IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MUGASHA, J.A., NDIKA, J.A. And LEVIRA, J.A.)

CIVIL APPEAL NO. 343 OF 2019

SEVERO MUTEGEKI..... 1st APPELLANT

REHEMA MWASANDUBE.....2nd APPELLANT

VERSUS

MAMLAKA YA MAJI SAFI NA USAFI WA MAZINGIRA MJINI DODOMA (DUWASA).....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dodoma)

(Mansoor, J.)

dated the 21st day of September, 2018

in

Labour Revision No. 06 of 2017

JUDGMENT OF THE COURT

16th & 19th June, 2020

MUGASHA, J.A.:

The appellants in this case were employees of the respondent as cashier and assistant accountant respectively. On the 1st February, 2016 the respondent wrote a letter to each appellant notifying them on having occasioned loss of TZS. 250,560,517 and TZS. 380,478,754 respectively, as unveiled in the internal audit report. In the said letters, each was required to make a written response to the said allegations

and they both obliged. Subsequently, they were interdicted in order to pave way for an investigation to be conducted. Later, the appellants after being heard before the respondent's disciplinary committee, were found guilty of negligence and given a warning. However, they were directed to resume their duties.

On 29/2/2016 the appellants were for the second time interdicted from employment to pave way for another investigation to be conducted which is the subject of the present appeal. Subsequently, on the 9th and 18th day of March, 2016 the respondent wrote to each appellant directing them to avail explanation on the loss of TZS. 408,851,939/=. They both obliged and on the 21st March, 2016 were summoned before the respondent's disciplinary committee on account of allegations of occasioning loss of TZS. 408,851,939/=. After the hearing, the appellants were found guilty of gross negligence and dishonesty and as a result, they were both terminated from employment from the 2nd day of April, 2016.

The appellants were not amused by the expulsion and as such, they lodged an appeal to the Commission for Mediation and Arbitration (the CMA) for Dodoma vide RF/CMA/DOD/46/2016 and

RF/CMA/DOD/47/2016 respectively. The CMA reversed the decision of the respondent's disciplinary committee on the ground that, the appellants were unfairly terminated from employment because there were no justifiable reasons and that procedures for termination were unjustifiable. Aggrieved with the decision of the CMA, the respondent successfully lodged a Labour Revision No. 6 of 2017 in the High Court of Tanzania at Dodoma whereby the decision of the CMA was quashed and set aside. Apart from the High Court observing that the CMA award in favour of the appellants was illegally procured, it concluded that the termination was justified because the respective procedures were complied with.

Being aggrieved with the decision of the High Court, the appellants have preferred the present appeal to this Court. In the Memorandum of Appeal, they fronted seven grounds of complaint as follows:

1. That the High Court erred in law and fact in deciding that there was illegal and improper procurement of the award at the Commission for Mediation and Arbitration.

2. That the High Court erred in law and fact in deciding that, there was proof of loss of Tshs. 408,852,939/= caused by the appellants' gross negligence.

3. That the High Court erred in law and fact in deciding that, there was gross negligence committed by the appellants and that there were justifiable reasons for their termination.

4. That the High Court misdirected in deciding that the appellants were warned for the first time and then the loss continued as such it justified for their termination.

5. That the High Court erred in law and fact in deciding that the supply of the extract of the audit report was enough for the appellants' right to be heard.

6. That the High Court erred in law and fact in deciding that the respondent followed lawful procedures in termination of the appellant's employment.

7. That the High Court erred in law and fact in not upholding the decision of the Commission for Mediation and Arbitration for

Dodoma in its findings and award since it was based on thorough analysis and valuation of the evidence.

Parties filed written submissions containing arguments for and against the appeal which were adopted by the respective learned counsel at the hearing of the appeal.

At the hearing, the appellants were represented by Mr. Elias Machibya and Ms. Magreth Mbasa, learned counsel, whereas the respondent had the services of Mr. Abubakar Mrisha, learned Senior State Attorney and Mr. Daniel Nyakiha, learned State Attorney.

Upon being reminded on the dictates of section 57 of the Labour Institutions Act No. 7 of 2004 which require parties appealing to the Court to do so on a point of law, Mr. Machibya opted to abandon the 2nd, 3rd, 4th and 7th grounds of appeal. In the 1st , 5th and 6th grounds of appeal, the appellants basically faulted the learned High Court Judge in ruling that, the award in their favour by the CMA was illegal and improperly procured and that the termination of the employment of the appellants was lawful.

It was submitted that, the learned High Court Judge made determination on extraneous matters which were raised *suo motu* in

the course of writing her judgment and without hearing the appellants which made her to conclude that the CMA award was illegal and improperly procured. On this, it was argued that, though the issues of improper procurement of the arbitration award; gross negligence of the appellants and embezzlement of funds were not pleaded, they were the basis of the learned Judge's determination who for that reason, condemned the appellants without hearing them. He argued this to be contrary to paragraph 13 (6) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N 42 of 16/2/2007 (The Code of Good Practice) and urged the Court to nullify the decision of the High Court and return the case file to the High Court for the proper hearing of the Revision.

Regarding the unfair termination, it was submitted that, the learned High Court Judge did not consider that the appellants were terminated in violation of the prescribed procedure. It was pointed out that, while the audit report is what precipitated the termination of the employment of the appellants, after the audit in question, the appellants were not given opportunity to discuss the audit findings with the internal auditor before he made a report which was the basis of preferring the charges against the appellants. He argued this to

have contravened Dodoma Urban Water Supply and Sewerage Authority (DUWASA) Internal Audit Manual (the Internal Audit Manual). In addition, it was contended that, though the appellants had requested to be given the audit report before the hearing, this was not heeded by the respondent. In this regard, it was argued that the appellants were condemned without being given opportunity to be heard which is a violation of Rule 13 of the Code of Good Practice.

On the other hand, in opposition of the appeal, Mr. Mrisha urged the Court to dismiss the appeal. It was submitted that, the High Court s observation on the illegal and improper procurement of the CMA award, was justified as it suffered material irregularities on account of the failure by the arbitrator to properly evaluate the evidence presented before the CMA on the occurrence of loss occasioned by the appellants which was not considered by the arbitrator.

Moreover, it was submitted that the termination was fair and valid because the procedures were complied with to the letter. On this, Mr. Mrisha pointed out that, the appellants were duly notified about the allegations against them; were given opportunity to make responses; informed about right to be represented before the

disciplinary committee and opted to bring their advocates; upon being heard they were found guilty and terminated from employment on account of gross negligence occasioning loss of TZS. 408.851,938.65/=. It was argued that, since the internal auditor had conducted a special audit, he was bound by special terms of reference and not the Internal Audit Manual and as such, he was not obliged to discuss the findings with the appellants before making the audit report.

In the alternative, it was argued that, since the appellants were given extracts of the audit reports, it was perilous on their part not to press to be availed with the full audit report. In addition, Mr. Nyakiha chipped in by arguing that, the auditee referred to under item 8.4 of the Internal Audit Manual is the Director General who was being audited and not the appellants. Finally, it was submitted that the termination was fair and valid having complied with the criterion stated under Rule 13 of the Code of Good Practice.

In rejoinder, Mr. Machibya maintained that, the appellants were not heard in what was raised *suo motu* by the learned High Court Judge on the illegal and improper procurement of the award. He added

that, since it is the Director General of the respondent who directed the audit to be conducted as reflected at page 100 of the record of appeal, the actual auditees were the appellants and not the Director General. He thus reiterated that, the appellants were entitled to be given opportunity to discuss the findings with the auditor before the making of the report. Besides, he added that despite requesting to be availed with the full audit report as indicated at pages 877 and 879 of the record which was conceded by the Auditor at page 1593 of the record of appeal, the report was not availed to the appellants. He argued this to be a violation of Rule 13 (5) of the Code of Good Practice and urged the Court to allow the appeal.

After a careful consideration of the written submissions for and against the appeal and the oral submissions of learned counsel, we have gathered that, it is not in dispute that the employment of the appellants was terminated on account of having occasioned loss of the sum of TZS 408,851,939/= to the respondent. However, parties locked horns on the propriety or otherwise of the finding by the High Court on the award by the CMA being illegally and improperly procured and secondly, the validity or otherwise of the termination of the appellants' employment.

Rule 8(1) (c) and (d) of the Code of Good Practice provides that:

"An employer may terminate the employment of an employee if he-

> *(c) follows a fair procedure before terminating the contact: and*
>
> *(d) has a fair reason to do so as defined in Section 37(2) of the Act."*

In terms of the provisions of section 37 (2) of the Employment and Labour Relations Act, termination is adjudged unfair if the employer fails to prove that: **One**, the validity of reasons for termination; **two,** that the reason for termination is fair and **three,** that the termination was conducted in accordance with a fair procedure. What constitutes a fair termination is regulated by Regulation 13 of the Code of Good Practice which prescribes the criteria and the procedure regulating lawful termination to include the following:

> *"13-(1) The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held.*

(2) where a hearing is to be held, the employer shall notify the employee of the allegations using a form and language that the employee can reasonably understand.

(3) The employee shall be entitled to a reasonable time to prepare for the hearing and to be assisted in the hearing by a trade union representative of fellow employee. What constitutes a reasonable time shall depend on the circumstances and the complexity of the case, but it shall not normally be less than 48 hours.

(5) Evidence in support of the allegations against the employee shall be presented at the hearing. The employees shall be given a

In terms of sub-regulation (1) what entails an investigation to ascertain whether there are grounds of the hearing includes as well, exhausting the prescribed internal measures in the Employment Institution regulating the operational aspects which are binding on

both the employees and the employer. In the present case, as earlier stated, what triggered the dispute which is the subject of the appeal before us, is the internal audit in terms of letters authored by one Selemani Mwaita, Accountant addressed to each of the appellant. In respect of the 1st appellant, the letter with REF: DUWASA/CF.SD20/3/VOL.I/ 45 dated 9/3/2016 at pages 838 indicates among other things, as follows:

YAH: KUTOA MAELEZO KUHUSIANA NA UPOTEVU WA FEDHA KIASI CHA TSHS. 408,851,939/=

" *Mnamo tarehe 14.01.2016 mwajiri alipokea taarifa ya Mkaguzi wa ndani ikiwa na taarifa mbili moja ikiwa ni upotevu wa fedha kiasi kilichotajwa hapo juu.*

Katika taarifa hiyo inaonesha kuwa wewe kama ***Mtunza Fedha (Cashier)*** *kwa kipindi cha kati ya tarehe 01.07.2015 hadi 26.11.2015 haukuweza kupeleka fedha benki kiasi tajwa hap juu zikiwa ni fedha taslimu kutoka kwa wateja waliolipia kupitia pay points za Mamlaka kwa kipindi tajwa.*

Kwa mujibu wa majukumu yako ya kazi kama Mtunza Fedha (cashier) ulipokea fedha

hizo kutoka kwa Revenue collectors kwa tarehe tofauti kama viambatisho vinavyoonesha lakini kutokana na sababu ambazo hazifahamiki haukuweza kupeleka fedha benki kama unavyopaswa kufanya pasipo maelezo yoyote kitendo ambacho kimepelekea upotevu wa fedha kiasi hicho....

*Kwa barua hii nakupa masaa **48** tokea muda wa kupokea barua hii utoe maelezo ya kina ni wapi fedha hizo zilipo, na kama hakuna majibu je kwa nini usichukuliwa hatua kali za kinidhamu kwa upotevu huo.*

Kwa barua hii naambatisha vielelezo vinavyoonesha mchanganuo wa kiasi kilichopokelewa kwa siku na kiasi kilichopelekwa benki pamoja na tofauti ambavyo ndiyo kiasi kilichopotea."

In respect of the 2nd appellant, the respective letter is REF: DUWASA/CF.SD.20/3/VOL.I/ 52 dated 18/3/2016 whereby at page 1497 it bears the same contents as that of the 1st appellant except on the allegation of negligent making entries in the cash book.

In a nutshell, in reference to the audit report in question, each appellant was required to explain away as to why he should not be

subjected to disciplinary measures on account of omitting to discharge duties which occasioned the stated loss to the respondent. The appellants obliged and gave their explanations. In those explanations, in 1st appellant's letter which appears from pages 874 to 877 of the record, she among other things, inquired from the respondent what is reflected at page 877 that:

> *7. Vielelezo vyote ulivyoambatanisha kwenye barua yako nilikwisha vijibu kwenye hatua za nidhamu za awali. Hivyo hatua hii iliyoanza upya ni batili na yenye nia mbaya kwangu. Hata hivyo, vielelezo hivyo havieleweki kwani vingine vimeandikwa kwa kiingereza, vingine vinaonesha majedwali amabayo siyo rahisi kuyachambua na kuyaelewa. Wakati mwingine kama kuna shtaka halali na la haki ni* ***vema mtu akapewa report yote nzima ya ukaguzi*** *ili aweze kujibu vizuri. Mimi sikupewa hiyo taarifa. Badala yake kwenye barua yako umeambatanisha vipande tu ambavyo unavihitaji wewe bila kuona taarifa yote. Vipande vya kuonyesha wazi wapi mkaguzi alisema mimi nimekosea...."*

As for 2nd appellant, her letter dated 20/3/2016 from page 878 to 880 of the record in paragraph 5 at page 879 of the record raised a similar concern as follows:

> *"...Vielelezo vyako vyote ulivyoambatanisha vinaonyesha tu mchanganuo wa kiasi kilichopelekwa benki pamoja na tofauti ambayo ndiyo kiasi kilichopotea. Vielelezo hivi havinihusu kutokana na mapungufu yafuatayo:*
>
> *(i) Havionyeshi mimi kosa langu ni lipi na nilihusika wapi?*
>
> *(ii) Taarifa yenyewe ya mkaguzi sikupewa yote ili nami niweze kuelewa mapungufu yangu yalitokea vipi na hapo ndipo ningeweza kujibu vizuri.*
>
> *(iii) Hizo taarifa za mahesabu (cash book) zinazodaiwa nilliingiza mahesabu kimakosa sijapewa iii niweze kujibu mapungufu yangu.*
>
> *(iv) Majedwali yote uliyoniambatanishia yanaonyesha fedha zilizoingia na zilizopelekwa benki na mapungufu. Mimi kazi yangu siyo kupokea pesa wala kuzipeleka benki. Hivyo vielelezo hivyo havihusiki na mimi. Ningeomba nipewe vielelezo vinavyohusiana na kazi yangu ili niweze kujibu malalamiko yanayonihusu...."*

Both appellants brought to the attention of the respondent that, without the full audit report they were not placed in a position to know the raised queries and that, the extracts of the report availed were not clear; neither relevant to the charges nor had any bearing on the scheduled duties of one of the appellant. As such, it was not possible for them to make adequate explanations on the charges laid. However, this was not heeded and instead, the appellants were subjected to a disciplinary committee and they were expelled from the employment.

Before the CMA, a similar complaint ensued that neither were the appellants involved in the audit exercise nor given the audit report so as to make proper responses to allegations against them. The CMA's determination was to the effect that the appellants were not fairly terminated on account of what is reflected at page 1685:

> *"Tume inaona kuwa hoja hii ina mashiko kwa sababu ya kutowahoji walalamikaji wakati wa ukaguzi ilikuwa ni sawa na kuwanyima haki ya kusikilizwa. Hii pia ilikuwa ni kwenda kinyume na kanuni za ukaguzi wa ndani za DUWASA. (Internal Audit Manual)...."*

The decision was reversed by the High Court on ground that the award was illegal and improperly procured because the appellants were guilty of gross negligence. Besides, the appellants' complaint on not being availed with the audit report was treated by the High Court in the following manner:

> *"In fact there was illegal and improper procurement of the Award in that there was ample evidence of gross negligence present before the Arbitrator, and it was wrong for the Arbitrator to rely in his decision that since the employees were not supplied with full report of the audit then they were denied a chance to be heard.* ***It is in evidence that the employees were supplied with the extract of the audit report in which their charge was based, and if they needed more information or more particulars of the charge, they should have requested from the employer before they answered the letter to show cause.*** *It is in evidence that the employer was able to prove that the employees were negligent."*

[Emphasis added]

This finding is with respect, wanting and it is entirely not supported by the evidence on the record which justifies the intervention of the Court on account of misapprehension of the evidence on the record as it constitutes a point of law for determination by the Court in terms of section 57 of the Labour Institutions Act. We say so because, it is on record that, the request by the appellants to be availed with the full audit report and other documents so that they could make prompt responses was not heeded by the respondent who proceeded to punish the appellants.

Moreover, while the CMA considered paragraphs 8.4 and 8.4.1 of the Audit Manual which, among other things, prescribes the modality of discussion of internal audit report with the management and that no findings, conclusions and recommendations should ever be incorporated in an audit report that were not previously discussed with auditees, the High Court did not consider the Manual which was crucial in determining if the appellants were involved or not.

It was the submission of Mr. Nyakiha for the respondent that, the auditee in this matter was the Director General and not the appellants and as such, the internal auditor was not obliged to have a

prior discussion with the appellants. This was challenged by Mr. Machibya who argued that, since it is the Director General who directed the audit to be conducted, the actual auditees were the appellants and not the Director General of the respondent.

It is our considered view that, though the Internal Auditor's ultimate reporting responsibility lies to the Director General it is not in dispute that, those actually audited were the appellants and it is the audit report which triggered the charges against them. In that regard, the non-involvement of the appellants and subsequent conviction based on that report was irregular because they could not adequately prepare for the hearing before the disciplinary committee of the respondent. Instead, it is the respondent who being in possession of the report had all the ammunition to make a stronger case which was to the disadvantage of the appellants which rendered what followed to be unprocedural. We are fortified in that account in the light of what the High Court said in case of **SIMEON MANYAKI VS THE INSTITUTE OF FINANCE MANAGEMENT** [1984] TLR 304 among other things, that:

(i) An administrative body exercising functions that impinge directly on legally recognized interests

has a duty to act judicially in accordance with the rules of natural justice,

(ii) the applicant whose rights and legitimate expectations stood to be so adversely affected by the inquiry had the right:

a. of being sufficiently appraised of the particulars of the prejudicial allegations that were to be made or had been made against him, so that he could effectively prepare his answer and collect evidence necessary to rebut the case against him;

b. subject to the need for withholding details in order to protect other overriding interest, of being accorded sufficient opportunity of controverting or commenting on the materials that had been tendered or were to be tendered against him;

c. of presenting his own case;

d. of being given a reasonable and fair deal..."

We fully subscribe to the said decision and in the case at hand, it was incumbent on the respondent's disciplinary committee to observe the said guidelines. We say so because in the light of what transpired

in the case at hand, it cannot be safely vouched that the appellants were given opportunity to be fully heard before being condemned. The right to be heard before adverse action or decision is taken against a party 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. This is so because the violation is considered to be a breach of natural justice. See- **ABBAS SHERALLY & ANOTHER vs. ABDUL S. H. M. FAZALBOY,** Civil Application No. 33 of 2002 (unreported). Thus, the failure to accord the appellants an opportunity to be fully heard was a breach of natural justice and a violation of a fundamental right to be heard under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution) which provides:

> *Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa Mahakama au chombo kinginecho kunachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamillfu..."*

See- **MBEYA RUKWA AUTO PARTS AND TRANSPORT LIMITED vs. JESTINA GEORGE MWAKYOMA,** Civil Appeal No. 45 of 2000 and **MIRE ARTAN ISMAIL AND ANOTHER VS SOFIA NJATI,** Civil Appeal No 75 of 2008 (both unreported) and **SELCOM GAMING LIMITED VS GAMING MANAGEMENT (T) AND GAMING BOARD OF TANZANIA** [2006] T.L.R 200.

In view of what we have endeavoured to discuss, we are satisfied that the termination of employment of the appellants was unfair as correctly found by the CMA on account of denial of the right to be heard on the part of the appellants.

As to the finding by the learned Judge of the High Court that, the CMA award was illegal and improperly procured, this was not justified as it is not backed by the evidence on the record. However, we do not agree that it was based on extraneous factors because the issues of gross negligence fared right from the initial stages when the charge was laid against the appellants; during the proceedings before the disciplinary committee and before the CMA.

In this regard, we are satisfied that, the termination of the appellants was not valid on account of being condemned without being

heard and as such it was unprocedural and unfair as rightly found by the CMA. We thus allow the appeal, reverse the decision of the High Court and order the respondent to pay the appellants remuneration or terminal benefits in compliance with CMA's award. This being a labour matter, we make no order as to costs.

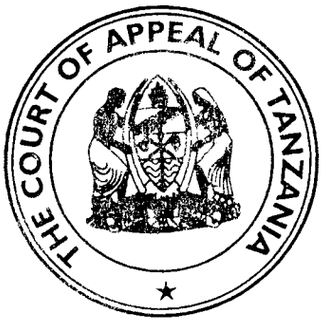
DATED at **DODOMA** this 18th day of June, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Judgment delivered on 19th day of June, 2020 in the presence of Mr. Elias Machibya & Magreth Mbasha, learned counsel for the Appellants and Mr. Ayoub Mganda, learned Principal Officer for the Respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL