IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
HIGH COURT LABOUR DIVISION SHINYANGA

AT SHINYANGA

REVISION APPLICATION NO. 50 OF 2018

(Arising from an award of the Commission for mediation and arbitration of Shinyanga in Labour Dispute No. CMA/SHY/ARB/283/2016)

ACCESS BANK TANZANIA LIMITED..... APPLICANT

VERSUS

AMOS LUKUBA.....RESPONDENT

JUDGMENT

Date: *13-03-2020* ***&*** *8-5-2020*

MKWIZU, J.:

The respondent was employed by the applicant as a Junior Client Advisor on a fixed term contract commenced on the 1st day of August 2016 to 31st July 2019. However, his employment contract was on 8th September, 2016 terminated after being found guilty of a misconduct of dishonest and negligence in performing his duties. Discontented by the termination, the respondent refereed the dispute to the Commission for Mediation and Arbitration (CMA) complaining of unfair termination. He claimed for compensation in form of damages of the remaining period of contract, clean certificate of service and repatriation expenses. The CMA decided in

favour of the applicant (present respondent). It found that, the respondent termination was unfairly substantively and procedurally and ordered for payment of salaries for the remained period of the respondent's contract, repatriation costs and a clean certificate of service.

Aggrieved, applicant -employer has filed present application for revision. The application was initiated by a notice of application filed under Rule 24 (1) (2) (a) (b) (c) (d) (e) and (f) (3) a) (b) (c) and (d), 28 (1) (a) (c) (d) and (e) of the Labour Court Rules, GN No. 106 of 2007 and Section 91 (1) (a) and Section 91 (2) (a) (b) and 4 (a) and (b) and 94 (1) (b) (i) of the Employment and Labour Relations Act 2004. The applicant relied on five (5) grounds enumerated under paragraph 12 of the affidavit in support of the revision application, but on the way he abandoned ground one, two and five thus leaving two grounds which are:

1. The Honourable Arbitrator erred in law and fact in holding that the Respondent was unfairly terminated without considering evidence adduced by the Respondent's witness. DW1.
2. The Honourable Arbitrator erred in law and fact in holding that the Applicant had no valid reason to terminate the employment

contract taking into consideration that the Applicant produced proper section which was violate in Applicant's Human Resource Manual.

The above two grounds tend to challenge the finding by the Commission for Mediation and Arbitration that the respondent was unfairly terminated. The application was heard by way of written submissions. The applicant filed a written submission on 4th March 2020 and the respondent filed a reply on 11th March 2020.No rejoinder submissions was filed.

In support of the application, counsel for the applicant submitted that, the termination was fair as there was sufficient material breach of the terms and condition of employment by the respondent on the ground that respondent committed the offence of gross dishonesty by transferring clients for purposes of earning bonus which was not a result of his efforts contrary to the provision of clause 5.15 of the Employer's Human Resource Manual. Citing the provisions of Rule **12 (3) (a) of the employment and Labour Relations 9 Code of Good Practice) Rules, GN No. 42 of 2007**, Mr. Gondo said, gross dishonesty is among the acts by the employee which may justify termination. He clarified that, the

termination was justified as the evidence was led to the effect that respondent was charged and finally terminated on the gross dishonesty.

Speaking of the condition under rule 12 cited above that first offence do not justify termination, Mr. Gondo said, the offence by the respondent was a serious misconduct to the detriment of the applicant's business which requires high degree of honest and trust.

In respect of procedural fairness of the termination, Mr. Gondo argued that the conclusion by the arbitrator that procedures for a fair termination were not followed on the reason that Chairperson of the Disciplinary Committee is the same person signed the termination letter is not founded in law. He said, the Chairperson of the Disciplinary Committee was involved in all stages of the disciplinary hearing and signing the termination letter did not contravene **Rule 13 (4) of the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007.**He finalized his submission by asking this court to quash and set aside the CMA award .

In rebuttal, respondent supported the CMA's award. He said, the award is in compliance with rule 27 of the GN NO. 67 of 2007 and Rule 8 of GN No. 42 of 2007. He insisted that, the applicant breached the employment contract and the Labour Laws. He cited to the court the decision of the court in **Catholic university of health and Allied Sciences CUHAS V. Epiphania Mkunde Athanase**, Labour Revision No.96 of 2017 and **Weir Services Tanzania limited V. Jacques Luis Bruwer**, Labour revision No. 11 of 2019 (All Unreported) to support his submissions. He urged this court to dismiss the revision and order the applicant to pay him the amount ordered in the CMA's award.

Having considered the matter at hand and the parties submission, I think the main issue for consideration is whether there was a fair termination substantially and procedurally. It is a trite law that apart from establishing sufficient reasons for termination, employer is duty bound to observed to the procedures for termination of the employment contract. Meaning that both, genuine reason (s) and adherence to the procedures must co exists. This duty is on the employer, short of that, the termination is termed unfair.

Section 37 of the Employment and Labour Relations Act, No. 6/2004 read together with Rule 12 (3) of the Employment and Labour Relations (Code of Good Practice) GN 42/2007 provides specifically the need to establish a valid reason(s) for termination before one's employment contract is terminated. See also the case of **Mohamed R. Mwenda V. Ultimate Security Ltd**, Revision No. 440 of 2013 HC Labour Court Case Digest [LCCD) 2013 where the court added that:-

> *"Valid reasons must relate to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer"*

It is on records that respondent committed misconduct by transferring client's portfolio of his fellow employee without following the procedures contrary to clause 5.15 of the Employer's Human Resources Manual.

Now the question that follows is whether such delinquency fall within the misconduct which may rationalize termination by the employer. **Rule 12(1) of the Employment and Labour Relations (Code of Good Practice) GN No. 42/2007** provide that;

12(1) Any employer, arbitrator or judge who is required to decide as termination for ***misconduct is unfair shall consider****;*

a) Whether or not the employee contravened a rule or standards regulating conduct relating to employment;

b) If the rule of standards 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.

I had an opportunity of going through the said Human Resource Manual whose clause 5.15 is alleged to have been contravened. The said clause is a commitment by all staff members to adhere to the highest standards of personal conduct in keeping with the responsibility and traditions of the Bank and avoid conflict of interests. These standards were said to include strong personal commitment with unquestionable honest, integrity, impartiality and respect to each individual and general public. Again clause 5:20 of the same manual provides disciplinary action including dismissal

from the Bank as a consequence for violation of any part of the code (Part 5 of the Manual) .

Guided by the provisions of Rule 12 and part of the Human Resource Manual referred to above, I am convinced that indeed, respondent contravened the Human Resource Manual particularly employee code of conduct. The breach related squarely to his conduct, capacity and is based on the operational requirements of the employer which he was bound to.

Next for consideration connected to the above is whether termination was the appropriate sanction under the circumstance. In its decision, the Commission said, the fact that respondent was a first offender, he had for more than three years worked honestly with the applicant's bank, absence of evidence in relation to the likelihood of repetition of the same misconduct as provided for under **rule 12 (4) (a) and (b) of GN No. 42 of 2007** and non-tendering before the commission the organization police attracts a warning to the responded and not termination of his employment contract.

The arbitrator's view was faulted by Mr. Gondo, counsel for the applicant. In his written submission in support of the application, he said, **Rule 12 (3) (a) of the employment and Labour Relations (Code of Good Practice) Rules, GN No. 42 of 2007** provides Gross Dishonesty as one among the reasons that would justify termination. Respondent was charged and finally terminated on gross dishonesty hence termination was justified even if the respondent is a first offender. Mr. Gondo said, considering the nature of the applicant's business which requires a highest degree of honest and trust, the offence by the respondent was a serious misconduct that affected the working environment between the applicant and respondent.

With due respect to Mr. Gondo's submission, the evidence adduced on the record is silent as to how detrimental the respondent's misconduct was to the applicant's business. The accusation laid against the respondent and which is not disputed by the respondent himself is that he did what he was not supposed to do contrary to the Human Resource Manual. To arrive into an appropriate sanction, one must look into the effect of the

misconduct in relation to the applicant's business and the whole circumstances surrounding that business.

It is on the CMA's record and the submissions by the counsel for the applicant in support of this application that, the alleged misconduct was aimed at deceiving the employer in view of earning bonus. It was also testified by the applicant's witnesses that, the respondent was paid bonus out of his unlawful acts. However, my perusal of the entire records failed to see how much the respondent earned out of the alleged mischief and the resultant damage to the applicant's business. The question arises are, did the misconduct affected any of the applicant's client, employee(s) or the business? If yes how? The record does not provide answers to these questions. It is beyond question, as correctly submitted by the applicant's counsel that the applicant's business requires a highest degree of honest and trust, however, that fact cannot be looked at in isolation of other requirements of the law. Rule 12 (4) of GN NO. 42 of 2007 provides factors to be considered by the employer in the determination of whether termination is appropriate or not. The rule reads: -

> *"In determining whether or not termination is the appropriate sanction, the employer should consider -*

(a) the seriousness of the misconducts in the light of the nature of the job and the circumstances in which it occurred, health and safety and the likelihood of repetition; or

b) the circumstances of the employee such as the employee s employment record, length of service, previous disciplinary record and personal circumstances."

The evidence given in support of the reasons for termination do not clearly clarify on the issues mentioned in the above quoted rule. Given the circumstances of this case and for the foregoing reasons, I can contentedly conclude that, termination was not an appropriate sanction to the respondent. He ought to have been warned. I therefore find nothing to fault the trial arbitrator's decision on this point.

As to the procedural fairness of the termination, section 37 (2) (c) of the ELRA provides that a termination of employment by an employer is unfair if the employer fails to prove that the termination was in accordance to fair procedure . Once an employee commits any offence, the employer has no legal right of absolute dismissal. Rule 13 of GN No 42 of 2007 provides the procedure for termination of employment.

The procedures required to be taken are as follows: The employer must conduct investigation to ascertain whether a disciplinary hearing is to be conducted or not, draw and serve the employee with a charge with time to respond to the charges against him or her. Employee must be informed of the hearing date, and he is to be allowed to appear at the hearing by either himself or with a representative. Rules also allow an employee to bring witnesses and also to cross examine witnesses of the employer. At the end, the disciplinary committee is required to prepare a report and submit it to the employer for a decision which is to be communicated to the employee.

Aided by the evidence on the records, it is clear that the respondent was notified of the charges against him, investigation and hearing were conducted and thereafter, respondent was informed of the decision by the disciplinary committee that his employment contract was terminated. The complaint by the respondent on the procedural issue was the signing of the termination letter by the Chairperson of the Disciplinary Committee. He said, the decision-making process was not impartial.

The records speak loud on this issue. The Chairperson of the Disciplinary Committee is the same person who signed the termination letter. At page 19 of the typed proceedings, one Prosper William Gwemera, the Chairperson of the Disciplinary Committee admits this fact. It was Mr. Gondo's submission that, rule 13 does not restrict Chairperson of the Disciplinary Committee to sign the termination letter. I have consciously gone through the provisions of rule 13 (4) of GN No. 42 of 2007.Construing the said sub rule 4 objectively, the Disciplinary Committee is to be chaired by a sufficiently Senior Management representative who should not have been involved in the circumstances of the case.

In our case, the chairperson of the Disciplinary Committee was a Senior Management Officer in a position of a 'Head of Region' of the Applicant. It goes without saying therefore that, the complaint that the Committee was not impartial is justified. The Disciplinary Committee did not exhibit neutrality/independence while carrying out its function. This is so because, the head of region in the place of work where the misconduct was committed, investigated is the same person who Chaired the Disciplinary Meetings meaning that he is the one who proposed the sanctions and the same person who terminated the respondent. This, in my view,

contravened the provisions of rule 13 (4). It should be stressed here that, the committee should be chaired by a neutral person so as to bring in fairness in the whole procedural process.

The above said, I am strongly convinced that the respondent's termination was both substantially and procedurally wanting. The revision therefore is baseless, it is hereby dismissed in its entirety. Order accordingly.

Dated at **Shinyanga** this 8th day of **May**, 2020

E.Y.MKWIZU
JUDGE
8/5/2020

Court: Right of Appeal Explained.

E.Y.MKWIZU
JUDGE
8/5/2020