IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MZIRAY, J.A., MWAMBEGELE, J.A. And KWARIKO, J.A.)

CIVIL APPEAL NO. 33 OF 2018

SERENITY ON THE LAKE LTD ..... APPLICANT

VERSUS

DORCUS MARTIN NYANDA ..... RESPONDENT

[Appeal from the decision of the High Court of Tanzania (Labour Division) at Mwanza]

(Nyerere, J.)

dated the 7th day of November, 2017

in

Revision No. 24 of 2017

JUDGMENT OF THE COURT

9th & 12th April, 2019

KWARIKO, J.A.:

The appellant having been aggrieved by the decision of the High Court of Tanzania (Labour Division) (Nyerere, J.) in Revision No. 24 of 2017 dated 07/11/2017, filed this appeal with the following three grounds:

1. *That, in view of the fact that the respondent's termination from employment was grounded on misconduct, the learned High Court Judge erred in*

holding that the said termination was grounded on incapacity or poor work performance;

2. *That, since the respondent's termination was fair both in terms of the ground in support thereof and proper procedure followed by the appellant in effecting the said termination, the award by High Court of Tshs. 2,016,000/= as compensation for twelve months' salary was not justified; and*
3. *That, since the respondent had worked for the appellant for a period of less than 6 months, she had no locus standi both before the Commission for Mediation and Arbitration and the High Court.*

In order to appreciate the decision we are going to make hereinbelow, we find it appropriate to recapitulate the facts of the case which led to this appeal. They are as follows. Before the Commission for Mediation and Arbitration (the CMA), the evidence unfolded from the appellant was that, the respondent was employed as a housekeeper on a fixed term of three months which was being renewed from time to time from March, 2013 to November, 2016. The evidence on record shows that the respondent was a supervisor in a housekeeping section

of the appellant's tourist hotel which was operating seasonally. That sometime in 2016 there occurred loss of USD 700 and a cell phone in the room of one of the customers under her supervision. The respondent being the supervisor in that part was held accountable.

However, because at that time the respondent was pregnant, the appellant's management found it wise to defer the matter until the respondent completed her maternity leave. When she returned in November, 2016, she was notified to attend a disciplinary meeting to deliberate on that issue which was termed as misconduct on her part.

At the end of the hearing, it was found that the respondent was habitually responsible for the loss of customers' properties. She was found guilty of misconduct thus the decision was made to terminate her from employment. She was terminated and served with termination letter on 30/11/2016. On her part, while she did not deny the facts about her employment with the appellant, she complained that she did not admit responsibility on the loss of USD 700 and a cell phone, was not given written notice to attend disciplinary committee and was not paid anything after the termination. That is why she filed the dispute before the CMA complaining of unfair termination. She prayed to be paid overtime, leave, public holiday's allowances and severance pay.

The Arbitrator who entertained the dispute found that the complaint was baseless and dismissed it.

Upon being aggrieved by that award, the respondent filed revision before the High Court. The High Court found that the respondent's termination was unfair as there was no valid reason for it and the procedure for termination was not followed. The Arbitrator's finding was quashed and set aside.

The High Court dismissed the respondent's claims for overtime and public holiday's allowance and awarded compensation of Tshs. 2,016,000/= being twelve months' salary for unfair termination, Tshs. 168,000/= being one month's leave salary and Tshs. 156,800/= being severance allowance for four years.

During the hearing of the appeal, the appellant was represented by its Principal Officer one Bernard Mkungu while the respondent appeared in person unrepresented.

Arguing for the first ground of appeal, the appellant submitted that the respondent was terminated for misconduct as opposed to incapacity or poor work performance as it was decided by the High Court. The appellant contended that before the respondent's

termination all legal requirements were followed as provided for in the Employment and Labour Relations Act No. 6 of 2004 (the Act). The appellant reiterated the procedure taken leading to the respondent's termination as it has been shown earlier in this judgment. Thus, the respondent did not appeal against the appellant's decision instead she took the matter to the CMA.

In the second ground of appeal, the appellant argued that the High Court erred to award compensation of twelve months' salary to the respondent because the termination procedures were followed by the appellant.

As regards the third ground of appeal, the appellant submitted that, because the respondent's contract of employment was for a fixed term of three months renewable, the issue of unfair termination is not applicable to her as per section 35 of the Act. The appellant argued further that the High Court erred in law to apply the Employment and Labour Relations (General) Regulations GN. No. 47 of 2017 in respect of this case because the same became operational long after the termination of the respondent.

In her reply the respondent complained that, the allegations which saw her out of work were unfairly leveled against her. That, the appellant ought to have questioned her misconduct when it allegedly occurred and not waiting until she completed her maternity leave. That, she did not fail to perform her work.

In the second ground of appeal, the respondent contended that she was entitled to the award of twelve months' salary because the termination was abrupt.

Arguing the third ground of appeal, the respondent repeated that her contract of employment was for three months renewable which continued for four years without termination. That she signed the last contract sometime in 2015. She contended that the appeal was without merit and prayed it to be dismissed.

In rejoinder, the appellant contended that the issue of misconduct could not be pursued when it happened owing to the respondent's pregnancy. That the High Court award was illegal. Lastly, that, the appellant's hotel operates seasonally and the respondent's contract was for three months renewable for four years. He concluded that, the

respondent never complained that she worked without a contract of employment.

Having considered the opposing submissions from the parties, we find it convenient to start dealing with the third ground of appeal which raises a point of law. The appellant argued that because the contract of employment between the parties herein was for a fixed term of three months thus less than six months prescribed by section 35 of the Act, the principle of unfair termination relied upon by the respondent is not applicable in this case. Section 35 of the Act provides:

> ***"Sub-Part E- Unfair termination of employment.***
>
> *35. The provision of this Sub-Part shall not apply to an employee with less than 6 months' employment with the same employer, whether under one or more contracts."*

Having pondered over this point, this Court is in agreement with the appellant that, the principle of unfair termination is inapplicable in this case because the contract of employment was for a period of less than six months. Further, the law under Rule 4 (2) of the Employment

and Labour Relations (Code of Good Practice) GN No. 42 of 2007 (the Code) says:

> *"Where the contract is a fixed term contract, the contract shall terminate automatically when the agreed period expires, unless the contract provided otherwise."*

Whereas, Rule 8 (2) (a) and (c) of the Code provides:

> *(2) Compliance with the provisions of the contract relating to termination shall depend on whether the contract is for a fixed term or indefinite in duration. This means that:-*
>
> > *(a) where an employer has employed an employee on a fixed term contract, the employer may only terminate the contract before the expiry of the contract period if the employee materially breaches the contract.*
> >
> > > *(c) where the contract is for an indefinite duration, the employer must have* ***a fair reason to terminate and follow a fair procedure."*** (emphasis supplied)

Therefore, the law is clear that, where the contract of employment is for a fixed term, the contract expires automatically when the contract period expires unless the employee breaches the contract before the expiry in which case the employer may terminate the contract. On the other hand, the employer must have a fair reason to terminate the contract in case of the indefinite contract of employment and must follow a fair procedure in that regard.

The foregoing proves that the respondent did not have cause to complain that she was unfairly terminated because she was not covered by the law on that. In that regard, the High Court erred in fact when it found that the parties were in an indefinite term of contract because the appellant had failed to furnish the respondent with the written particulars as provided under section 15 of the Act. This was not the case because the respondent personally confirmed that she had been signing a contract of employment of three months renewable for four years in aggregate. We are of the considered view that even if Rule 11 of GN No. 47 of 2017 was in place at the material time, it could not apply in respect of the respondent. This is because she was not in the managerial cadre. Neither was she a professional. For clarity, we find it apt to reproduce Rule 11; it provides:

"A contract for a specified period referred to undersection 14 (1) (b) of the Act, shall not be for a period of not less than twelve months."

Whereas section 14 (1) (b) of the Act reads:

"A contract with an employee shall be of the following types-

(b) a contract for a specified period of time for professionals and managerial cadre."

The High Court recognized the enactment of this law, but did not apply it as claimed by the appellant.

The foregoing analysis proves that, the dispute between the parties to this appeal was illegally entertained before the CMA and its resultant revision proceedings before the High Court. This ground of appeal has merit. The decision in the third ground of appeal is sufficient to dispose of this matter, but for clarity, we find it apposite to decide on other grounds of appeal as well.

As regards the first ground of appeal, we are in agreement with the appellant that, the High Court erred when it held that the

respondent's employment was terminated on the ground of incapacity and poor work performance. This is so because it is not disputed by the parties that the employment of the respondent was terminated when she was found guilty of misconduct after she failed to ensure safety of customers' properties which led to loss of a hotel guest's money and cell phone. This ground has merit.

In the second ground of appeal, we have gone through the evidence on record and found that the appellant followed proper procedure before the respondent was terminated. The respondent was given notice to appear before the disciplinary committee on 21/11/2016 which fact she did not dispute. The hearing was done on 26/11/2016 being beyond 48 hours after the notice of hearing which complied with Rule 13 (3) of the Code. The respondent was further given opportunity to be heard before the committee as per Rule 13 (5) of the Code and did not say she needed any representation or witness during the hearing. The respondent was furnished with the decision taken in terms of Rule 13 (8) of the Rules.

Therefore, the appellant followed legal procedure before the termination and hence the respondent was not entitled to the

compensation awarded by the High Court. This ground of appeal has merit.

In the upshot, for the reasons stated earlier, we find the present appeal meritorious and allow it. Consequently, we quash the decision and set aside the award of the High Court. This being a labour matter, we make no order as to costs.

DATED at **MWANZA** this 11th day of April, 2019

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL