being aggrieved with the award, applicant filed this application for revision. In the affidavit in support of the Notice of Application, applicant raised the following issues: -

i. *In absence of any evidence to the contrary, whether the Commission was legally justified to disregard the testimonies of the applicant on the truth that respondent was misbehaving at work.*
ii. *In total absence of proof of the service, whether the Commission was legally justified to reason that respondent's monthly salary was TZS 300,000/= without considering the parties agreement on the monthly salary.*
iii. *Whether it was proper for the Commission without explanation to disregard the respondent's final submission.*
iv. *Whether the Commission was legally justified to entertain the matter where the accused was a wrong party.*
v. *Whether it was proper for the Commission after hearing the testimony of the parties, not to consider substantial part of the examination of the applicant's witness which had undeniably shown that the respondent was not willing to continue with the work.*

With consent of the parties hearing of the application was conducted by way of written submission. The applicant's submissions were prepared by Ditrick Mwesigwa, Advocate whereas the respondent enjoyed the aid of the Legal and Human Rights Centre.

In his written submissions, Mr. Mwesigwa abandoned the fourth issue and argued the remaining issues. Submitting in support of the first issue, Mr. Mwesigwa argued that respondent is not entitled to the award of TZS 4,200,000/= because it was proved by evidence that there were valid reasons for termination of her employment. he argued that reasons for termination of the respondent's employment as it was testified by DW1 are that respondent was misbehaving by failing to assist her fellow workers; failing to follow instructions of her manager; and illegal channeling the report to the Director. Based on these reasons, counsel submitted that there were fair reasons for termination of employment of the respondent because the latter admitted having committed these misconducts.

On the second issue, it was submitted on behalf of the applicant that respondent's salary was TZS 250,000/= as agreed by the parties and not 300,000/=. Thus, it was wrong for the arbitrator to award compensation, annual leave and notice based on the salary rate of TZS.

300,000/=. Further to that, Mr. Mwesigwa submitted that, arbitrator wrongly awarded the respondent annual leave pay while respondent had not attained the statutory period to be granted leave. To strengthen his argument, he cited Section 31(3) (a) of Employment and Labour Relations Act, [Cap. 366 R.E. 2019].

Regarding the third issue, Mr. Mwesigwa submitted that, the arbitrator disregarded applicant's final submission, as a result, applicant was partially heard. He argued that applicant's submissions were timely filed, but CMA's administrative issues caused the same to reach the trial arbitrator on 13th October 2021 while out of time. Counsel for the applicant relied on the case of ***Mbeya Rukwa Auto parts and Transport Ltd v. Justine George Mwakyoma*** [2003] TLR 251 in submitting that applicant was partially heard.

On the fifth issue, Mr. Mwesigwa submitted that, evidence of both DW1 and DW2, proved that respondent was not ready to work with her co-workers. He argued further that, even on the alleged date of termination respondent was not at work. Counsel concluded his submissions by praying that the CMA's award be revised and set aside.

In rebuttal, it was submitted on behalf of the respondent that there is no evidence proving that respondent was misbehaving at work.

It was further argued that applicant failed to prove that there were fair reasons for termination as it is provided for under section 39 of the Employment and Labour Relations Act [Cap.366 R.E. 2019]. The case of ***Youth Dynamix vs. Fatuma A. Lwambo,*** Revision Application No. 427 of 2013 HC (unreported) was cited to cement on that applicant was supposed to prove that there was a fair reason for termination. Further to that, it was submitted on behalf of the respondent that Section 37 of Cap 366 RE 2019(supra) read together with Rule 9(1) of Employment and Labour Relations (Code of Good Conduct) GN. No. 42 of 2007 requires that for termination to be fair, an employer, the applicant in this application, must prove that she followed fair procedure of termination, but she failed.

It was further submitted that, respondent started to work with the applicant at the salary of TZS. 300,000/= but after hiring other employees, applicant attempted to pay the respondent TZS.200,000/=which did don materialize because respondent asked to be paid TZS. 250,000/=. It was submitted that there is not proof that respondent was paid TZS 200,000/= or TZS 250,000/=.

It was further submitted on behalf of Ms. Suzana, the respondent that the award was legally justified. That, applicant was negligent as she

failed to file her closing submissions on time. it was further submitted that respondent is entitled the relief claimed in the CMA and awarded by the arbitrator because she was unfairly terminated.

In rejoinder, counsel for the applicant reiterated his submission in chief and added that respondent was misbehaving at work causing chaos at the place of work. Counsel submitted that respondent was warned several times hence there was justification for termination of her employment. On failure to file closing submissions in time and failure of the arbitrator to consider those submissions, counsel for the applicant submitted that CMA is not required to apply technicalities. He argued further that the arbitrator was supposed to extend time to the applicant to file submissions out of time.

I have examined the CMA record and considered submissions of the parties and find that the center of controversy is whether; termination of employment of the respondent was fair. It was submitted by Mr. Mwesigwa, learned counsel for the applicant that there were fair reasons for termination of employment of the respondent. On the other hand, it was submitted on behalf of the respondent that there was none. I have examined evidence of Peter Athur Shayo (DW1) and Bibiana Bernard Richard (DW2), the only witnesses who testified on behalf of

the applicant and find that the they gave three reasons that lead to termination of the respondent's employment namely; (i) that respondent was misbehaving by failing to assist her fellow workers; (ii) she failed to follow instructions of her manager; and (iii) she illegally channeled the report to the Director. In his evidence, Peter Athur Shayo (DW1) while under examination in chief gave out reasons for termination of the respondent by stating: -

> *"...**kutosikiliza. Alipewa mashuka na mito apeleke ofsini kwa meneja vigongwe muhuri kabla ya kupeleka vyumbani lakini yeye alipeleka vyumbani kabla havijagongwa muhuri...26/4/2021 kutosaidia wenzake kazi...Muhudumu kupeleka malalamishi changamoto kwa mkurugenzi wa hotel na sio kwa meneja. Alikiri kuwa alikuwa anampigia simu Mkurugenzi na kuwa alishindwa kujizuia...**"*

While under cross examination, DW1 stated: -

> *"...Alikuwa ni housekeeping. Ulikuwepo kwenye kikao lakini hakuna uliposaini. **Mashuka yaliyokuja sikuyaona lakini huo ndio mwongozo. Tarehe 25/5/2021 sijui kilichofanya ufukuzwe kazi, nilikuwepo na nilikuona ukiwa getini sifahamu uliambiwa nini. Jana yake sikusikia taarifa ya wewe kufukuzwa kazi. Getini alikuzui askari ukiwa unakuja kazini kama kawaida**".*

On her part, Bibiana Bernard Richard (DW2) while in chief testified: -

> *"...Kwenye kikao alikiri makosa ya kutowasaidia kazi wenzake na kutopeleka mashuka kwa meneja yapigwe muhuri."*

While under cross examination, DW2 testified: -

"...Mashuka yalihifadhiwa katika ofsi ya meneja. Jukumu lako lilikuwa kuhakikisha jengo lipo sawa. ***Tarehe 25/5/2021 sikuwepo wakati unafukuzwa kazi. Sababu ya kukufukuza kazi ni hayo niliyoyasema****".*

It is my view, from the word go, that there were not justifiable reasons for termination of respondent's employment. It is clear from evidence of both DW1 and DW2 that they were not present at the time applicant was terminating employment of the respondent. Therefore, reasons advanced by them as grounds for termination of the respondent are hearsay that is inadmissible.

The first reason that respondent was misbehaving and failed to assist her co-workers, to me sounds guff. It was not explained how the respondent was misbehaving in this aspect. More so, it was not explained whether respondent was under duty to assist her fellow employees and the areas her co- workers needed assistance and why. In my view, so longer as the respondent's co-workers were employed by the applicant and were paid salary as agreed, they were duty bound to perform their duties without waiting assistance from the respondent. In my view, respondent's co-workers' terms of employment did not mean that they will be assisted by the respondent. In fact, there is no

evidence in the CMA record suggesting that the terms of employment of respondent's co-workers were supposed to be assisted by the respondent. In addition to that, there is no proof that the said respondent's co-workers were sharing their salaries with the respondent depending on the assistance the respondent rendered to them. It is my firm view that, respondent was unfairly terminated allegedly, because she refused to render assistance to the lazy employees of the applicant while those employees agreed the terms of employment that was not dependent on assistance from the respondent. I am alive that employees are encouraged to assist each other and that, that is the spirit of teamwork, of which, any employer and employee should vie to have, and in fact, should be encouraged in order the office whether public or private to meet its targets. What should be discouraged is assistance and dependance that may turn into liability to few employees leading into costing others as it has happened in the application at hand. I am of the strong view that, employees whether in public or private sector, should know that they have a duty of performing their duties as they can, and that, laziness is a poor excuse. More so, employers should motivate performers by rewards including promotions and demote the laziness and none-performers. In my view, doing business as usual

depending on few performers and sometimes punishing the performers for failure to assist the none-performers or the laziness while paying them equal salary, is a disincentive to performance and an initial stage of many businesses suicidal. In the application at hand, instead of being terminated on ground that she failed to assist her co-employees, respondent was supposed to be complemented. In my view, strangely as it sounds, termination of employment of the respondent based on the first ground was unfair.

It was submitted by counsel for the applicant in the 5th issue that both DW1 and DW2 proved by evidence that respondent was not ready to work with her co-workers. As pointed hereinabove, evidence of both DW1 and DW2 are shaky because they did not explain how and when respondent committed the so-called misconducts. More so, this issue is not supported by evidence on record. Neither DW1 nor DW2 testified that respondent was not ready to work with her co-workers. None of the two witnesses testified that on the date of termination respondent was not present. These two witnesses testified that on the date of termination of the respondent, they were not there, as such, they don't know reasons for her termination. It seems, counsel for the applicant has willfully submitted by manipulating the facts and evidence to

confuse the court, of which it is unprofessional. I once again, call learned brothers and sister to stick on what legal professions demands them to do considering that they are officers of the court and owe a duty to their clients.

On the 2nd alleged reason for termination of employment of the respondent, it was alleged that she failed to follow instructions of her manager after being ordered to take bedsheets to the manager's office to be stamped, but she took them to the rooms. This reason also bears no support because (i) both evidence of both DW1 and DW2 is hearsay, (ii) DW1 admitted while under cross examination that he did not see the alleged bedsheet, and (iii) DW2 testified while under cross examination that the said bed sheets were kept in the Manager's office. Evidence of the applicant in this reason of termination is contradictory because it was alleged that respondent was ordered by the manager to take bedsheets to the manager's office while the said bedsheets were kept in the said manager's office.

On the 3rd alleged ground of termination, it was testified by DW1 that respondent illegally channeled the complaint to the Director instead of the manager. I should straightly say, this is unfounded allegation because nothing was testified by DW1 as to the nature of the complaint

that the respondent forwarded directly to the director without passing through her manager. More so, no evidence was adduced as to how complaints were handled in applicant's office. In my view, if at all the respondent forwarded her complaint directly to the manager, then, it is a proof that the manager had problems and or failed to hand previous complaints by the respondent. In fact, in his evidence, DW1 testified that respondent stated that she called the director because she was fed-up. The only recourse for her, in my view, as any reasonable person would have done, is to seek help from the person who can assist. In the application at hand, it was the director. Be as it may, that is not a justifiable reason to terminate employment of an employee.

For all said hereinabove, I hold that applicant failed to discharge the duty placed unto her under the provisions Section 37(2) of Cap. 366 R.E. 2019(supra) that requires an employer to prove that there was a fair reason for termination of employment of an employee. This provision reflects the provisions of Article 4 of the International Labour Organization Convention (ILO) 158 of 1982 which provides that: -

> "***The Employment of a worker shall not be terminated unless there is a valid reason for such termination*** *connected with the capacity or conduct of the worker or based on the operation requirements of the*

undertaking, establishment of services". (Emphasis added).

I therefore dismiss the first ground/issue and hold as the arbitrator did, that termination of employment of the respondent was unfair for want of reasons.

On procedural aspect, I hold that fair procedures for termination of employment as provided under Rule 13 of GN. No. 42 of 2007 were not followed because there was neither disciplinary hearing nor investigation. In terminating employment of an employee, employer is supposed to comply with the procedure for termination as stipulated in the above cited rule. It is my view that applicant was duty bound to conduct investigation to establish existence of reasons for holding a disciplinary hearing after finding that an employee committed misconduct justifying a disciplinary measure to be taken. More so, applicant was duty bound to inform the respondent the allegation levelled against her and afford her time to prepare for the defense etc. The Court of Appeal deliberating on the compliance of the procedure for fair termination, in the case of ***Paschal Bandiho vs Arusha Urban Water Supply & Sewerage Authority (AUWSA)*** Civil Appeal No. 4 of 2020 (unreported) quoted the holding of the South African Court in the

case of ***Avril Elizabeth Home for the Mentally Handicapped v CCMA*** [2006] ZALC 44 held that: -

> *"This conception of the right to a hearing prior to dismissal ... is reflected in the Code. When the Code refers to an opportunity that must be given by the employer to the employee to state a case in response to any allegations made against that employee, which need not be a formal enquiry, it means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss. In the absence of exceptional circumstances, the substantive content of this process as defined by Item 4 of the Code requires the conducting of an investigation, notification to the employee of any allegations that may flow from that investigation, and an opportunity, within a reasonable time, to prepare a response to the employer's allegations with the assistance of a trade union representative or fellow employee. The employer should then communicate the decision taken, and preferably communicate this in writing."*

As pointed out hereinabove, that fair procedure of termination of employment was not complied with by the applicant. In short, termination was also procedural unfair.

On the second issue of revision, it was submitted on behalf of the applicant that, respondent's salary was TZS 250,000/= as agreed by the parties and not 300,000/=. I have read evidence of the respondent and find that she testified that from the date of commencement of her employment in November 2020, her salary was TZS 300,000/= and that when applicant employed new employees there was a proposal that she should be paid TZS 200,000/=. Respondent (PW1) testified that she was

willing to receive TZS 250,000/= per month after discussions. That evidence was not challenged. I have examined the CMA record and find that there is no evidence proving that the proposal of paying respondent TZS 250,000/= was implemented. Since applicant did not bring evidence to that effect, and since respondent (PW1) testified that her salary was TZS 300,000/= per month, then, the arbitrator cannot be faulted in awarding the respondent based on TZS 300,000/= salary per month. In short, I find that respondent was properly awarded to be paid TZS 4,200,000/=. In addition to that amount, I hereby order the applicant to issue the respondent with a Certificate of Service as prayed in the CMA F1 since it was not ordered by the arbitrator.

It was further submitted by counsel for the applicant that, arbitrator wrongly awarded the respondent to be paid annual leave while respondent had not attained the statutory period to be granted leave. I should say that this is submissions from the bar because neither DW1 nor DW2 testified to that effect. No evidence was adduced by the applicant showing leave circle of the respondent to enable the arbitrator or this court to buy the argument by counsel for the applicant that respondent had not attained leave circle. I therefore dismiss this ground too.

The arbitrator is criticized for failure to consider closing submissions filed by the applicant. It is undisputed fact that applicant filed her closing submissions out of time and without leave. This complaint cannot detain me because closing submissions are not evidence, rather, are clarifications on issues of law based on evidence available and how parties perceived their case to be merited as it was held in the case of ***Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman Bunju Village Government, Civil*** Appeal No. 147 of 2006, CAT (unreported). In my view, even in absence of closing submissions, a decision can be made. It is my considered opinion that cases are decided based on evidence and not submissions. However loaded and or strong submissions can be, if evidence is weak, then, submissions will serve nothing and will be of no use. The argument that applicant was partially heard based on the reason that the arbitrator did not consider her closing submissions, in my view, cannot be correct.

It was further submitted on behalf of the applicant that the arbitrator was supposed to extend time to the applicant to file submissions out of time. With due respect to counsel for the applicant, it cannot be automatic extension without an application by the applicant.

The CMA record does not show that applicant prayed for extension of time to file closing submissions out of the time provided and her prayer rejected. I should point out that courts and CMA inclusive, cannot be held up by the parties who does not wish to follow orders issued and wait them to comply with the orders at the time they wish.

For all what I have discussed hereinabove, and, in the upshot, I hereby uphold the CMA award and dismiss this application for being devoid of merit.

Dated at Dar es Salaam this 29th July 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 29th July 2022 in the presence of Ditrick Mwesigwa, Advocate for the applicant and Suzana Selemani Kakulu, the respondent.

B. E. K. Mganga
JUDGE