

TANZANIA / JUDGMENT

feystambuli vs rudys hotel

2018 tzhcld 38 10 may 2018

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM REVISION NO. 570
OF 2016 FEY STAMBULI.....APPLICANT VERSUS RUDYS
HOTEL..... RESPONDENT

JUDGEMENT

Date of Last Order: 07/02/2018 Date of Judgement: 10/05/2018 L.L.Mashaka. J This judgement is in respect of the application for revision of the CMA award issued on 17/11/2016 in labour dispute CMA/DSM/ILA/R. 124/16/117 before Hon. Mpapasingo B. Arbitrator with a view to satisfy as to the legality, propriety and correctness thereof and revise the whole award of the CMA. For one to comprehend and appreciate the decision of this Court in this labour dispute, production of a background of the same and what transpired at the CMA is of importance. The applicant was employed by the respondent Rudys Hotel as a waitress on 03/08/2014 with a salary of Tshs 120,000/= and on 9th December 2015 the applicant employee made a request for an increase of salary from the respondent employer and the Chief Executive Officer (CEO) response to the same was to be first discussed by the Management. Following that the applicant when receiving her January 2016 salary she found it had not been increased hence rejected the same and on the 1st February year 2016 filed labour dispute to the CMA. At the CMA, Hon. Arbitrator drew up four issues, namely,

- i. Whether the applicant employee was terminated. //.
- Whether there was a valid reason for termination. Hi.
- Whether a fair procedure was followed before termination. iv.
- Reliefs to the parties. That the evidence adduced at the CMA was DW1 Ambwene Aron Ntiwimah the CEO of the respondent in December 2015 the applicant approached him for the increase of salary and told her that they would discuss together and went on safari. That on 1/02/2016 he found the claims of the applicant. That he was informed by the supervisor that when paying January salary the applicant refused to accept the same and left the work place. That the supervisor informed him and rang the applicant to pick her salary and he did the same and left without coming back. That he had the one responsibility to terminate employees but not the supervisor. That the applicant was not terminated hence issue of notice does not arise. That on payment of leave and severance pay DW1 did not refute the same. On the other hand DW2 Stanley Clever who was the Supervisor of the applicant testified that it was his

duty to pay other employee's salaries when the CEO is not present and when paying salary for January 2016 the applicant refused to accept the same on the reason that they had agreed with CEO to be paid higher salary than the one that she was paid. Since she refused and left, DW2 informed the CEO who directed him to call the applicant to come back to work, and when she reported back she took her salary on 02/02/2016 and left. He testified that from there he knows nothing on what went on thereafter. The applicant employee testified that she was employed on 03/08/2014 in the post of waitress by an oral contract and on 09/12/2015 prayed for a salary increase and was told by the CEO that the same will be done in January. That on the 30th January 2016 when she went to collect her salary she found that there was no any increase of her salary. That she enquired from the Supervisor of the respondent who had no any directives until he consults the CEO. On 01/02/2016 while at work she was told by the Supervisor that she had been given leave for five days and upon the expiry of the five days she reported back to work and was paid some money and told that she was no longer needed. That she made communications with the CEO but it was futile. t After evaluating evidence at hand, Hon. Arbitrator first ruled out there was contradiction on when the dispute arose, that during the hearing the applicant claimed to have been terminated by DW1 Ambwene on 12/02/2016 while in the CMA Form No. 1 to be 01/02/2016 or 06/02/2016 hence held the dispute arose on 01/02/2016. Secondly, Hon. Arbitrator held that the applicant was not terminated rather she left her employment. Aggrieved by the CMA decision, the applicant filed the present application for revision by Notice of Application and Chamber summons under Sections 91(l)(a) and (b), (2)(a) and (b), (4)(a) of the Employment and Labour Relations Act No 6 of 2004, Rule 24(l)(2)(a)b(c)(d)(e)(f), (3) 3 (a)(b)(c)(d), Rule 28(l)(b)(c)(d) and (e) of the Labour Court Rules, Government Notice No. 106/2007 and supporting affidavit of the applicant Fey Stambuli. The hearing of the application was by way of written submissions and from the records the submissions for the applicant were drawn and filed by Mr. Peter Mnyanyi from TAROTWU and Mr. Emmanuel William Kessy, Advocate drew and filed those for the respondent. The applicant submitted that the application was centred on Section 91(2) (a) (b) of the Employment and Labour Relations Act No. 6 of 2004 that there was misconduct on the part of Hon. Arbitrator and the CMA award was improperly procured. Before going into the merits of the revision there was reproduction of the history to the dispute, which has already been done. On the first ground for revision it was submitted that at page 3 of the typed CMA award, Hon. Arbitrator did not properly record the evidence adduced by the applicant during the hearing rather it was Hon. Arbitrator's assumptions, that Hon. Arbitrator misconducted himself in neglecting the applicant's evidence. That the applicant never pleaded that she went for leave of five days and came back and took her salary nor, on the 12/02/2016 being terminated from job by the Director one Ambwene but it is Hon. Arbitrator's assumption and misconduct. That the parties' pleadings at the CMA and the evidence adduced are inconsistent. That Hon. Arbitrator's misconduct has diametrically prejudiced her case at the CMA. That the evidence of the applicant at the CMA was that, she was employed by the respondent on 03/08/2014 as a waitress for a salary of Tshs. 126,000/- per month and on the 09/12/2015 prayed for a salary increment from the respondent. That on 01/02/2016 she was paid her January 2016 salary

and on the same day she was terminated orally without any valid reason by one Ambwene Aron Ntiwimah Director of the respondent. This was the evidence from DW1 before the CMA. The second ground for revision is consolidated from point No. 3 and 4 of the application, and submitted that the applicant was terminated on 1/02/2016 and not on 12/02/2016 as claimed by Hon. Arbitrator and the labour complaint at the CMA was not premature and Hon. Arbitrator failed to analyse evidence and assess the parties evidence during the hearing which caused the CMA award fail to reflect the proceedings during the hearing. The applicant prayed this Court to revise and set aside the award issued by Hon. Mpapasingo, Arbitrator. In response the respondent prayed at the outset this Court to dismiss the application for lack of merit. The respondent explained the background of the dispute and insisted that when the applicant found that there was no increase of her January salary she refuse to take her salary. That she asked for an increase and was told by the Supervisor that the Director had travelled, hence she had to wait for the return of the Director. That the applicant did not attend work after that on reasons known to herself. That the respondent made contact with the applicant to collect her salary, which she did collect and never appeared for work. When Director returned back from safari on the 1/02/2016, she was served with the CMA Form No. 1 by the applicant. On the first ground for revision, respondent argued that Hon. Arbitrator considered every evidence adduced by both parties as per pages 3 and 4 of the CMA award. That the applicant claimed to be unfairly terminated but never justified her termination to be unfair. That as per DW1 testimony applicant's claim for raise of salary was received and replied her that the same will be taken into consideration. That on 1/02/2016 the respondent received complaint from the applicant. It was also corroborated by DW2 that he was informed by the Director (DW1) to communicate with the applicant to return back to work and the applicant responded and on 02/02/2016 she went back and took the salary and never came back. It was further argued that the applicant had shown in the CMA Form No. 1 that she was terminated on 1/02/2016 but during the trial she testified that she was terminated on 12/02/2016 and that on 01/02/2016 she was just given suspension by DW 2 the Supervisor. That the said contradiction can be seen at pages 3 and 4 of the CMA award, while under cross-examination the applicant testified that DW1 terminated her on the 12/02/2016 and lodged a complaint at the CMA on 12/02/2016 for unfair termination while the CMA Form No. 1 was signed and served to the respondent on 01/02/2016 when the applicant alleged to have been suspended and not terminated. That Section 36(ii), (iii) & (iv) of the Employment and Labour Relations Act No 6/2004 vividly explains the interpretation of termination. Thus the applicant was not terminated by the respondent but by her own conduct she refused to report for work. That Hon. Arbitrator was correct in awarding the respondent as the applicant failed to prove she was terminated from employment by the respondent. 6 The respondent emphasised that the respondent has not terminated the applicant from work for any reason basing on her claim. That trial Arbitrator having found no evidence to support applicant's claims for termination by the respondent, thus the applicant's claims were baseless and were considered as mere words as there is no solid proof or evidence to support her claims. The respondent referred this Court to the case of C.RJ.E Vs. Abdallah Said and 15 Others, Revision No 116 of 2015 where it was held:- 7/7

absence of any other evidence I find the arbitrator correct to rely on the available documents in records." Lastly the respondent prayed that the application be dismissed for lack of merit. The issue for determination having heard submissions by both parties and gone through Court records at hand is whether or not the applicant was terminated by the respondent despite the fact there is contradiction on the material date when the dispute arose raised by parties and Hon. Arbitrator, will have no any impact thereto. The law, under Section 36 of the Employment and Labour Relations Act No. 6 /2004 clearly shows what amounts to termination of employment of an employee. That:- " 5. 36. For purpose of this Sub-Part-

- a) "termination of employment" includes-
 - i. a lawful termination of employment under the common law; //'. a termination by an employee because the employer made continued employment intolerable for the employee; and Hi. a failure to renew a fixed term contract on the same or similar terms if there was a reasonable expectation of renewal; iv. a failure to allow an employee to resume work after taking maternity leave granted under this Act or any agreed maternity leave;
 - v. a failure to re-employ an employee if the employer has terminated the employment of a number of employees for the same or similar reasons and has offered to re employ one or more of them." From the records at hand the respondent adduced evidence that he did not terminate the employment of the applicant as per the above provision of the law. The evidence adduced shows that the applicant had request for a salary increment and was told to wait for the Management to discuss on the request. It is noted that the applicant rose to claim for her existing right which is a dispute of interest. This Court in the case of Reli Assets Holding Co. Ltd Vs. Japhet Casmir & 1500 Others, Rev. No. 10 of 2014 HCLD at Tabora, Hon. Mipawa J [as he then was] defined dispute of interest to mean, "a dispute about the creation of new right(such as employees demanding that their employer must provide their children with after school care where this has never been done) or more commonly\ about the variation of an existing right(for example here employees demand an increase in wages)." Therefore the applicant had a right to lodge a dispute of interest, claiming for a salary increment, but instead lodged a dispute for unfair termination of employment. a The Court take note from the pleadings that the respondent did not dispute the claim advanced by the applicant for a salary increment but they had not yet met to discuss on the same rather the applicant went to the CMA to lodge a dispute for unfair termination and as per CMA proceedings at page 7, the respondent testified that the applicant was not told "kazi hamna" and the cross examination by the applicant was closed, the applicant did not further cross examine. Hon.Arbitrator did properly record the proceedings and not as alleged by the applicant. The applicant's opening statement its contents are also contradictory to the evidence adduced during arbitration proceedings. It is the holding of this Court that there was no termination of the applicant's employment as per law explained above rather the applicant decided not to report back to work on her own accord. Hon.Arbitrator properly analysed the evidence at hand and there was no misconduct on the part of Hon. Arbitrator,

hence the CMA award was properly procured. I uphold the CMA award. The application for revision is hereby dismissed for lack of merit. So ordered. L.L.Mashaka JUDGE 10/05/2018

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