IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 124 OF 2023

(Arising from an Award issued on 09/05/2023 by Hon. Ndonde, S, Arbitrator, in Labour dispute No. CMA/DSM/ILA/500/2021 at Ilala)

SOPHIA MKETO ..... APPLICANT

VERSUS

TANRUSS INVESTMENT LIMITED
T/A DAR ES SALAAM SERENA HOTEL ..... RESPONDENT

JUDGEMENT

Date of Last Order: 21/08/2023
Date of Judgement: 29/08/2023

B. E. K. Mganga, J.

Sophia Mketo, the abovenamed applicant was employed by Tanruss Investment Limited t/a Dar es Salaam Serena Hotel as for unspecified period contract of employment as Human Resources Manager. Employment relationship between the two was good until on 28th August 2021, when applicant wrote a letter to Lusajo Sajent, the security officer of the respondent, an incident relating to 32 charge

plates. In the said letter, applicant informed the security officer that on 19th December 2019, she received the said charge plates from one Herman Peter also an employee of the respondent. In the said letter, applicant notified the said Lusajo that Herman Peter informed her that he was given the said charge plate as gifts and that the said Herman Peter informed applicant that he was ready to dispose them. In the said letter, applicant informed the security officer of the respondent that, the said Herman Peter followed all procedures for taking out personal property from the premises of the respondent and handled the said 32 charger plates to her and that she gave the said Herman Peter TZS 30,000/=. Applicant also stated in the said letter that since then, she has come three times with the said charger plates in the respondent's premises and that it was only on 21st August 2021 when she heard information that she was not comfortable and asked the said Lusajo Sajent to conduct investigation.

It is undisputed by the parties that based on the said information, Lusajo Sajent, conducted investigation by recording statements of various persons including the said Herman Peter and gave his report to the management of the respondent. Based on that investigation report, respondent served applicant with two suspension letters, but applicant refused to sign demanding to be given explanation including but not

limited to requiring the said Herman Peter to be interrogated in her presence. The General manager of the respondent felt that applicant committed insubordination for failure to sign suspension letters. Though applicant declined to sign suspension letters, she was suspended with pay.

Based on the foregoing facts, on 27th September 2021, respondent served applicant with a notice to attend disciplinary hearing containing three counts namely (i) gross negligence and failure to observe responsibilities, (ii) gross insubordination and (iii) gross dishonest and breach of trust. Hearing of the said disciplinary charges was conducted on 1st October 2021. On 5th October 2021, the disciplinary hearing committee found applicant guilty as charged and proposed termination of her employment. Applicant appealed unsuccessfully, as a result, on 27th October 2021, she was served with a termination letter signed by Godfrey Mikisi, Group Accountant showing that applicant's employment was terminated due to gross negligence, gross insubordination and dishonest and breach of trust.

Applicant being aggrieved with termination of her employment, on 15th November 2021, filed Labour dispute No. CMA/DSM/ILA/500/2021 before the Commission for Mediation and Arbitration henceforth CMA at Ilala claiming to be reinstated without loss of remuneration. In the

Referral Form (CMA F1), applicant indicated that the reasons for termination of her employment were not true and that procedures for termination were not followed.

On 9th May 2023, Hon. Ndonde, Severin, Arbitrator having heard evidence of the parties issued an award dismissing the dispute on ground that termination was both substantively and procedurally fair. Applicant was further aggrieved hence this application for revision. In her affidavit in support of the Notice of Application, applicant has raised a total of eight (8) grounds namely: -

1. *That the honourable arbitrator immensely errored in law to deliver an award which was not grounded on evidence adduced at the trial.*
2. *That honourable arbitrator erred in facts and law in deciding that there was gross insubordination without considering evidence adduced before her and the fact that the alleged victim did not appear to testify.*
3. *The arbitrator erred in law and facts by failure to note that applicant was terminated by someone who was a stranger hence termination was null and void.*
4. *The arbitrator erred in law and facts by failure to note that according to respondent's own work place known procedures, termination of the applicant who was the head of department was to be approved by the managing director and failure to prove that the termination was approved by the managing director made the whole process null and void ab initio.*

5. *Respondent had no valid reason to terminate the applicant.*
6. *The honourable arbitrator erred in law and fact by completely ignoring the binding decisions of the High Court Labour Division and Court of Appeal cited and attached to final written submission on the issue as who has the power to discipline an employee.*
7. *The arbitrator erred in law and fact in shifting the burden of proof on fairness of termination to applicant (an employee).*
8. *That award is illegal, irrational, illogical and improperly procured.*

Respondent is of the view that termination was fair, and the award was properly issued in her favour. She therefore filed both the Notice of Opposition and the counter affidavit of Bilal Kittapa, her Assistant Human Resources Manager to oppose the application.

By consent of the parties, the application was argued by way of written submissions. In the said written submissions, applicant enjoyed the service of Evold Mushi, advocate while respondent enjoyed the service of George Shayo, advocate.

In arguing the 1st, 2nd and 5th grounds, counsel for the applicant submitted that the person who was alleged to have been disrespected by the applicant did not testify at CMA to enable applicant to cross examine him because insubordination is against someone. Counsel for the applicant cited the case of ***Aziz Abdallah vs. Republic*** [1991] TLR 71, CAT to implore the court to draw adverse inference against the

respondent for failure to call the General manager to testify. Learned counsel submitted that, there is no evidence of the General manager of the respondent to justify termination based on insubordination. Counsel for the applicant submitted further that, the arbitrator found that applicant was only guilty of insubordination and that, considering ten years of applicant's service, termination was not justified. To support his submissions, learned counsel cited Rule 12(2) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019].

Arguing in support of the 3rd, 4th and 6th grounds, Mr. Mushi submitted that, termination of the applicant was done by a group accountant, one Godfrey Mikisi and that, it is not known that he was group accountant of which group of companies. Learned counsel submitted further that, DW5 and PW1 testified that Godfrey Mikisi was not an employee of the respondent and was not the director of the respondent hence termination was null and void. Counsel added that, respondent's employees' handbook (exhibit D8) provides clearly that no termination involving a head of department will be effected without knowledge and approval of the Managing Director. Counsel submitted further that, there is no any evidence tendered by respondent to prove that in terminating the applicant, the Managing Director had knowledge and he/she approved. Counsel went on that, in terms of Rule 9(3) of the

Employment and Labour Relations (Code of Good Practice) Rules, G.N. No.42 of 2007, employer had a burden of proving fairness of termination. He added that, it was the duty of the respondent to prove that termination of the applicant was after approval of the Managing Director. To cement on his point, that for termination to be fair, there must be evidence as to who made the decision to terminate, he referred the court to the case of ***Hamad Koshuma vs Tanzania Ports Authority,*** Civil Appeal No.40 of 2016, CAT(unreported) and ***Mbeya City Council vs Thomas A. Mwanga and Herieth Kibiki***, Revision No.41 of 2013, HC., Labour Court Digest of 2013. Counsel submitted further that, respondent had her internal binding procedures that requires termination of head of department to be approved by the Managing Director, but respondent was terminated by someone who had no such power namely, by an accountant of unknown group.

Arguing the 7th ground in support of the application, Mr. Mushi, learned submitted that, the arbitrator shifted burden of proof to the applicant contrary to the requirement of Rule 9(3) of GN. No. 42 of 2007 (supra) after respondent has failed. Learned counsel for the applicant did not submit on the 8th ground. In summing up his submissions, learned counsel for the applicant prayed the court to all the application,

revise the CMA award and order reinstatement of the applicant without loss of remuneration.

In resisting the 1st, 2nd and 5th grounds of the application, Mr. Shayo, learned counsel for the respondent submitted that, evidence of Lusajo sajent (DW1) and Alex Maboko (DW4) being eyewitnesses, proved the misconduct of insubordination on 10th September 2021 and on 14th September 2021 when applicant refused to sign suspension letters to pave way investigation. Counsel cited the provisions of section 62(a), (b) of the Evidence Act [Cap. 6 R.E. 2019] on oral evidence and added that, a letter written by DW1(exhibit D3) proved the misconduct of insubordination. Counsel submitted further that, applicant was afforded right to cross examine witnesses for the respondent but did not discredit their evidence. Counsel went on that, ***Abdallah's case*** (supra) should also apply against the applicant for failure to call the labour officer who she alleged that informed her not to sign suspension letters. Counsel for the respondent submitted further that, employment relationship between the parties was intolerable hence the provisions of Rule 12(2) of G.N. No. 42 of 2007 (supra) cannot be relied upon. He further cited Rule 12(3) of GN. No. 42 of 2007 and referred the court to the Employees' handbook (exhibit D8) and submit that, insubordination is a serious misconduct and warranted termination.

Responding to submissions made by counsel for the applicant on the 3rd and 4th counsel for the respondent submitted that, termination of employment of the applicant was done by the respondent and not by a stranger. Mr. Shayo submitted further that, the only respondent's senior officio who could have communicated termination decision to the applicant was the General Manager, who, was involved in the allegation leading to termination of the applicant. Counsel submitted further that, DW5 testified that Godfrey Mikisi was a senior officer of the respondent. Counsel added that, submissions that applicant's termination was not approved by the Managing Director is an afterthought because it was not one of the issues at CMA. He went on that; evidence shows that respondent's top management was involved and approved termination of the applicant. He added that, there is no obligation under the law or the respondent's policy, that respondent had to communicate the Managing Director's approval to the applicant for termination to be fair. Counsel submitted further that, ***Koshuma's case*** (supra) and ***Kibiki's case*** (supra) are not applicable in the application at hand because, there was no issue at CMA as to whether, there was approval of by the Managing Director in terminating employment of the applicant or not. He further cited the case of ***Future Century Limited v. TANESCO***, Civil Appeal No. 102 of 2008, CAT(Unreported), ***Ernest Sebastian***

Mbele v. Sebastian Sebastian Mbele, Abdul Mhagama and Kasian Mahai, Civil Appeal No. 66 of 2019, CAT(unreported) to the position that, a party who desires the court to give judgment as to any legal right or liability depending on facts which he asserts, must prove that those facts existed.

Mr. Shayo, learned counsel for the respondent submitted further that, given the nature of the contract between the parties, namely fixed term contract of employment, respondent was not under obligation to prove fairness of termination. He referred the court to the cases of ***I.O.T (Traveling Bags) v. Thomas Coke and 2 others,*** Revision Application No. 131 of 2015, HC, Dar es Salaam, ***Generics & Specialities Ltd v. Kalenga Katele***, Revision No. 833 of 20l9, HC, Dar es Salaam, ***Asanterabi Mkonyi v. TANESCO,*** Civil Appeal No. 53 of 2019CAT(unreported) and ***Serenity on the Lake Ltd vs Dorcus Martin Nyanda,*** Civil Appeal No. 33 of 2018, CAT, (unreported) to support his submissions.

On the 6th ground, Mr. Shayo submitted that, the ground is ambiguous as it just states that the arbitrator erred in law and fact by completely ignore the binding decision of the High Court and Court of appeal without stating which cases specifically were not considered and ignored. Counsel for the respondent submitted that, the arbitrator

delivered the award in consideration of facts, circumstances, evidence, and law. He added that, the arbitrator has backed up her decision by case laws.

On the 8th ground, Mr. Shayo, learned counsel for the respondent submitted that the impugned award is neither illegal, irrational nor illogical because, it was properly procured. He then prayed for the applicant's submissions and prayers be ignored for being baseless.

In rejoinder Mr. Mushi submitted that, initially applicant was employed for one year fixed term contract but on 1st July 2015, her contract changed to unspecified period and referred the court to exhibit D7. On power to terminate, counsel for the applicant strongly submitted that applicant was employed by "Tanrus Investment Limited t/a Dar es Salaam Serena Hotel" and not by someone called "group". He maintained that applicant was the head of department hence according to exhibit D8, her disciplinary authority was the Managing Director and that there is no evidence to prove that the said Managing Director delegated his duties and that there was approval. Counsel submitted further that, cases cited by the respondent are not applicable to the application at hand.

I have carefully examined evidence of the parties in the CMA record and considered respective submissions made in this application

and I am of the views that, three issues namely, (i) whether there was valid reason for termination, (ii) whether procedures for termination were adhered to and (iii) to what relief(s) are the parties entitled to can sufficiently dispose this application.

It is undisputed by the parties that reasons for termination of employment of the applicant as indicated in termination letter (exhibit D15) was due to (i) gross negligence and failure to observe responsibilities, (ii) gross insubordination and (iii) gross dishonest and breach of trust. The issue is whether, respondent adduced evidence at CMA to prove these counts.

I will start with the 1st count of gross negligence and failure to observe responsibilities. Particulars in the 1st count of gross negligence are that: -

> *"It has come to the mind of the management that on 21st August 2021 Mr. Herman Peter found charger plates which were alleged to have been given to you by him. Basing on the investigation report and your written statement you took those charger plates from Mr. Herman Peter knowing proper procedures of handling Hotel's and guests' equipment's(sic) were not followed and agreed with him that he takes those charger plates outside hotel's premises. You have not explained as to why despite knowing that you failed to take proper action against Mr. Herman Peter. This is negligence towards duties assigned to you by the Management as per job description including but not limited to execution and maintenance of Company's operational policies. The same is against the Employment and*

Labour Relations Act of 2004 and its Code of Good Practice GN. no(sic) 42 of 2007 Rule 13(3)(d).”

In the bid to prove that count, respondent fronted Lusajo sanjent Masosi (DW1), Herman Peter Kiberege (DW2), Fortunatus Boniphace Magesa (DW3) and Alex Maboko (DW4). It was evidence of DW1 that, on 21st August 2021, he received information from Herman Peter that, at Kivukoni Ball meeting venue, there were charger plates and that he (DW1) directed DW2 to pass that information to DW4. DW1 testified further that, on 25th August 2021, applicant called him over the phone and asked him to go in her office and that he responded positively. He testified further that, while in the applicant's office, the latter gave him a letter (exhibit D1) showing that on 19th September 2019, Herman (DW2) gave applicants charger plates allegedly, that the said charger plates were left at the hotel long time ago by the decorator and that; the owner does not need them, as a result, they became property of DW2. DW1 testified further that, it is DW2 who took the said 32 charger plates outside the respondent's gates and that, applicant gave DW2 TZS 30,000/=. While under cross examination, DW1 testified that, the said charger plates were not property of the respondent and that, they were found in the compound of the respondent not outside the gates.

In his evidence, DW2 did not state that he gave information to DW1 and throughout his evidence, he did not mention the name of DW1. Again, DW2 did not state that DW1 directed him to report to DW4 as alleged by DW1. In my view, evidence of DW1 in relation to what he alleged to be information received from DW2 on 21st August 2021, and allegations that he directed DW2 to report to DW4, cannot be relied upon. In his evidence, DW2 did not state that he reported to DW4. In his evidence, DW2 testified that he reported to his supervisor one Fortunatus Boniphace Magesa (DW3), but the latter was not interested in that story or issue. DW2 testified further that, he continued to perform his duties up to 19:00hrs or 20: hrs and left the office to his home. He added that, the next day was Sunday, and he was off hence he did not attend at work and that, he attended on Monday but DW3 was off. DW2 stated that, on Tuesday, DW3 informed him that applicant gave DW3 charger plates to be handled to him (DW2). DW2 stated that, he refused to receive the said charger plates because, it was already reported to the management. While under cross examination, DW2 admitted having given the said charger plate to the applicant unprocedurally and that, he has no evidence to show that applicant took them away from the hotel. He admitted that he was charged in relation to the said charger plates, but he was acquitted, which is why, his

employment was not terminated. While under re-examination, DW2 testified that he doesn't know who gave applicants the said charger plates on 21st August 2021.

In his evidence, DW3 without stating the date, he testified that, DW2 informed him that there are charge plates in the venue and that, he (DW3) directed persons who were decorating the room using the said charger plates not to remove them therefrom. In other words, DW3 testified that he acted spontaneously on information of DW2. I should point out that, there is contradiction in evidence of DW3 and DW2 because, while DW2 stated that, DW3 after being notified presence of the said charger plates, he was not interested and took no action, but DW3 stated that he acted on the same date by ordering that those charger plates should not be taken away. Again, in his evidence, DW2 stated that on Tuesday, DW3 informed him that he (DW3) was directed by the applicant to handover the said charger plates to him (DW2) and that he refused because it was already reported to the management. On the other hand, in his evidence, DW3 said nothing in relation to the alleged directive from the applicant. While under cross examination, DW3 stated that, DW2 informed him that he (DW2) gave the said charger plates to the applicants. DW3 admitted in his evidence that,

both himself and DW2 were charged in relation to the said charger plates but they were not terminated.

In his evidence, DW4 said nothing in relation to what happened on 21st August 2021 in relation to the said charge plates. In fact, he did not testify that on 21st August 2021, DW2 reported to him in relation to the charger plates as was directed by DW1.

On the other hand, Sophia Ally Mketo (PW1), applicant stated that, on 19th December 2019, she received the said charger plates from DW2 after the latter has followed procedures provided by the respondent. She stated further that, she used the said charger plates for two years and was coming with them at the respondent's premises for decoration in the functions that were held thereat. In her evidence, Applicant (PW1) is recorded stating: -

> *"…nilipewa na Herman Peter ambaye alisema ni za kwake na nilimrudisha nazo nikamwambia kama ni za kwako umepewa kaombe kibali, maana alinilietea ofisini akiwa amezibeba openly na akasema amepewa na decorator kama zawadi. Na akaniambia mimi sina kazi nazo, kwa kuwa wewe madam huwa unapamba, naomba nikupatie. Nikamwambia kama unataka kunipa mimi rudi nazo kwa decorator aliyekupa, akakuandikie "note" kisha ufuate utaratibu wa kuombea "gate pass" na ukitaka kunipa mimi utanipa nje ya geti. Akasema sawa. Mimi nikaendelea na majukumu yangu mpaka jioni. Nilipokuwa natoka getini akasimamisha gari yangu na kuniambia zile charger plate nimeshakabidhiwa na nimefuata utaratibu na*

niko nazo hapa. Nikamwambia unanipa bure? Maana ilikiuwa ni mali yake. Akaniambia nipe tu chochote. Nikampatia 30,000/= cash. Akazipakia yeye mwenyewe mbele ya askari wanamuona. Ni getini kabisa. Nikaondoka nazo… Nikaendelea kuzitumia mle ndani kwa miaka miwili, kwa sababu ikitokea function nilikuwa napamba. Alinipa tarehe 19/12/2019…"

I have read the letter that was written by applicant on 25th August 2021(exhibit D1) as a report and handled to DW1 to initiate investigation and find that it corroborates evidence of the applicant. In fact, Bilal Kitapa (DW5) admitted under cross examination that, the first report to security officer was made by the applicant. It is my view that, applicant gave credible evidence and that, the arbitrator did not analyze properly evidence on record. Evidence of the applicant that she received the said charger plates from DW2 in 2019 and that she used to go with them at respondent's premises for decoration whenever there was a function was not discredited. It is beyond imagination that DW2 gave applicant the said charger plates in 2019 and the latter used them for two years including going with them in the respondent's premises. The allegations by the respondent that the alleged misconduct occurred on 21st August 2021 is not support even by her own(respondent's) evidence.

According to particulars of the 1st count, applicant was negligent for her failure to take actions against Herman Peter (DW2) and agreed with the latter to take out of the hotel's premises the said charger plates. In his evidence, DW2 admitted that he was charged in disciplinary proceedings, but his employment was not terminated. It is my view that, respondent having not terminated DW2 who took the said charger plates outside the respondent's premises unprocedurally, then, she was not supposed also to terminate applicant. In my view, termination of applicant based on the allegation that involved DW2 was done in a double standard way. It can be recalled that, applicant gave evidence that was not challenged by the respondent that, she received the said charger plates from DW2 in 2019 at the gate in presence of security officers. It is my view therefore, that, DW1 being the security officer and DW2, being the giver of the said charger plates, had an interest to serve, and their evidence was supposed to be acted upon with caution as it required corroboration. See the case of ***Godfrey Elisalia & Others vs Republic*** (Criminal Appeal No.39 of 2022) [2023] TZCA 17325. It is my view that, DW1 was protecting his employment because, exhibit D1 and evidence of the applicant (PW1) indicated weakness in security if at all there was no security clearance for the said charger plates to be taken from the respondent's premises. On the other

hand, DW2 having attended the disciplinary hearing and not terminated based on the same fact, was doing every possible way to impress the respondent and protect his employment. I am of the view that, these witnesses are not worth to be believed. I am guided by what the court of Appeal held in the case of ***Goodluck Kyando v. Republic,*** [2006] T.L.R 363 that: -

> *"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."*

Again, in the case of ***Patrick s/o Sanga v. The Republic, Criminal Appeal No. 213 of 2008,*** (unreported) the Court of Appeal held: -

> *"…To us, there are many and varied good reasons for not believing a witness. These may include the fact that the witness has given improbable evidence; he/she has demonstrated a manifest intention or desire to lie; the evidence has been materially contradicted by another witness or witnesses; the evidence is laden with embellishments than facts; the witness has exhibited a clear partiality in order to deceive or achieve certain ends, etc…".*

Since evidence of the aforementioned witnesses is full of contradictions and lies, I find that the first count was not proved.

The particulars in the 2nd count of gross insubordination reads; -

"As noted hereinabove in (i), after the Management came to know about the scenario, ordered investigation to be done. In line of the same decided to suspend you from work for 10 days pending investigation which is one of the legal requirements. In the course of giving, you suspension notice on 10th September 2021 as you refused to sign it in front of witnesses before the General Manager while showing some unprofessional and unethical conducts. Again, as per the investigation report, after you refused to sign suspension notice you were ordered not to enter your office without notice. Unfortunately, on 14/09/2021 around 16:05 you entered in the said office without informing anyone which was against General Manager's order. This behavior is against our daily practices and embarrassed the Management to the extent deteriorating the well-built relationship between you and senior management, in your capacity no one can expect what you did…"

In the bid to prove this count, respondent depended on evidence of DW1 and DW4. According to evidence of DW1, on 10th September 2021, when applicant was called in the office of the General Manager in his presence and DW2's presence, applicant was nearly to sign a suspension letter, but the General Manager told her to read first. That, after reading, applicant found that there were typographical errors but when errors were corrected, she refused to sign, became furious, banged the door, and left. DW1 testified further that, applicant said that the General Manager was supposed to call her and Herman Peter and hear them before issuing a suspension letter against her. DW1 testified further that, on 14th September 2021, after applicant has communicated with the labour officer over the phone, she refused to sign another

suspension letter in the presence of DW1 himself, Alex Kurwa (Accounts/Financial Manager), and the General manager and that, she became furious, banged the door, and left. On his side, DW4 testified that, applicant refused to sign a suspension letter in his presence (DW4) and Alex kulwa, the chief accountant and the General Manager. It is worth to note that, DW4 did not state that applicant refused to sign the said suspension letter in presence of DW1. Again, in his evidence, DW1 did not stated that on 14th September 2021, when applicant refused to sign the said suspension letter in presence of Alex Kurwa or Kulwa, DW4 was present. I find that, evidence of these witnesses is irreconcilable and cannot be believed. I have noted that, the persons mentioned by DW4 in his evidence to have witnessed applicant refusing to sign the second suspension letter, were not mentioned in the letter he wrote on 10th September 2021(exhibit D6). It is my view that, the ability of DW4 to recollect and retell what happened was high on 10th September 2021 the date the alleged incident occurred, compared to the date he gave evidence at CMA on 30th August 2022 almost one year thereafter. Had this been true, DW4 would have so indicated in exhibit D6.

According to evidence of DW1, DW4 witnessed applicant refusing to sign a suspension letter on 10th September 2021, but on that day,

Alex Kulwa, the accountant was not present. Though in his evidence DW1 stated that applicant also refused to sign on 14th September 2021, in his statement (exhibit D2), DW1 mentioned only one incidence namely of 10th September 2021. As pointed hereinabove, evidence of DW1 and DW4 needs to be scrutinized with care because they had their own interest. More so their evidence is full of contradictions and embellished with lies.

Reasons for failure of the applicant to sign suspension letter was clearly given by the applicant in her evidence as supported by DW1 that, she wanted the General Manager to hear her story and that of DW2 before issuing a suspension letter. It is my view that, under the prevailing circumstances in the application at hand, applicant had a point. I am of that view because, on 25th August 2021, DW2, DW3 and applicant recorded their statements as evidenced by their statements (exhibit D5, and D1) and there was no evidence of continuation of investigation that was being conducted after the said date. In fact, the investigation report (exhibit D4) does not show anything material that was investigated by DW1 after the said date apart from adding only the allegations relating to refusal to sign suspension letters. In my view, the said suspension letters were issued just to trap applicant and ensure

that she can be terminated. I am of that view because, in terms of 27(1) and (3)(a) and (b) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007, in order suspension to be issued, three conditions must be mate namely (i) the alleged misconduct must be serious, (ii) employee's presence at work may obstruct investigation and (iii) employee's ongoing performance of duties may present a problem whilst investigation being conducted. The cited Rule has been amplified by Guideline 5(1) of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures, issued under GN. No. 42 of 2007 (supra). The said Guideline provides: -

> "SUSPENSION
>
> *5.(1) In circumstances of **serious misconduct** or incapacity a senior manager may suspend an employee from work pending an inquiry. An employee may be suspended **if the employee's presence would obstruct the investigation** into the alleged offence or **if the employee's presence could create difficulties at the workplace**. An employee who is suspended by management under these circumstances must be paid basic wage for the period of suspension."*

It is my view that, an employer is not allowed under our laws to suspend an employee as she wishes. In the application at hand, as pointed out hereinabove, investigation was already completed and there

was no investigation to be carried out by the respondent. In other words, respondent was finding a way to terminate applicant by creating conducive environment to terminate applicant. More so, no evidence was adduced by the respondent to suggest that it was necessary to suspend applicant based on the above pointed conditions. In addition to that, respondent did not consider the plea by applicant that she should be heard together with DW2 before respondent to issue a suspension letter. Respondent did not listen the applicant considering that she was the one who called security officer (DW1) and explained what happened and triggered investigation. For all what I have pointed hereinabove, I find that respondent had no valid reason to terminate employment of the applicant based on insubordination. In my view, a decision to be obeyed or respected by an employee must be reasonable otherwise, an employee cannot be forced to accept unreasonable orders or decisions.

In addition to the foregoing, I associate myself with the definition of the word "insubordination" in the South African case of ***Sylvania Metals (Pty) Ltd vs Mello N.O. and Others*** (JA83/2015) [2016] ZALAC 52 that was referred by Hon. Mteule, J, in the case of ***Nas Hauliers Ltd vs Mahmoud B. Mohamed*** (Application for Revision No. 463 of 2020) [2022] TZHCLD 116 that:-

"Insubordination in the workplace context, generally refers to the disregard ***of an employer's authority or lawful and reasonable instructions****.* ***It occurs when an employee refuses to accept the authority of a person in a position of authority over him or her*** *and, as such, is misconduct because it assumes a calculated breach by the employee of the obligation to adhere to and comply with the employer's* ***lawful authority.*** *It includes a willful and serious refusal by an employee to adhere to* ***a lawful and reasonable instructions*** *of the employer, as well as conduct which poses a deliberate and serious challenge to the employer's authority even where an instruction has not been given."* (Emphasis is mine).

It is clear from the quoted paragraph that, for insubordination to occur, (i) there must be a lawful order or instruction issued by a lawful authority and, (ii) the order or instruction must be reasonable. Now in the application at hand, was the order by the General manager requiring applicant to sign a suspension in presence of her subordinates, reasonable and without being heard on what she demanded? For reasons stated hereinabove and those I will soon give hereunder, I find that it was not.

The last count relates to gross dishonest and breach of trust. Particulars of this count are that: -

"In addition to the above allegations in (i), (ii) and (iii) there is a breach of trust to the company. One of the key issues after being promoted as Human Resources Manager was to make sure all operational policies of the company are well followed by all staffs and in case of any breach you were

either supposed to take actions against or report the same immediately as per the Fraud Prevention and Whistle Blower Protection Policy you signed on 27/01/2016. The act of noticing fraudulent activities and keeping quiet, refusing to sign suspension notice in a very unprofessional and unethical manner has breached the trust. Also, the same is against the Employment and Labour Relations Act of 2004 and its Codes of Good Practice GN no(sic) 42 of 2007 specifically Rules 13(3)(a).”

I should, as a kickoff, point out that, there is no Rule 13(3)(a) of GN. No. 42 of 2007 (supra). According to evidence of the applicant that was supported by exhibit D1 and that of DW1, applicant accepted the said charger plates from DW2 after the latter has followed procedures. It is my view that applicant did not notice fraudulent acts being committed. It is my further view that, applicant did not fail to act or report because procedures were followed by DW2. I should state that, in the last count, respondent did not adduce evidence to show incidences of fraud that applicant witnessed and failed to act or report. In my view, that count was also not proved.

In his evidence, DW1 admitted that he did not serve applicant with the investigation report (exhibit D4). In short, there is no evidence proving that applicant was served with exhibit D4. That amounted to unfair termination procedurally. See the case of ***Kiboberry Limited vs John van der Voort*** (Civil Appeal 248 of 2021) [2022] TZCA 620.

It was submitted by counsel for the applicant that, applicant was terminated by a stranger namely Godfrey Mikisi, the group accountant, who was not employee of the respondent and had no power to terminate employment of the applicant hence termination was null and void. It was also submitted by counsel for the applicant that, termination of employment of the applicant was done without the knowledge and approval of the Managing Director of the respondent. I have considered rival arguments of the parties in relation to power to terminate employment of the applicant. It is undisputed by the parties that applicant was the Human Resources Manager and head of department. I have read the Employees' Handbook (exhibit D8) and find that, at page 28, it provides grievance and disciplinary procedures. At page 30, exhibit D8 under clause 4(c) provides procedures for termination and reads: -

> *"**4(c) Terminations***
> *All decisions on terminations shall be made in strict consultations with the General managers.*
>
> ***No termination involving a Head of Department will be affected without the knowledge and approval of the Managing Director**."* (Emphasis is mine).

The bolded sentence is loud and clear. There is no evidence in the CMA record showing that the Managing Director of the respondent was aware and that approved termination of the applicant. In fact, when Bilal

Kitapa (DW5), the Acting Human Resources Manager who tendered exhibit D8 was cross examined, is recorded stating: -

> *"…Kipengele cha 4(c) kinasema "All decisions on termination shall be made in strict consultation with the General Manager". Hili halikufanyika kwa Sophia. Kipengele 4(c) "No termination of head of department will be effected without consultation approval (sic) of the Managing Director". Sijatoa uthibitisho mbele ya Tume hii kwamba termination ya Sophia ilifanyika baada ya consultation au approval ya Managing Director. Godfrey Mkisi alikotoa mamlaka ya kumwachisha kazi Sophia, alipewa na General Manager. Ushahidi sina wa maandishi, ninao wa kusikia. Kwenye barua ya termination hakuna aliposema amepewa mamlaka na General manager."*

It is clear from evidence of DW5, the only witness for the respondent who testified on procedures for termination of employment of the applicant, that, there is no evidence to prove that the Managing Director of the respondent was aware and approved the said termination. The above quoted clause 4(c) of exhibit D8 requires termination of the head of department to be done after knowledge and approve of the Managing Director and not the General manager. Evidence of DW5 that termination of applicant was after consultation and approval by the General manager suffers two brows namely, (i) it was hearsay and (ii) was contrary to clause 4(c) of exhibit D8 that requires knowledge and approval of the Managing Director because, as stated by DW5, the General Manager reports to the Managing Director.

It was submitted by counsel for the respondent that the only respondent's officio who could have communicated termination to the applicant was the General Manager who was involved in the allegations leading to termination of employment of the applicant. With due respect to learned counsel, that submission is not supported by evidence on record. It is submissions from the bar so to speak, that cannot be regarded as evidence. It is my view that, Godfrey Mikisi, who signed a termination letter, had no power to issue the said letter because, he was not the Managing Director and there is no proof that the said termination was approved by the Managing Director. In the case of ***Hamad Kushoma vs Tanzania Ports Authority*** (Civil Appeal 40 of 2016) [2019] TZCA 200, cited by counsel for the applicant, the Court of Appeal approved the principle pronounced in the case of ***International Medical and Technological University v. Eliwangu Ngowi***, Revision No. 54 of 2008 HC(unreported) that termination from employment by a wrong or improper authority, amounts to unfair termination. I therefore hold that, Godfrey Mikisi, who issued a termination letter, had no power to terminate the applicant. In short, termination was unfair.

It is my opinion that, the view by counsel for the respondent that absence of approval by the Managing Director to terminate applicant's employment is an afterthought and that it was not one of the issues at CMA, is a misconception. The dispute was on fairness of termination and the respondent was duty bound to prove that termination was fair. In my view, fairness of termination entails also powers to terminate. Termination cannot be valid if it is carried out by a person without authority. It was respondent's duty to prove that applicant was terminated by a person with power to terminate her employment. It is clear from the record that, counsel for the applicant cross examined witnesses for the respondent on powers of Godfrey Mikisi to sign a termination letter and whether, there was approval by the managing Director. In my view, that was an alert to the respondent to bring evidence to that effect. More so, in her evidence, applicant (PW1) testified *inter-alia* that, her employment was terminated by group accountant of Tourism Promotion Services Tanzania (TPST) who is not her employer. She stated further that, Godfrey Mikisi is not an employee of the Tanrus investment. She was categorical that, being the Human Resources Manager, knows who is and who is not employee of Tanrus investment. With that evidence, the issue relating to who has power to terminate applicant cannot be a new issue. It can be recalled that, DW5

was cross examined on exhibit D8 specifically on clause 4(c) quoted hereinabove. It was therefore, upon the respondent to prove by evidence that termination of employment of the applicant was done by a proper person for it to be fair termination but she failed.

It was submitted by counsel for the respondent that respondent had no obligation to prove fairness of termination of employment of the applicant because the two had a fixed term contract. With due respect to counsel for the respondent, that submission, in my view, cannot be correct. It is my view that, the law does not allow an employee with a fixed term contract of employment to be terminated at the will of the employer without reason and or without adhering to fair procedures of termination provided for under the law. Section 35 of Cap. 366 R.E. 2019 (supra) is clear that, the only exception for none application of fairness procedures of termination is for employees who has worked for less than 6 months with the same employer whether under one contract or more contracts. In my view, reference to one contract or more in section 35 of Cap. 366 R.E. 2019(supra), the legislature was referring to fixed term contract, because in no way, an employee can have several unspecified contracts with the same employer. More so, section 36(a)(iii) failure to renew a fixed contract on the same and similar terms may

amount to unfair termination. I can therefore conclude that, submissions by counsel for the respondent that in a fixed term contract an employer is not obliged to prove fairness of termination, is a great misdirection. More importantly, cases cited by counsel for the respondent cannot apply in the application at hand because, applicant testified that initially she had a one-year fixed term contract but upon confirmation, the contract changed from fixed to unspecified period. That evidence was not challenged. In fact, confirmation letter dated 1st July 2015 (part of exhibit D7) does not show that the contract between the parties was for a fixed term.

For all what I have explained herein above, I hold that termination was unfair both substantively and procedurally.

In the CMA F1, applicant only prayed to be reinstated without loss of remuneration. Having found that termination was unfair both substantively and procedurally, I hereby revise the CMA award, quash, and set it aside and order the respondent to reinstate applicant without loss of remuneration from the date of termination to the date of this award. According to salary slip (part of exhibit D16), applicant's monthly salary was TZS 5,006,289.50 and was receiving TZS 750,943.43 as house allowance all amounting to TZS 5,575,232.93 per month. From the date of termination to the date of this judgment is 22 months but

applicant was paid for the month of November 2021. Therefore, respondent shall pay applicant a total of TZS 120,901,891.53 being salary and house allowance for 21 months and reinstate the applicant. If respondent is unwilling to reinstate the applicant, then, she shall pay the said amount plus twelves (12) months salaries.

Dated at Dar es Salaam on this 29th August 2023.

B. E. K. Mganga
JUDGE

Judgment delivered on 29th August 2023 in chambers in the presence of Mr. Flavian Assenga, Advocate holding brief of Mr. Evold Mushi, Advocate for the Applicant and Mr. George Shayo, Advocate for the Respondent.

B. E. K. Mganga
JUDGE