IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 156 OF 2022

(Arising from an Award issued on 11/4/2022 by Hon. Mbena M. S, Arbitrator, in Labour dispute No. CMA/DSM/KIN/343/21/123/2021 at Kinondoni)

H & O TRADING TANZANIA LIMITED ..... APPLICANT

VERSUS

HELENE JAMES KIHUNRWA..... RESPONDENT

JUDGMENT

Date of the last Order: 19/08/2022
Date of Judgment: 9/9/2022

B. E. K. Mganga, J.

On 1st June 2021 applicant and respondent entered a one-year fixed term contract of employment expiring on 31st May 2022. On 28th August 2021 applicant terminated employment of the respondent who was under probation on ground that she violated Rules prohibiting employees to use mobile phones while on duty. Aggrieved with termination, respondent filed Labour dispute No. CMA/DSM/KIN/343/21/123/2021 before the Commission for Mediation and Arbitration (CMA) at Kinondoni claiming to

be paid TZS 3,108,886/= for breach of contract. On 11th April 2022, Hon. Mbena M.S, Arbitrator, issued an award in favour of the respondent and awarded her to be paid TZS 2,444,442/= being salary for the remaining period of the contract and one month salary in lieu of notice.

Applicant was aggrieved by the said award hence this application for revision. In her affidavit in support of the Notice of Application, Jenipher Likangaga, the principal officer of the applicant raised three (3) grounds namely: -

1. *That, the Arbitrator erred in law and facts in holding that applicant terminated the contract of the respondent.*
2. *That, the Arbitrator issued a biased award without considering evidence adduced by the applicant.*
3. *That, the Arbitrator erred in law and facts in awarding the respondent to be paid TZS 2,444,442/=.*

When the application was called for hearing, Mr. Mwombeki Kabyemela, Advocate appeared and argued for and on behalf of the applicant, while Mr. Lusekelo Samson, the Personal Representative, appeared and argued for and on behalf of the respondent.

Mr. Kabyemela learned argued the aforementioned three grounds generally by submitting that the arbitrator erred in holding that respondent who was a probationer, was entitled to be heard prior termination. He

submitted that respondent was terminated because she was found in a room communicating over the phone to unknown person. He submitted further that; respondent was prohibited to use her mobile phone while at work. He added that, all mobile phones of the applicant's employees were being collected and kept by the Operation Officer on behalf of the applicant. Elaborating more on reasons for terminating employment of the respondent, counsel for the applicant submitted that, at CMA evidence was adduced to the effect that there were regulations prohibiting employees to use mobile phone while at work. When asked by the court whether, the said rules passed Constitutional validity of right to communication, counsel for the applicant submitted that the said rules did not violate constitutional rights of applicant's employees.

Counsel for the applicant submitted further that, findings of the arbitrator that applicant did not give respondent right to be heard and further that did not give respondent a chance/ an opportunity to improved was not correct because the word "or" used in Rule 10(7) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 connotes that it is in alternative. He went on that, the findings by the arbitrator that respondent was supposed to be given a chance to

improve is not a correct interpretation of the law. He cited the case of ***WS Insight Ltd (formerly known as Warrior Security Ltd) v. Dennis Nguaro***, Revision No. 90 of 2019 HC (unreported) to the position that a probationer has no right to be heard. He therefore concluded by praying that the application be allowed by quashing and setting aside the CMA Award.

Arguing the application on behalf of the respondent, Mr. Samson, the personal representative, submitted that there was no valid reason for termination of employment of the respondent because the alleged misconduct was not proved. He added that, the alleged regulation was not known to the respondent because no evidence was adduced to prove that respondent knew its existence. He submitted further that; respondent was not afforded an opportunity to improve the alleged poor performance. When asked by the court as whether termination of the respondent was due to poor performance, he readily changed and submitted that respondent was terminated on ground that she talked over her mobile phone while on duty and not due to poor performance.

Mr. Samson submitted that, Rule 10 of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 that provides

procedure on how to terminate a probationer was not complied with hence there was unfair labour practice relating to probationers. He argued further that termination of respondent allegedly, for use of mobile phone while on duty, violated constitutional right of the respondent.

In rejoinder, Mr. Kabyemela reiterated his submissions in chief and added that right to communication is not absolute. It is subject to some limitations depending on the nature of employment. He argued further that the nature of employment of the applicant is that use of mobile phones is prohibited.

It is undisputed that the parties had a one-year fixed term contract of employment, and that respondent was terminated at the time she was a probationer. I have examined the CMA record and considered submissions of the parties as to the reason for termination of employment of the respondent. In her evidence Helene James Kihunrwa (PW1) testified that on 28th August 2021 she was called and told that her employment has been terminated with effect from that date without being given reason thereof. While under cross examination, PW1 testified that they were prohibited to talk over mobile phones while serving customers and that they were allowed to use phones while not serving customers. On the

other hand, Jenifer Alguine Likangaga (DW1) testified that respondent was terminated because respondent's supervisor found the respondent in the changing room talking over the mobile phone while on duty contrary to employment rules of the applicant. While under cross examination, DW1 testified that respondent caused loss to the applicant because she left the customer unattended and violated the rules prohibiting her to talk over the phone while on duty. On further cross examination, DW1 testified that she did not have evidence to prove that a customer was not attended by the respondent.

In my scrutiny of evidence of the parties namely PW1 and DW1, the only witnesses in this application, I have found that evidence of DW1 was hearsay and conclude as the arbitrator did, that evidence of DW1 is hearsay hence inadmissible. I have noted that the supervisor who allegedly, found respondent talking over her mobile phone in the changing room was not called as a witness. This makes evidence of DW1 to be hearsay. Once evidence of DW1 is excluded for being hearsay, then, the only evidence that remains on record is that of the respondent that she was not told reason for termination of her employment.

Even if we assume for the sake of argument, that evidence of DW1 is not hearsay, that evidence is yet shake and cannot give justifiable reason for termination of the respondent because there is no proof that respondent left applicant's customer and went in the changing room to talk over her mobile phone or that she caused loss to the applicant. The amount of loss itself was not stated to justify termination of employment of the respondent. I therefore hold that there was no valid reason for terminating employment of the respondent.

Applicant has criticized findings of the arbitrator that respondent was not afforded right to be heard and further that did not give respondent a chance/ an opportunity to improved. It was submissions by counsel for the applicant that a probationer had no right to be heard. I should point that counsel for the applicant has missed a point in his submission that a probationer is not supposed to be afforded right to be heard. In my view, that cannot be a correct position of the law. It is a settled law that right to be heard is a fundamental right. See ***Attorney General vs The Board of Trustees of The Cashewnut Industry Development Trust Fund & Another***, Civil Application 73 of 2015, [2015] TZCA 80, Pili Ernest vs. Moshi Musani, Civil Appeal No. 139 of 2019[2021]TZCA 297, Georgio

Anagnostou & Another Vs. the Hon. Attorney General & Another, Civil Application No. 210 of 2019 [2019]TZCA 213 to mention but a few. In ***Musani's case*** (supra) the Court of Appeal held: -

> *"…it is a cardinal principle of natural justice that a person should not be condemned unheard… The right to be heard is one of the fundamental constitutional rights… In this country, natural justice is not merely a principle of the common law, it has become a fundamental constitutional right… The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."*

In my view, the argument by counsel for the applicant that respondent, who was a probationer, was not entitled to be heard is not correct. In my view, the mere fact that a person is a probationer, does not entitle him to lose his or her fundamental right to be heard. ***Nguaro's case*** (supra) was quoted by counsel for the applicant out of context. In my view, what this court meant in that case and ***Stella Temu v. Tanzania Railways Authority***, Civil Appeal No. 72 of 2002, CAT cited in ***Nguaro's case*** was that procedures relating to disciplinary hearing that is normally conducted when dealing with employees who are not probationers cannot apply to

probationers because there is specific procedure covering probationers. The court, in my view, did not give an open cheque to employers to deny probationers right to be heard that is a constitutional right. The court cannot give a room for violation of fundamental or constitutional rights of certain groups, probationers inclusive, simply because the persons found themselves in that group at that time. My conclusion is backed up by the provision of Rule 10(7), (8) and (9) of GN. No. 42 of 2007(supra) that provides procedures on how to terminate employment of the probationer. That procedure includes right to be heard. The said Rule is clear that before terminating the probationer who is not performing or not suitable for the position, the employer must (i) notify the employee that concern (ii) give the employee an opportunity to respond or improve, and (iii) give the employee right to be represented. These, in my view, entails right to be heard. Therefore, submissions that a probationer has no right to be heard is not supported by the law.

I have pointed hereinabove that respondent was terminated allegedly, that she talked over the phone while on duty contrary to applicant's rules and that it was not proved by evidence because evidence

of DW1 is hearsay. Mr. Samson, argued on behalf of the respondent that those rules violate constitutional rights of the employees and that respondents' right to communication was violated. I am alive that I am not sitting as Constitutional court in this application. But I should comment in a passing that, constitutionality of those rules may be subjected to scrutiny at the opportune time to see whether, they pass constitutional validity. As correctly testified by the respondent while under cross examination, though without admitting that she was found talking over the phone, an employee might have an emergence like having a sick child etc hence the need to access mobile phone. In my view, a mere fact that an employee is in a certain category, cannot be a ground to deny him his constitutional right to communicate. That right, as correctly submitted by counsel for the applicant is not absolute. It may be curtailed subject to security of the nation and public interest under legally permissible reasons and not, at the will and whelms of just a certain employer. In the application at hand, counsel for the applicant did not give circumstances that led to prohibition of the use of mobile phones by applicant's employees while on duty. In my view, employees are entitled to enjoy their constitutional rights without

affecting rights of the employer and employers should not violate constitutional rights of their employees.

For all explained hereinabove, I hold that applicant breached contract of the respondent and there was unfair labour practice relating to probation. I hereby by uphold the CMA award and dismiss this application.

Dated at Dar es Salaam this 9th September 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 9th September 2022 in chambers in the presence of Lusekelo Samson, Personal Representative of the respondent but in the absence of the applicant.

B. E. K. Mganga
JUDGE