IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: LILA, J.A., KITUSI, J.A. And FIKIRINI, J.A.)

CIVIL APPEAL NO. 138 OF 2022

PRATINUM CREDIT LIMITED.....APPELLANT

VERSUS

MARTIN JOAQIM.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Tanga)

(Mkasimongwa, J.)

Dated 20th day of October, 2021

in

Labour Revision No. 21 of 2017)

JUDGMENT OF THE COURT

3rd May, & 6th October, 2023

LILA, J.A.:

The appellant herein, Pratinum Credit Limited, was a losing party before both the Commission for Mediation and Arbitration (the CMA) and the High Court in, respectively, Labour Dispute No. TAN/CMA/65/2016 and Labour Application No. 21 of 2017. Still undaunted, the appellant has preferred this appeal to challenge the decision of the High Court.

The facts of the case leading to this appeal pose no difficult to comprehend. The appellant company is a financial institution dealing with lending money to employees and has branches, Tanga inclusive, managed by Branch Sales Managers. It also has market searchers who work under

and are financially facilitated by the Branch Managers. The parties to this appeal are at one that the respondent was employed by the appellant on 23/11/2006 as a Sales Executive at a monthly salary of TZS 216,000.00 and was later promoted to a post of Branch Sales Manager at a salary of TZS 1,000,000.00. He worked at Tanga at a position of Branch Sales Manager where, unfortunately, on 20/7/2016 the appellant terminated him from employment on misconduct. Aggrieved, he lodged his complaints with the CMA.

In their respective opening statements, the place and date of recruitment were at issue before the CMA as the respondent claimed that he was recruited in Dar es Salaam on 23/11/2006 and was later transferred to Tanga as opposed to the appellant who claimed that the respondent was recruited in Tanga on 1/6/2015. Also at issue were the reasons for termination and fairness of the procedure adopted during the disciplinary hearing.

The appellant's case was briefly that; complaints were registered to the company from various sales agents in Tanga namely Ally Bendera, John S. Gatt (DW3), Yona Cleophas and Sunday Philipo Nkupama that the respondent had a tendency of not giving them financial support as directed/instructed by the management at the Main Branch in Dar es Salaam. To have the matter resolved, the respondent was summoned to

appear before a Disciplinary Committee on 26/6/2016 at 10.00 am to which he attended to answer a charge of embezzlement/misappropriation of the appellant's funds and dishonesty. In defending himself, the appellant submitted to the Credit Department of the appellant company receipts for fuel, accommodation and meals which were later suspected to be forged. A hearing was conducted on 4/6/2016 in the presence of both sides and the appellant was afforded opportunity to defend himself and, at its conclusion, the Disciplinary Committee recommended to the Management that the respondent's employment be terminated. Aggrieved, the respondent unsuccessfully appealed to the Management and he was effectively terminated on 20/6/2016.

On his part, the respondent simply claimed that there were fatal irregularities during the Disciplinary Committee hearing which culminated in his employment being terminated by the appellant. The respondent referred the matter to the CMA.

From the parties' respective opening statements, the CMA drew these four issues to guide it during the hearing of the dispute: -

1. Whether or not there was/were valid and fair reasons for the complainant's termination
2. Whether the letter dated 20/07/2016 is validly enforceable in law.

3. Whether or not the respondent complied with procedures before terminating the complainant.
4. To what relief are the parties entitled.

The appellant produced four (4) witnesses namely Ladislaus Mwongerezi (DW1) who was the appellant's Human Resource Manager, Edith Leonard Chundu (DW2), a Manager Holly Lodge, DW3 and Doris Lyakulwa (DW4) a Chief Accountant of the appellant. The respondent, on the other side, was the sole witness. The learned counsel Mr. Arnold Luoga represented the appellant and Mr. David Kapoma appeared on behalf of the respondent as his representative. Since an appeal to this Court is on points of law only as shall be shown hereunder, we find it unnecessary to reproduce in details the substance of the witnesses' evidence and, instead, reference to the relevant parts of their testimonies shall, whenever necessary, be made in the course of the judgment.

The CMA rendered its award on 31/5/2017 after hearing the witnesses for both sides. DW2 stated that she issued the respondent with a receipt of TZS 35,000.00 upon him and two other persons staying in the lodge but the cost was inflated by the respondent by adding number 3 so as to read TZS 335,000.00. Relying on such evidence, the CMA was of the finding that out of the listed allegations of misconduct, only one allegation was sufficiently established which was presentation of false receipts in

respect of the funds spent for shelter, food and drinks. The CMA further observed that such a conduct, in terms of Rule 12(3) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 (GN No. 42 of 2007) (henceforth GN No. 42/2007), amounted to gross misconduct which is the same thing as gross dishonesty. However, the CMA was satisfied that such a misconduct is not stipulated in the contract of employment (exhibit DE1) and neither did the appellant produce before it the workplace rule or policy providing that such a misconduct would warrant termination of employment in terms of Rule 12(3) and 12(1)(v) of GN No. 42/2007. Stressing on the need to comply with that requirement, the CMA pronounced itself in these words which, given their relevance in the determination of this appeal, we take pain to quote in extenso: -

> *"Before I conclude on this issue, I think I should stress up something important.* ***Stating and proving a reason shouid go hand in hand with justification that such a reason is among those which justify termination or, at least that the aiieged person has committed the same repeatedly. The employment contracts or rules shouid expressly provide for offences which may justify termination because termination is the biggest punishment for an employee. Failure to specify that a particular offence***

justifies termination or, warning or, any specific punishment, may give the empioyers a room to impose any punishment as they wish.

I am aware and, I have seen a formal warning (exhibit DE3) issued to the compiainant but, I have also realised that the said warning was concerning (sic) the issue of failure to meet certain performance targets and not misconduct. My position would have been different had the respondent proved that the alleged misconduct justifies termination.

It wiii be unfair to terminate an employee who has worked for not less than ten (10) years for a reason not expressly stated to justify termination. *It therefore goes to the advantage of the complainant as I rule that the reason for termination was unfounded and unfair."*(Emphasis added)

Properly and objectively gauged, it is clear that the arbitrator was stressing the need for employers to strictly comply with the provisions of Rule 12(1) of GN No. 42 of 2007 failure of which renders the reason for termination unfair.

Besides the above, the CMA was convinced that there were irregularities in the conduct of disciplinary committee hearing rendering

the procedure of termination unfair outlining a few of them to be that; **one**, the witnesses, specifically DW2 and DW3, were not called before the committee so that the respondent could be afforded the right to question them in terms of Rule 13(5) of GN No. 42 of 2007 and, **two**, that no member of the disciplinary committee was called before the CMA so as to prove that the procedures undertaken were fair before making a finding that the appellant is guilty of misconduct. The CMA also found the termination letter faulty for not showing who signed it as it simply indicated "Uongozi mkuu" only. In the final analysis, the CMA held that the termination was unfair and awarded the respondent various reliefs outlined in the award rendered on 31/05/2017.

As explained above, the CMA's decision was unacceptable by the appellant who preferred a revision application to the High Court moving it to consider three issues as hereunder: -

> *"1. Whether or not upon finding that the respondent herein was guilty of the misconduct of gross dishonesty, it was proper and logical for the Arbitrator to rule out that the said misconduct did not justify termination.*
> *2. Whether or not it was proper and logical for the Arbitrator to rule out that the termination of the respondent was procedurally unfair for the reason of none appearance of a member(s) of*

the disciplinary hearing committee before the Commission during the hearing of the case

3. *Whether or not it was proper and logical for the arbitrator to rule out that termination of the respondent was unfair whilst holding that the termination letter was untenable."*

Upon consideration of the grounds for revision and the parties' rival arguments, the High Court disagreed with the appellant and dismissed the same. It found the first ground misconceived for the reason that, on its words quoted above, the CMA did not hold the respondent liable with misconduct of gross dishonest. Going further, the High Court disagreed with the appellant that the CMA held that absence of evidence of a member of the disciplinary committee rendered the termination unfair but that such evidence was of essence in proving compliance with Rule 13(5) of GN No. 42 of 2007. The High Court went further to hold that, despite the deficiencies unveiled by the CMA, the termination letter was not nullified making it not true that it solely caused the termination to be unfair. Instead, the High Court held that other pieces of evidence were relied on to arrive at such conclusion. On the basis of the findings in the two grounds, the third ground was found to have no merit and the application was accordingly dismissed.

Three grounds of appeal were raised by the appellant before the Court but the third ground was abandoned before the hearing could commence by Mr. Luoga, learned advocate, who had represented the appellant throughout. In compliance with the imperative terms of section 57 of the Labour Institutions Act, Cap. 300 (the Act), the appellant placed two points of law for the Court's determination. They state thus: -

> *"1. That, the honourable High Court Judge erred in law by failure to properly interpret the provisions of rule 12(2), (3)(a), and (3) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007. GN No. 42 of 2007.*
> 2. *That, the honourable High Court Judge erred in law by holding that the Appellant failed to adhere to the requirements of rule 13(5) of the Employment and Labour Relations (Code of Goods Practice) Rules, 2007. G. N. No. 42 of 2007."*

Before us, Mr. Anold Luoga, as hinted above, and Ceasor Kabissa represented the appellant whereas Mr. David Kapoma, a dully appointed representative of the respondent, appeared.

The parties had earlier on lodged written submissions in support of their respective cases which they adopted as part of their arguments in this appeal. Given the legal position that an appeal to this Court on labour

matters is on matters of law only, we find it proper to refer to the submissions as shall be necessary in the course of the judgment. Suffice it to say that the appellant expressed dissatisfaction with the failure by the learned judge to hold that the respondent was liable to be terminated following the CMA's finding that he was guilty of presenting false receipts and also having held that the respondent's conduct amounted to gross dishonesty. Reference was made by the appellant to the persuasive decision of the High Court in **Vedastus S. Ntalanyeka and Six Others vs Mohamed Trans Ltd**, Revision No. 4 of 2014 (unreported) which presented identical facts and held that such a conduct amount to gross dishonesty.

In our deliberation, we shall begin with the first ground of appeal and for ease reference, we shall first reproduce the provisions of Rule 12(2), (3)(a) and (3) of GN. No. 42 of 2007 which we are invited to interpret in this appeal. They provide that: -

> *"12(2). First offence of an employee shall not justify termination unless it is provided that the misconduct is so serious that it makes a continued employment relationship intolerable."*

We have no hesitation, upon our reading of the CMA award, to hold that the learned judge misconceived the holding of the CMA in respect of whether or not the respondent was held liable of the offence of

misconduct. The truth, as reflected at page 11 of the CMA award which is at page 192 of the record of appeal and as summarised above, the CMA's finding was that out of the listed allegations of misconduct, only one allegation was sufficiently established which was presentation of false receipts in respect of the funds spent for shelter, food and drinks. Such finding was not challenged by the respondent by way of revision to the High Court which entitles the Court to presume that he had no issue with it, hence true. The issue that arises and which we think precipitated the appellant to complain before the Court is that the learned judge failed to properly interpret Rule 12(2) GN. No. 42 of 2007 to determine whether or not such a misconduct would justify termination of employment.

A careful examination of Rule 12(2) GN. No. 42 of 2007 would reveal that it embraces two distinct scenarios which have similarly two different effects in employment relationship between an employee and an employer. These are, **one**; that there are misconducts or offences which if an employee commits for the first time (first offence) an employer would not be justified to terminate him from service and, **two**; that, there are certain misconducts which if they are proved to be so serious and make a continued employment relationship intolerable, then such misconducts justify termination.

It is also noteworthy that Rule 12 GN. No. 42 of 2007 enjoins an employer, arbitrator or judge to consider the factors listed under it so as to determine whether termination for misconduct is unfair. It provides that: -

> *"12 – (1) any employer, arbitrator or judge who is required to decide as to whether termination for misconduct is unfair shall consider-*
>
> *2. Whether or not the employee contravened a rule or standard regulating conduct relating to employment;*
>
> *If the rule or standard was contravened, whether or not –*
>
> *(i) It is reasonable;*
>
> *(ii) It is clear and unambiguous;*
>
> *(iii) The employee was aware of it or could reasonably be expected to have been aware of it;*
>
> *(iv) It has been consistently applied by the employer; and*
>
> *(v) Termination is an appropriate sanction for contravening it.*

A reading of the above provisions to the letter, makes it apparent that they place an obligation to the employer to ensure that the set of policies, standards or rules regulating the conduct of employees at the work place are in place, to which every employee should be aware of and should endeavour at all times to observe. To prove fairness of termination

in this category, the employer is required to prove existence of the rules, policy or express standard and that the employee has contravened it and the sanction relating to it. These rules or regulations governing employee's conducts may arise either from the express or implied terms of the employee's contract and from express provisions of the employer's disciplinary code (see a Book the **Formation and Termination of Employment Contracts in Tanzania**, by Hamidu Millulu, First Print June 2013, page 119 (henceforth Millulu's book). This is in line with Rule 1(2) of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures GN No. 42 of 2007 which provides for what is expected from the employee. It states that: -

> *"(2) Employees are expected to carry out their duties effectively and conduct themselves in a reasonable manner so that any act shall at all-time be in accordance with the policies and rules existing within an organisation."*

In terms of Rule 12(2) of GN. No. 42 of 2007, where an employee commits the first category of misconducts, the employer is not justified to terminate him from employment. Instead, he is required to pursue corrective or progressive disciplinary measures or procedures to rectify the situation. The measures should be aimed at correcting the employee's behaviour which includes counselling and warnings which may be followed

by disciplinary hearing by Disciplinary Committees. These procedures are generally termed as graduated disciplinary measures.

As opposed to the above category, the second category of misconducts under Rule 12(2) GN. No. 42 of 2007, that is serious misconducts, warrant an outright termination of employment, if proved. Such conducts are sometimes termed as gross misconducts. The Rule is self-explanatory that the reason for such stiff sanction is that such a misconduct makes a continued employment relationship intolerable. Unfortunately, labour statutes in Tanzania do not expressly define what is gross misconducts. However, its meaning may be deduced from other sources. Discussing the consequences of these misconducts, the learned authors of the book "**THE NEW EMPLOYMENT AND LABOUR RELATIONS LAW IN TANZANIA**" edited by Boneventure Rutinwa, Evance Kalula and Tulia Ackson at page 124, state that; -

> *"In all these cases the relationship of trust between employer and employee is irreparably eroded."*

Another attempt to define what constitutes gross misconduct and the related consequences, with which we subscribe, was made Mallulu's book at page 138 stating that: -

> *"Gross misconduct can be defined as conduct on the part of an employee which is so bad that*

destroys the employer/employee relationship and normally merits instant dismissal without notice or pay in lieu of notice."

Besides, the meaning of gross misconduct or serious misconduct may be implied from the provisions of Rule 12(3) of GN. No. 42 of 2007 which enumerates various forms or incidences of serious misconducts to be: -

"12(3) The acts which may justify termination are-

(a) gross dishonesty;

(b) wilful damage to property;

(c) wilful endangering the safety of others

(d) gross negligence;

(e) assault on a co-employee, supplier, customer or a member of the family of, and any person associated with, the employer; and

(f) gross insubordination."

In the light of the above, it becomes clear that Rule 12(2) of GN. No. 42 of 2007 encompasses two categories of misconducts which have different effects on the employee, **one** which are tolerable and allowing opportunity for an employee to change the behaviour through counselling and warning and, **two**, misconducts which are serious or gross hence intolerable entitling the employer, upon being satisfied that such an

offence has been committed, to outrightly terminate an employee from service. This does not warrant deployment of progressive disciplinary process before termination notwithstanding that it is a first offence.

As reflected above, one such serious misconduct that warrants termination of employment is gross dishonesty. Yet again, neither the ELRA nor GN. No. 42 of 2007, define gross dishonesty. Citing Grogan, J. in the Book Dismissal, Discrimination & Unfair Labour Practice, 2nd Edition, 2007 at page 300, Millulu's book at page 138 states:

> *"However according to Grogan, 'Dishonesty' is a generic term embracing all forms of conducts involving deception on the part of employees. In employment law, a premium is placed on honesty because conduct involving moral turpitude by employees damage the trust relationship on which the contract is founded. Dishonesty at workplace takes two main forms, lying and stealing. Dishonesty can consist of any act or omission which entails deceit. In the case of* ***Labee Park Club v Garrant*** *(1997) 9 BLLR 1137 (LAC) it was held to include withholding information from the employer, or making a false statement or misrepresentation with the intention of deceiving the employer. In* ***Nedcor bank v Frank & Others*** *(2002) 23 ILJ 1243 (LAC), the South African Labour Appeal Court held that dishonesty*

entails 'a lack of integrity or straightforwardness and, in particular, a willingness to steal, cheat, lie or act fraudulently'.

As an illustration of an act of dishonesty in Tanzania, Millulu's book at page 139, cites the decision of the High Court in the case of **Hussein Kiaratu v Ms S. B. C (T) Ltd,** Revision No. 261 of 2009 (unreported). To avoid distortion of the facts and holding of the court, I quote the relevant part as under: -

"The applicant admitted to have gone to sell soda at Mbalizi area where he fell sick and handed over the vehicle to Joachim Mpangala. Joachim denied to have been handed over the soda vehicle. All other documents were okay except those of 14/4/2006. The Committee afforded him to look for necessary documents but he failed to bring the documents. Five months passed after being directed by the employer to bring the documents. Thus, the employer decided to terminate his services for being dishonesty. The Arbitrator submitted that, the employer cannot reinstate the applicant as he had occasioned loss and due to his dishonesty conduct."

In the instant appeal, the CMA found only one allegation was sufficiently established. It related to presentation of false receipts in respect of the funds spent for shelter, food and drinks. The CMA also

observed that such a conduct, in terms of Rule 12(3) of GN No. 42 of 2007, amounted to gross misconduct which is the same thing as gross dishonesty. In view of our discussion of the law in this respect we agree with the CMA's finding that the misconduct was a serious one. We entirely agree for the reason that it touched on the principal business of the institution (the appellant) it being a financial institution.

The appellant, it was uncontroverted, was tasked with the responsibility to receive money from the head office for him to provide the sales agents or market searchers with financial support. The nature of his employer's business and therefore his employment required him to be honest and truthful. But he did not exhibit such conduct when he presented false receipts to justify its expenditure which were calculated and intended to deceive the employer, the appellant. He being a Branch Manager of the appellant company was, no doubt, expected to be of an impeccable trustworthy conduct. There is an observation by the CMA absolving the respondent from liability, in its award, that the appellant did not exhibit company rules or employment contract which would justify termination upon commission of such offence. That was true but, as demonstrated above, rules or regulations governing employee's conduct may arise either from the express (disciplinary code) or implied terms of the employee's contract as well as from general standards applicable to

the workplace. Generally, employees are expected to carry out their duties effectively and conduct themselves in a reasonable manner so that any act shall at all-time be in accordance with the policies and rules existing or implied within an organisation. That said, some of the rules need not be written but can be presumed from the nature of business of the organisation. On this we agree with Millulu's book when it states at page 123 that: -

> *"However, the rule need not exist in written form; it is generally assumed that certain conduct is calculated to destroy the employment relationship, whether or not it is expressly prohibited in a contract or disciplinary code, and that the employee knew or should have known that this conduct could lead to termination. When employees deny the existence of rule upon which the employer relies, the employer is required to satisfy the court or arbitrator that the rule exists, and the employee was or should have been aware of it."*

In the instant case there is clear and uncontroverted evidence that the respondent, as Branch Manager, was charged with the responsibility to receive money from the Head office and distribute it to the market searchers to facilitate them in the performance of their duties but he did not and there is also sufficient evidence that he produced to the appellant

forged receipts with the aim to deceive the employer which proved the respondent's guilt with serious misconduct. Given the above stance of the law, it is clear that the CMA's finding in the portion reproduced above, was erroneous. Such a misconduct amounted to serious dishonesty deserving an outright termination from employment under rule 12(2) and 12(3) of GN. No. 42 of 2007. We accordingly hold that as the respondent was found guilty of serious misconduct by the CMA and he did not challenge it before the High Court, then his outright termination from employment was proper. The holding by the CMA that due to failure to produce the work place rules or policies and the respondent being a first offender or that the sanction is too stiff have no place in the circumstances. As rightly complained by the appellant, that was a clear misinterpretation of Rule 12(2) and (3) of GN. No. 42 of 2007. We allow this ground of complaint.

The appellant's complaint in ground two relates to failure by the appellant to comply with the requirements of Rule 13(5) of GN. No. 42 of 2007. That Rule provides: -

> *"13(5) Evidence in support of the allegations against the employee shall be presented at the hearing. The employee shall be given a proper opportunity at the hearing to respond to the*

allegations, question any witness called by the employer and to call witness if necessary."

As unveiled above, the essence of the appellant's complaint is the High Court's disagreement with the appellant that the CMA held that absence of evidence of a member of the disciplinary committee rendered the termination unfair instead, it held that such evidence was of essence in proving compliance with Rule 13(5) of GN No. 42 of 2007. The purpose of the rule is to provide an employee with a fair hearing of the allegation raised against him at the disciplinary committee (fairness of the procedure). It has nothing to do with the hearing before the CMA. Before the High Court, the appellant's complaint, as quoted above, was this: -

"Whether or not it was proper and logical for the Arbitrator to rule out that the termination of the respondent was procedurally unfair for the reason of none appearance of a member(s) of the disciplinary hearing committee before the Commission during the hearing of the case."

It is vivid that at pages 166 and 167 of the record the arbitrator considered the issue whether there was adherence to fair procedure before termination of employment. To arrive at his finding, he considered, among other things, appearance before him of either of the members, particularly chairperson of the committee of the disciplinary committee or

a report to that effect be tendered and defended by the chairman. We entirely agree with the appellant that the complaint is justifiable. It is not a requirement of law that the witnesses who testified before the disciplinary committee should also appear and testify before the CMA to prove that a fair procedure was followed by the disciplinary committee before termination of employment. All that is required is evidence of the manner the disciplinary proceedings were conducted which evidence could be presented by any officer of the appellant as DW1 satisfactorily did. The CMA, therefore, wrongly relied on failure by the appellant to produce as a witness a member of the disciplinary committee as one of the grounds to arrive at a finding that the termination was unfair. This ground has merit and we allow it.

We wish, albeit in passing, to express our view that the issue on the place where the respondent was recruited which appeared to be in controversy between the parties when they presented their respective opening statements was not dealt with in sufficient details or pursued and determined by both the CMA and the High Court. Neither was it a ground of appeal before the Court. We could not therefore deliberate on it.

All said, we allow the appeal, quash and set aside the award and orders by the CMA and the decision by High Court declaring that the

respondent was unfairly terminated. Instead, we hold that his termination was fair and is entitled to his terminal benefits as they stood on the date he was terminated, that is on 20/7/2016.

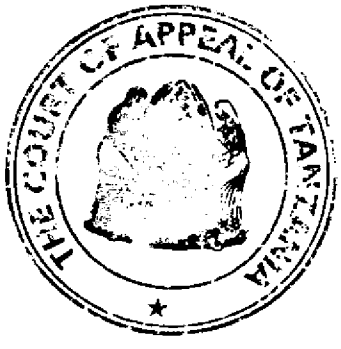
DATED in **DAR ES SALAAM** this 8th day of September, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 6th day of October, 2023 in the presence of Mr. Arnold Arnold Luoga, learned counsel for the Appellant and Mr. David Kapoma (with power of Attorney) for the Respondent through Video Link connected from Dar es Salaam to Tanga High Court, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL