IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 105 OF 2023

(From the decision of the Commission for Mediation and Arbitration at Kinondoni in Labour Dispute No. REF: CMA/DSM/KIN 230/76/21, Kokusiima, L.: Arbitrator. Dated 31st day of March, 2023)

RIGHTWAY NURSERY AND PRIMARY SCHOOL..... APPLICANT

VERSUS

GRACE YESAYA MAHEKE..... RESPONDENT

JUDGEMENT

17th – 28th July, 2023

OPIYO, J

The respondent was employed by the applicant on 06th July, 2017 as a personal assistant to the school Director. Later she became the receptionist and a store keeper. On 18th June, 2021 she was terminated from her employment for the offence of collection of TZS. 10,000/= from parents. The respondent was dissatisfied and opted to filed for a Labour Dispute No. CMA/DSM/KIN 230/2021/76/21 at the Commission for Mediation and Arbitration (CMA). The matter was heard and the award was in favour of the respondent. Aggrieved the applicant filed for this application for

revision praying to this court to examine, revise, quash and set aside the award delivered by Hon. Kokusiima, L. (Arbitrator) on 31st March, 2023. The application was supported by the applicant's affidavit sworn by Mercy Mchechu, Principal Officer of the applicant having grounds for revision that:-

i. *Whether the arbitrator was correct to give award in favour of the respondent without considering the evidence adduced by the DW1 and DW2.*
ii. *Whether the arbitrator was correct on finding that the procedure for terminating the respondent employment was improper.*
iii. *Whether the arbitrator was correct in finding that the applicant had no valid reason of terminating the respondent's employment.*

The matter proceeded orally by both parties being represented by Learned Advocates. Ms. Joyce Mwakapila for the applicant and Mr. Felix Makene for the respondent.

For the application Ms. Mwakapila on the reason for termination submitted that it is established principle that for termination to be fair it should be based on valid reasons. She stated that section 37(2)(b)(i) of Employment and Labour Relations Act [CAP. 366 R.E. 2019] provides that the reason is fair related to employees conduct, capacity or compatibility. She added that the conduct of respondent going against the applicants policy by

starting to receive cash on processing gate passes was against school policy. For her, it was a valid reason for termination of respondent's employment contract because the policy of not receiving cash was well know and well communicated to all. She added also the respodnent was terminated on the ground of gross misconduct and the same is provided under rule 12(3)(a) of Employment and Labour Relations and code of conduct, G.N. No. 4 of 2007. To support her point, she referred to the case of **Mohamed Kijida vs. Everything Company Ltd,** Labour Revision No. 694 of 2019 High Court Labour Division at Pg 12. In her view, the act of respondent of receiving cash which was against school policy was a gross dishonest and valid for her to be terminated from her employement. Ms. Mwakapila submitted again that the respondent acknowledged doing the same as exhibit G6 shows and therefore the arbitrator erred in holding that the applicant had no valid reason for terminating respondents employment contract.

On the issue of procedure Ms Mwakapila submitted that section 37(2)(c) of CAP. 366 R.E. 2019 rule 9 of The Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007 provides for termination have to follow fair procedure. She added that there must be investigation conducted before termination as per rule 13 of G.N. No. 42 of

2007. She stated that investigation revealled that she failed to follow the policy and so she was then served with a charge and given right to be heard. To support his point she cited the case of **Peter Maghali Vs. Super Meals Ltd**, Civil Appeal No. 279 of 2019 CAT which at pg 10 referred the case of **I.S. Msangi Vs. Jumuiya ya Wafanyakazi Tanzania and another,** Civil Appeal No. 26 of 2019 were it was decided that the applicant must be heard by the body that ultimately decide his fate. In his view, the applicant was given a chance to be heard by disciplinary hearing as seen in exhibit G8. She added that, upon being found guilt she was terminated and given all her dues (exhibit G10). For her proper procedures were followed and that the CMA erred by finding otherwise.

On the issue of award, she submitted that the arbitrator failed to consider evidences adduced before her without giving any reasons. For her it was wrong for CMA to decide that the policy was not open and it was not in her job discription and not stated in the contract. She added that the testimony of DW2 ought to have been considered as it was oral evidence, thus no need for documentary evidence. To cement on it she cited the case of **Kioo Ltd vs. Daudi Mohamed Zonga,** Revision No. 37 of 2020, Labour Division which referred at page 3 the case **Abbas Kondo Code Vs. R. CR**.

Appl. No. 472 of 2007 CAT which emphasised that oral evidence is crucial in proving particular fact and the court is entiled to rely on it in reaching its conclusion. For her, the arbitrator was to rely on evidence of DW1 and DW2 and that it was unfair for CMA to give the award in favour of the respondent to tune of TZS. 6,806,250/=.

Against the application, Mr. Makene on the issue of the reason for termination submitted that, during trial there was no any document that was tendered as evidence as school policy to substantiate or corroborate the oral evidence. He added that, it was also not true that the policy was well communicated. The said policy is not in existence and was not provided to the employees and that no job description was given to that effect. He continued that failure to provide job description contravenes section 15(1)(c) of CAP. 366 R.E. 2019 as it is required by rule 11(3) of G.N. No. 42 of 2007. Exhibit G4 (Investigation Reprot) the investigator concluded that it has been a long practice of receiving cash from parents and prepare cards that were eventually distributed to the parents, the responsibility she was given by the head teacher. He added that, the respondent was not terminated for being dishonest as submitted by the counsel for applicant as she was on her day to day duties. He continued that, the records show that the purported no cash policy was only limited

to accounts section for school fees and uniforms. The typed award by CMA dated 31st march 2023 at Pg 4, 5, 6, 7 up to 10 in cross examinatin of both DW1 and DW2 respectively revels that. Therefore, it is argued that the respondent did not committ gross dishonest to the applicant as she did not go against any school policy as the same was not tendered in court to establish its existence.

Mr. Makene submitted further that the advocate for the applicant referred to the exhibit G6 claiming that the respondent admitted the offence. For him, it is a misconception as the document is just explaining the procedure of receiving cash for purpose of making ID's. it does not constitute any admission.

On the issue of procedure he submitted that, section 37(2)(c) of CAP. 366 R.E. was not followed. He added that the purported investigation (exhibit G4) is on report of pupils gate pass ID. It is far from being an investiation report. For him the law requires that in a dispute of such nature, a thorough investigation must be conducted involving a person to be investigated and various interviews made. Findings of the report should be produced and availed to the accused person. He added that, in the circumstance at hand the respondent was not involved in the investigation

and was not availed with a copy of the findings. He stated further that the investigator was not summoned to testify before the CMA for the validity of the report. He continued that, even the investigation was not conducted in accordance to the law as it still favoured the respondent because the investigator admitted that he had found the practice of collecting cash for pupils ID's when he joined the school.

Mr. Makene continued to contend that, it is a requirement of the law that the meeting be chaired by senior manager as per rule 13(4) of G.N. No. 42 of 2007. The record shows that the hearing was not chaired by a senior manager (exhibit G7) but was chaired by Halima Zuberi, a normal teacher of a nursery school (DW1) and that no witness were summoned during disciplinary hearing as required by the law.

On the issue of the award, he submitted that both evidences were considered and recorded clearly. That, it is a principle of the law of evidence under Section 110(1) and (2), Evidence Act, CAP. 6 R.E. 2022 that one who alleges must prove. The applicant ought to have proved at CMA the existence of the no cash policy so as to corroborate oral evidence and failure to do so rendered evidence a mere hearsay. He then submitted that, the case of **Mohamed Kijida (supra)** is distinguishable as it talks of

termination on poor work performance and that it supports the respondent's case for reason that the applicant failed under section 39 of CAP. 366 R.E. 2019 to prove that such terminantion was fair. He added that, also the case **Peter Maghali** at page 14 the termination was found to be unfair on procedural ground. He then prayed for the application to be dismissed.

In rejoinder Ms. Mwakapila reiterated what she submitted in chief and added that, on disciplinary hearing a chair person being a school teacher does not mean that she was not a senior member of the applicant. And good enough she was not involved in any way on the circumstances leading to the claim as claimed by the respondent.

On the issue of investigation report he submitted that the advocate for the respondent did not provided the law which provides how the report should be. For her, the report was genuine and explains the allegation which was investigated. She then reiterated her prayer for the CMA award to be quashed and set aside.

In going through parties pleadings, submissions and CMA records, it is obvious that this court has been called to determine whether CMA was

right to hold that substantially and procedurally the termination of employment contract of the respondent was unfair.

It should be borne in mind that labour law standards both nationally and internationally requires to establish fairness of the termination of employment contract in terms of reason and procedure. Section 37(2) CAP. 366 R.E. 2019 provides that, a termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid and fair and termination was in accordance with a fair procedure. This is at per with article 4 of ILO, Termination of Employment Convention, 1982 (No. 158) which states 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 or services."*

On the matter at hand the respondent was terminated for collection of TZS. 10,000/= from parents for gate pass identity cards allegedlly without following procedure (exhibit G9). The applicant's advocate stated that the respondent's act was against the 'no cash policy' of their organisation. Whereas the advocate for the respondent stated that no any school policy

was infringed as none was provided to the applicant's employees. The said 'no cash policy' was not tendered at CMA as evidence to prove its existance.

The first issue for determination is whether there was a reason for termination. In the first ground the applicant claims that the CMA by giving award in favour of the respondent did not consider evidence of DW1 and DW2. Examining the decision of CMA, I found that it extensively dealt with the testimonies of both sides including those of DW1 and DW2 from page 4 to 10 of the award. The allegation leading to termination was of breach of 'no cash policy.' In a trite position of law regarding proof, it is the applicant who was supposed to prove the existence of such policy and if the respondent really breach it warranting her dismissal, as the one alleges in terms of section 110 of the Evidence Act, Cap. 6 R.E. 2019. Did the evidence of DW1 and DW2, the CMA is accused to have not considered discharged this duty?

Looking at the above reason for respondent's termination, it relates to conduct of the respondent in terms of rule 9(4) of GN No. 42/2007 as one of the valid reasons for termination. Since it involves conduct of employee, it shall not only be one of those reasons to be considered fair, but also it

shall be sufficiently serious to justify one's termination. The issue is therefore, whether there was a 'no cash pay policy' in relation to gate passes IDs making. Going through CMA records, the respondent during examination in chief admitted that there was a 'no cash policy' at her work place, but that did not concern all employees and all aspects, but rather it only bound those in accounts department relating to payment of fees and uniforms. That, she was employed as an personal assistant to the Director and when she was posted to the reception she found the practice of receiving cash for gate passes making was well openely practiced there in accordance to the authority of the then Head teacher. She continued to do as it was always done, believing she was not breaching any policy.

DW1 in her part stated that the procedure for making the gate passes was through parents paying in the school accounts or through school M-pesa number. Then the school makes the ID that is consequently given to the parent. Therefore, no any employee was allowed to receive cash. However this contention was different from the version stated in exhibit G4 (the investigation report on the matter by Richard S). This brings an adverse inference on the applicant's testimony. It was undisputed that, prior to holding a disciplinary hearing the applicant conducted investigation on the

making gate passes process. According to what is termed as investigation report exhibit G4 by Richard Sheim is concluded as follows:-

> *The person who receives the money and the cards after they are ready is Grace Maheke and she is the one that distributes them to the parents or guardians...*
>
> *To be honest I don't know who gave her the permission and authority to deal with pupils ID cards. But, since when I started working I found her dealing with it. Sincerely, I have never questioned on this and thought she used Gregory whom we normally use for printing staff ID cards.*

What is connoted by the above conclusion is that, the practice was a long rooted and opened conducted by the respondent to the extent that even the reporter found it there when he started working with the applicant. With such testimony in place, I entirely agree with the finding by the CMA at page 13-14 that according to the report by Richard Sheim (exhibit G4) as he found the respondent making gate passes all along in the same way considered together with the respondent's testimony that she found the same practice when she was shifted to the reception proves that it was an open practice. This shows the practice was not started by the respondent. This contention of finding this practice ongoing and the authority of the former head teacher was not successfully challenged by the applicant

through cross examination, which signifies acceptance. In the case of **Shadrack Balinago v. Fikiri Mohamed @ Hamza, TANROADS and Attorney General, civil appeal No 223/217 as referred in the case of Tegemeo S/o Mandindo v Zakaria s/o Chaula, PC Civil No 13/2021, HC at Mbeya at page 11** it was held that:-

> *As rightly observed by the learned judge in her judgement, the appellant did not cross-examine the first respondent on the above piece of evidence. We would, therefore, agree with the learned judge's inference that the appellant's failure to cross examine the first respondent amounted to acceptance of the truthfulness of the appellant's account."*

It is also on record that the respondent was not employed as a receptionist, rather a personal assistant to the Director. She was just subsequently shifted to the reception without new job description apart from that in exhibit G1, her employment contract. That means, she was prone to be handed over the responsibilities of what was done by the former receptionists, which included making gate passes as revealled by the above quoted part of exhibit G4 that it was her responsibility to make gate passes and eventually handover the same to the parents. In my considered view, it could not have been easy for her to know that the

practice was prohibited while it was the thing passed to her in her new position at the reception by her predisessors . This can therefore not constitute misconduct fair and sufficient enough to result into termination, especially after an apologetic reply to the allegation reflected in exhibit G.6 by the respondent.

According to rule 12(1) (a) and (b) of GN 42 of 2007 in order to hold that one been faily teminated for misconduct, one need to consider whether any rule or standard regulating employment has been contravenned. Rule 11(3) of GN 42 (supra) requires availing and rule or emplyment standards to the employee in a manner that is easily understandable. This was not done to the respondent and other employees. It is on record in Minutes of a Disciplinary hearing, Exhibit GYM 7, the Accounts office employees Richard Sheim and Joyce were well aware of respondent's cash collection for gate passes, but never reported, inquire or advised her of the policy that was supposedly well known and practiced by them. This proves that the 'no cash policy was only for payments that was done through accounts office as it has been maintained by respondent all along. Therefore, in a situation where there is no proof of existence of alleged 'no cash policy' in relation to making gate passes that was made available to the respondent when she was shifted to the position, makes allegation of breach un

achievable as was found by the CMA. Thus, the finding by CMA that there was no valid reason for termination as misconduct was not proved is not an error in law or facts as argued by the applicants counsel. I find no reason to fault it on this reasoned finding.

After holding the decision by the CMA that there was no valid reason for termination, the second issue as to whether the procedure was followed becomes redundant there is no procedure to be followed in absence of a valid reason to do so for which compliance is to be checked by the court. Compliance with procedure is to be looked into when it is found that there was a valid reason for termination.

The application is hereby is dismissed. No order as to costs as this is a labour matter.

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

M.P. OPIYO,

JUDGE

28/07/2023