IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

HC: LABOUR REVISION NO.96 OF 2019

(Originating from CMA/MZ/NYAM/84/2019)

BANK OF TANZANIA ..... APPLICANT

VERSUS

ADRIAN LEONARD KAOZYA ..... RESPONDENT

JUDGMENT

Last order: 26.03.2020

Judgment Date: 21.04.2020

A.Z.MGEYEKWA, J

The applicant, The Bank of Tanzania filed the instant revision application in this Court against the award of the Commission of Mediation and Arbitration which ordered for reinstatement of the respondent, Adrian Leonard Kaozya without loss of remuneration

during the period that the employee was absent from work due to unfair termination.

The application is brought by way of Notice of Application and of Chamber Summons which is made under section 91(1)(a),(b), 91(2) (a),(b)(c) and section 94 (1)(b) of the Employment and Labour Relations Act, 2004 and Rule 24 (1),(2)(a)-(f) (3)(a)-(d) and Rule 28 (1) (a)(b)(c)(d) and (2) of the Labour Court Rules, 2007 and accompanied by an affidavit deponed by Regina Sinamtwa. The respondents challenged the application by filing a Joint Counter-Affidavit and a Notice of Opposition.

At the hearing of this application, the applicant enjoyed the service of Mr. Stanford Mbengane, learned Senior State Attorney and the respondent enjoyed the service of Mr. Godfrey Martin, learned counsel.

The applicant in his chamber summons prayed for the following orders:-

a) That this Honourable Court be pleased to issue an order to set aside the CMA Award No. CMA/MZ/NYAM/84/2019, dated 22nd

October, 2019 by Hon. Nnembuka , Arbitrator and determine the dispute in a manner considered appropriate.

2. *Any other relief as the Honourable Court may deem fit just to grant.*

Before going into the merits of the revision, it is important to comprehend what transpired in the Commission for Mediation and Arbitration which cropped the present revision, in a nutshell, the facts may be summarized as follows;-

The respondent was employed by the applicant and was working at the applicant's Mwanza Branch since 3rd February, 2003 and his employment was terminated on 3rd July, 2018, when he was Assistant Bank Officer and at the time when he was terminated, he was holding the position of Acting Manager. The reason for the respondent termination was dishonest, was and he was alleged to have stolen company fuel. During the hearing, the respondent disputed that he did not steal from his employer. His main defense at CMA was that the head of Administration was on her leave thus he handed over the department to the respondent. The respondent

initiated the process of obtaining generator diesel from the petrol station.

The employer on the other side brought two witnesses to prove the allegation before the Commission for Mediation and Arbitration. One was Ms. Esther Mahene (PW1) an Assistant Manager, among others, she stated that the employer has set a procedure in obtaining or purchasing fuel for the generator. She testified that the procedure of purchasing fuel involved several stages before approval; the initiator is issued with a password and that the respondent had the password. She stated further that the auditors are the ones who noted the defect that the fuel was obtained without approval.

The CMA arbitrator determined the dispute and in the end, he found that the respondent was unfairly terminated thus, the applicant was ordered to reinstate the respondent.

Trigged by the said award of the arbitrator, the applicant filed the present revision.

Supporting the application, the learned Senior State Attorney submitted that the applicant has filed a revision before this court after being dissatisfied by the award of the CMA. In particular the findings of the arbitrator that the respondent's employment was unfairly terminated since he was convicted for an offence which he was not charged with while the respondent was charged with an offence of gross dishonest. Mr. Stanford went on to submit that dishonest is listed as one of the grounds of termination. He fortified his submission by referring this court to Rule 12 (3) on the Employment Labour Relations Act (Code of Good Practice) GN No.42 of 2008. He stated that the applicant submitted before the CMA the Bank of Tanzania Disciplinary and Grievance Banking Procedure of 2009 to guide the arbitration in determination of this matter.

He went on stating that the Bank of Tanzania Disciplinary and Grievance Banking Procedure of 2009 provides that serious misconduct amounts to termination and theft or taking property which belongs to other employee are among the listed offences which might lead to termination of an employee.

He lamented that the arbitrator did not appreciate the said document, as a result, he came to a conclusion that the respondent was terminated for theft, the offence which he was not charged with, while Rule 12 (3)(a) of the Employment Labour Relations Act (Code of Good Practice) GN No.42 of 2008 provides for gross dishonest which includes all related offences such as theft, fraud, misappropriation of funds, providing false information of employment and other offence related to breach of trust. He argued that there is no any paragraph in the Employment Labour Relation Act which identifies theft as a disciplinary offence but rather as gross dishonest.

Mr. Stanford further submitted that it is their considered opinion that the CMA Arbitrator erred in interpreting the provision of law, as a result, he ended misinterpreting the law. He insisted that the BOT Disciplinary Committee found that the respondent was found guilty for theft which amounts to gross misconduct.

The learned counsel for the applicant urged this court to find that the CMA findings were in error and the trial arbitrator failed to interpret the law. He went on stating that the further CMA found that the applicant failed to provide proof on the balance of probability while he did not refer any reference of the Bank of Tanzania Disciplinary Committee which collected the evidence and adhered to investigation procedure otherwise the CMA could find that the respondent was guilty of dishonest which arises from the act of theft.

Mr. Stanford continued to submit that the applicant's witnesses testified how the respondent stole diesel oil by preparing misleading approvals and the said fuel was used for his own benefit. He went on submitting that the BOT Internal Audit Report was tabled before the BOT Disciplinary Committee and the same was tendered at the CMA, it was found that the respondent was a perpetrator of theft and found guilty thus termination was fair taking to account that the respondent admitted to having initiated the request for purchase diesel oil and that he initiated the memo but then he shifted the burden to his supervisor. He forcefully argued that the said request

memo does not exonerate the respondent from his personal responsibility to ensure that every request which he initiated was required to be genuine.

The learned counsel for the applicant further submitted that the arbitrator questioned the respondent why they did not call Total Tanzania Limited to testify in court because he was the supplier of fuel and lubricant to the BOT. He valiantly argued that they found there was no need to call Total Tanzania Ltd because the fuel was not stolen from Total Tanzania Ltd but it was stolen in the BOT books of accounts and the applicant paid full value of oil which was supplied from the Total Tanzania Ltd. Mr. Stanford thought that Total Tanzania Ltd was not in a position to prove the asportation of fuel rather he could prove that in prescribed period BOT purchased and paid for said oil.

Mr. Stanford continued to submit that the CMA misdirected itself by deciding that the respondent was not involved in theft alone instead there were other accomplices with BOT employees. He argued that if other employees could have breach BOT rules then

their offence would have fallen under negligence and therefore would have a different level of accountability. He insisted that the issue came up on the auditors' knowledge.

He went on to submit that Baking interest is based on trust and once an employee breaches the trust then the relationship between the employee and employer is brought to an end.

The arbitrator faulted to order reinstatement of the respondent, without paying attention to the reliefs of parties he could consider the nature of the applicant's business which is based on trust thus the arbitrator could consider compensation rather than reinstatement.

In conclusion, Mr. Stanford urged this court to quash the CMA decision and set aside the award for the reasons advanced in their affidavit and reasons adduced during submission in chief.

On the part of the learned counsel for the respondent, his reply based on two main reasons; firstly, the applicant had no good reasons to terminate the respondent, Secondly, the applicant had

not followed the proper procedure before terminating the respondent.

Submitting that the applicant had no good reasons to terminate the respondent, Mr. Godfrey argued that the respondent was charged for theft and the same was not proved. He argued that DW1 one Esther, Estate Manager who handed over the card to the respondent and she admitted that in processing purchasing of fuel three people are involved; initiator of the process, Manager, and accountant. He went on to submit that DW1 testified that the fuel went missing from 15th to 31st August, 2018 and that payment was effected before the respondent was charged with the offence of dishonest.

The learned counsel for the respondent continued to argue that DW1 testified that there was no fuel which can be taken from the service provider without approval from the applicant and no payment is made to the service provider without approval from the applicant and likewise, no payment is effected to the service provider if the applicant did not issue the approval form to purchase

the alleged fuel. Mr. Godfrey asked himself how the applicant could pay for something which was not requested.

It was his further submission that DW1 admitted that payment of consumed fuel is to be paid by the department after completion of the initiated process by the respondent. He added that the confirmation officer is at liberty to fuel the generator beyond the authorized liters. Mr. Godfrey argued further that it is unclear whether the fuel went missing at Total or BOT premises.

Submitting further Mr. Godfrey forcefully argued that the respondent wanted to prove the allegation thus he requested a copy of approval form which was retained by the applicant soft wear material but they denied issuing him the said copy. He continued to submit that the Disciplinary hearing procedure and the BOT regulations did not lay down a procedure on how to obtain or purchase fuel. The same lead DW1 to issue confusion testimonies that no fuel is taken without approval from and she admitted that payment was done on the absence of approval form thus he

believes in such a situation the service provider was in a better position to prove the said allegations.

Mr. Godfrey went on arguing that the accountant, who issued the invoice to the service provider, was in a better position to prove whether payment was effected before approval or otherwise. He further argued that the CMA was not obliged to go with the findings of the Disciplinary Committee.

As for the 2nd point, Mr. Godfrey briefly argued that the applicant did not follow the termination procedure because the respondent was terminated for an offence of theft while the charge stipulates that the respondent was charged with dishonest as per Rule 12 (3) (a) of the Employment Labour Relations Act (Code of Good Practice) which state that no one shall be convicted for an offence charged. He further argued that the applicant was required to terminate the respondent for the offence charged.

In conclusion, Mr. Godfrey argued that the respondent was a permanent employee of the applicant and was terminated unfairly

therefore he prays this court to uphold the CMA award and dismiss the application with costs.

In his rejoinder, the learned counsel for the applicant reiterates his submission in chief and refuted that fuel was taken from the supplier without approval since the evidence on record reveals that fuel was taken with approval and payment was legally effected. He went on that the approval process was fraudulently initiated by the respondent and thus he successfully withdrew the fuel and used it for his own benefit. He went on stating that since the fuel was delivered the applicant had no any claims against the service provider.

Mr. Stanford refuted that the respondent was found guilty for an offence which he was not charged with, he argued that the respondent's Advocate failed to differentiate between theft and the offence stated in the charge sheet. He insisted that theft falls under dishonest. He prays this court to quash the CMA award and set aside the award.

I have duly considered the submission of both counsels for the applicant and the respondent with eyes of caution and I have read the record of the Commission for Mediation and Arbitration records and the nagging questions evolve or crop which this court has the duty to resolve and decide are ***whether the revision is meritorious***. For the purpose of determining the instant revision, I have noted that the applicant's grounds fall under the unfair procedure, the reliefs the parties are entitled and the applicant is disputing the arbitrator findings that the offence in the charge differs from the offence stated in the termination letter.

In determining whether the Arbitrator followed a fair procedure in terminating the respondent, the learned Senior State Attorney faulted the arbitrator for deciding that the respondent was unfairly terminated because he was convicted for an offence which he was not charged with, the records reveal that the employer charged the respondent for dishonest contrary to Rule 12 (1) (a) of GN. 42 of 2007 which provides that:-

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

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

(b) 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.

The applicant's Advocate stated that they charged the respondent for dishonest and he thought the arbitrator misinterpreted himself by stating that dishonest does not include theft. I had to go through the BOT Disciplinary Committee hearing and I have found that the respondent was charged for Dishonest " Kukosa uaminifu kuliko kuthiri " contrary to Rule 12 (3) of GN. 42 of 2007 and paragraph (n) and (z) of Second Schedule of Disciplinary and Grievance Handling Procedure the respondent was charged for

stealing 5,898.08 liters of diesel with a value of Tshs.11,808,489.4 The property of Bank of Tanzania. Following the letter of termination, the respondent was terminated for theft.

I am aware that dishonest in the workplace can take many different forms including; stealing of the employer's money out of the petty cash box or safe, embezzlement of the employer's funds, Fraud, and receiving bribes. Furthermore, dishonesty includes any other forms of deception unethical acts detrimental to the employment relationship. Where an employee is disciplined for any form of dishonesty the issue of trust arises.

In my view, theft and dishonesty are interrelated both amounts to misconduct contrary to the cited case of **Coca Cola Kwanza Ltd v Enmmanuel Mollel** Labour Court Dar es Salaam Application No. 22 of 2008 whereas. the Labour Court was right to find that there was a difference between the charge and the reason cited for termination in the letter of dismissal whereas the charge was regarding gross negligence and the letter for termination was concerning incapacity; these are two different offence since gross negligence is

related to misconduct and incapacity does not amount to misconduct rather arises from ill health and failure to meet the employer's target.

I have laboured to examine the charge and the termination letter dated 5th July, 2018 and I have found that the elements on the charge are similar to the one appearing in the termination letter, both state that the respondent was charged for dishonest "*kukosa uaminifu kulikokithiri*" contrary to Rule 12 (3) of GN. 42 of 2007 and paragraph (n) and (z) of Second Schedule of BOT Disciplinary and Grievance Handling Procedure. The details are that the Disciplinary hearing Committee charged the respondent for stealing 5,898.06 liters of diesel fuel and found him guilty thus it decided to terminate his employment. It should be known that theft is not mentioned under the GN. 42 of 2007 that is why the charge is related to dishonest and in banking cases. Hence, theft is included in dishonesty.

Having noted the above findings, I have found that the Arbitrator's decision that the charge and the reason for termination

bear two difference offences is untrue. Therefore, I am in accord with Mr. Stanford's argument that the arbitrator findings were misconceived and therefore the respondent was properly charged.

Now, I am going to determine whether the respondent's termination of employment was fair. It is settled principle that for termination of employment to be considered fair it should base on valid reason and fair procedure. In other words, there must be substantive fairness and procedural fairness of termination of employment. The law under section 37 (2) of the Employment and Labour Relations Act, No.6 of 2004 provides that:-

> *" 37 (2) A termination of employment by an employer is unfair if the employer fails to prove –*
>
> *(a) that the reason for the termination is valid;*
>
> *(b) that the reason is a fair reason-*
>
> *(i) related to the employee's conduct, capacity or compatibility; or*
>
> *(ii) based on the operational requirements of the employer, and*

(c) that the employment was terminated in accordance with a fair procedure. "

Guided by the above provision of the law, it is clear that the legislature intends to require employers to terminate employees only based on valid reasons and not their will or whims. This is also the position of the International Labour Organization Convention 158 of 1982 as stipulated under Article 4. In that spirit, employers are required to examine the concept of unfair termination based on employee's conduct, capacity, compatibility, and operations requirement before terminating the employment of their employees.

Thus, in determining *whether the arbitrator was justified in deciding the respondent's termination was procedurally unfair*, I am compelled to observe the position of the provision of section 37 (2) (c) of the Employment and Labour Relations Act, No.6 of 2004 which provides that:-

" A termination of employment by an employer is unfair if the employer fails to prove that the employer was terminated following a fair procedure."

Additionally, I will observe the position of GN.42 of 2007 Rule 13 of the Employment and Labour Relation (Code of Good Practice). First of all, it should be known that a dismissal will be rendered unfair if the employer failed to follow a fair procedure before such dismissal, no matter how compelling the reason for dismissal may have been. Rule 13 of the Employment and Labour Relation (Code of Good Practice) GN.42 of 2007 provides the procedure for termination of employment. It is a requirement of the law, and practice of this court in various cases to mention a few see the case of **Sharifa Ahamed v Tanzania Road Haulage (T)** 1980 Ltd Revision No. 299/2014 and **Richard Mwanasasu v Toyota Tanzania Limited** Revision No. 282 of 2015 DSM Registry (unreported) where it was held that:-

> *" Termination of employment contract by an employer is unfair if the employer fails to prove the reasons for the termination is valid or followed a fair procedure."*

In the present case admittedly the applicant made efforts to comply with procedural fairness before he terminated the respondent. The employer complied with a checklist provided for

under Rule 13 of the Employment and Labour Relation (Code of Good Practice) GN.42 of 2007. I am saying so because the applicant proved that investigation was conducted to ascertain whether there are grounds to conduct a disciplinary hearing. Mitigation was conducted; the applicant was afforded right to defend himself and to file an appeal to the Deputy Governor of Bank of Tanzania, therefore, Rule 13 of GN.42 of 2007 was adhered to.

Additionally, the disciplinary committee confirmed to Rule 13 of the Employment and Labour Relation (Code of Good Practice) GN.42 of 2007. Therefore the employer followed a fair procedure in dealing with the termination of the respondent and the learned Arbitrator was not correct to hold that the procedure was not followed.

Now, turning on the issue of *whether the termination was substantively unfair*, I am compelled to observe the position of GN. 42 of 2007 Item 9 (5) of the Employment and Labour Relation (Code of Good Practice) which state that:-

" The reason shall not only be one of the kinds of reasons considered fair but the reason in a particular case shall be sufficiently serious to justify termination."

The applicant employer to prove the offence which the respondent was found guilty with and challenged the same in the Commission had called two witnesses who intended to prove that the respondent was fairly terminated. The first witness testified that the respondent was trusted with a card that was used to process and purchasing fuel for the generator and that he was required to obtain approval but he obtained the said fuel without approval. In the record, it is shown that the auditors are the ones who noticed the shortfalls that the employer's fuel was obtained without any approval. The respondent defended himself before the disciplinary committee that he obtained permission from DW1 who verified the authenticity of the invoice and allowed payment to be effected. He went on stating that the process of obtaining fuel involves more than one person; guardsman, Human Resource Officer, and the initiator all of them are engaged in the process of procuring the fuel.

The Disciplinary Committee found out that the respondent obtained the said fuel without any approval and the procedure to obtain fuel was not adhered to and the requested fuel was over the capacity of the generator. The respondent failed to prove if there were any oral approval, he acknowledged that he was involved in purchasing the said fuel. Thus, the accusation of stealing 5,898.08 liters was proved after the respondent failed to prove that he obtained a written approval and the quantity of fuel was above the capacity of the generator the same was not proved otherwise but also the respondent was in possession or custodian of the purchased card which was used to buy fuel from the supplier.

The CMA on the issue whether there was a valid reason to terminate the respondent's employment on dishonest ruled that the employer was not right to terminate the respondent because the charge differed with the reason for his termination, I have discussed this above in length that the arbitrator findings were misconceived and therefore the respondent was properly charged. Therefore based on this ground there was a fair and valid reason for

termination of the respondent employment as the charge sheet conforms to the reasons for termination. Therefore the respondent was properly charged,

Based on the above findings and guided by Rule 12 (3) of GN. 42 of 2007. I am of firm decision that; the termination was substantively fair because it was proved that the respondent obtained 5,898.06 liters of fuel without approval. As rightly pointed out by the learned counsel for the applicant that Banking industries are based on trust, once an employee breach the trust then the relationship between the employee and employer is brought to an end. In the record, the respondent was found to have caused loss to his employer and failed to explain why he did not obtain any approval before purchasing the said fuel and the excessive liters also are in question as to how could he request excessive litters of fuel contrary to the capacity of the generator.

In the event and on the foregone, I find that the respondent termination of employment was both substantively and procedurally fair. Therefore, I revise and quash the Commission for Mediation and

Arbitration decision which held that there were no valid reasons to terminate the respondent. I allow the revision to the extent explained above. Since this is a labour matter I make no order as to costs.

Order accordingly.

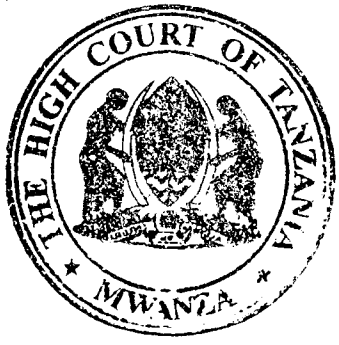
Dated at Mwanza this date 21st April, 2020.

A.Z.MGEYEKWA

JUDGE

21.04.2020

Judgment delivered on 21st April, 2020 via audio conference, and both parties were remotely present.



A.Z.MGEYEKWA

JUDGE

21.04.2020

Right to Appeal explained.