IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

LABOUR REVISION NO 16 OF 2021

CHARLES JACKSON WANYANCHA ..... APPLICANT

VERSUS

CRDB BANK PLC ..... RESPONDENT

JUDGEMENT

4th August & 19th September, 2022

F. H. Mahimbali, J.

The applicant in this revision, was an employee with the Respondent Bank since November, 2016. His employment came to an end on the 4th May, 2020 by being terminated on ground of gross dishonesty. The applicant unsuccessfully challenged the said termination before the CMA (in CMA/MUS/102/2020). He has been aggrieved, thus, the basis of this revision as per law.

The applicant prays that the CMA's award (in CMA/MUS/102/2020) be revised so as to award him a total of Tzs **36, 918,450 Tshs** as compensation, reinstatement without losing any entitlements and for of

employment without notice of termination, severance pay of 30 days subject to the applicant's unfairly termination.

During the hearing of the revision application, the applicant was represented by Mr. Rhobi Maritinus learned advocate whereas the respondent was dully represented by Ms Marina Mashimba, learned advocate from Galati Law Chambers.

In his submission in support of the revision application, Mr. Joseph Rhobi Maritinus while adopting the applicant's affidavit in support of the application, listed the following as grounds challenging the said award by CMA:

- Whether it was just and fair for the arbitrator to order that termination was fair.
- Whether it was proper for the trial Arbitrator not issuing severance pay to the applicant.
- Whether it was fair for the arbitrator to dispose of the matter without considering the issue of termination as introduced to CMA, form no 1.
- Whether it was fair and just for the trial Arbitrator to ignore the evidence that the applicant was punished twice by the respondent.

- Whether it was fair for the trial Arbitrator to circumvent and flyover the evidences adduced by the applicant.

In arguing the first issue, it is his considered view that the termination was not fair. This is because, it is the legal requirement that before one's employment is terminated, there must be issued notice for that termination as per section 41 (1) b (ii) of the Employment and Labour Relations Act which is not less than 28 days. That in this case, the applicant being employed on monthly basis and pursuant to the letter of employment offer dated 13/10/2016, he was not given the notice of termination as per law. He challenged the CMA's award at page 1 (paragraph 2) that the issue of notice of termination features but not reflected anywhere. Thus, it appears the applicant was terminated unfairly.

He further argued that pursuant to the letter of suspension pending investigation (P.2) dated 21st November, 2019 and the investigation report (D14) is dated 21/11/2019, he challenged the said suspension letter pending investigation as had nothing to do with any investigation while as per that report already investigation had commenced two months prior to his suspension. Reading that report from pages 19-21, it is clear that investigation had already been done earlier than his

suspension and the recommendations issued. It is therefore clear that this procedure was against the respondent's own internal policy.

As per CMA's proceedings at page 5, the witnesses testified on section 2:10 (fraud and forgeries), section 7:7 (b), which is contrary to D.14 (investigation report). The charge sheet dated 13/3/2020 talks of gross-dishonesty (Ref. No. CRDB/PCF. 22075). Close reading, it is vivid that there has been unfair termination. That suggests, what was investigated, charged and ground of termination, you will find that termination was not fair. The CMA's decision at page 9 is astonishing. He cited the case of **Charles Christopher Humphrey Richard Kombe t/a Humphrey Building Materials vs Kinondoni Municipal Council,** Civil Appeal No 125 of 2016 (at page 16 and 16) in support of his position. In arriving at such a conclusion, the CMA ought to have examined the opponent's case as well and examine its strength. With this, Mr. Maritinus is of the view that the termination was not fair.

On the second issue which is like an alternative, it is on severance pay. He submitted that as per section 42 of ELRA, provides for payment of severance pay upon termination being unfair. He insisted that, the termination was unfair therefore severance pay be effected.

As per ground no 3, he submitted on the issue of disposing of the matter without considering the issue of termination as stated in CMA Form No.1 The proceedings and judgment are silent on this. The CMA was duty bound to dispose it and not a mere mentioning. In the case of **Sosthenes Bunono and Dianarose Bruno vs Frola Shauri,** Civil Appeal No 81 of 2021 at page 8, it was ruled that failure to dispose of an issue is a serious breach of procedure. As it was raised but not disposed of by the CMA, it constituted a serious breach, he submitted.

On the fourth issue, whether it was fair for the applicant to be punished twice. Mr. Maritinus while relying on the CRDB's personal Manual, at paragraphs 10. 4. 3, submitted that in this case, the applicant has been condemned to pay loss, was demoted and changed department of work, then lastly terminated from his employment. That is more than double jeopardy if not tripod. As per page 4 of CMA's award, it establishes this all. On this he made reliance to Honourable Maige J's decision (a.h.w) in **Chai bora Ltd vs Allan Telly Mtukula**, Labour Revision No 38 of 2017, High Court Arusha at page 5 about double jeopardy. That as per para 10. 4.3. (CRDB'S personal Manual), the listed punishments are in alternative and could not be inflicted all to a single employee. That is equivalent to double Jeopardy, he argued.

With the 5th ground, Mr. Maritinus submitted that the trial Arbitrator circumvented and fly overed evidences adduced by the applicant. This is a general ground that the trial Arbitrator escaped his legal duty of circumventing the evidence in record and flied over. There were a lot of issues not dealt with. There was no any reasoning by the CMA in reaching that end. The weaknesses of the respondent's case were not even determined by the trial tribunal. Why was he charged with other offences while he was investigated for other offences. On this, he sought reliance in the case of **Twinogone Mwambele vs Republic,** Criminal Appeal No 388 of 2018, CAT at Mbeya at page 12.

On these grounds, he thus prayed that this Honourable court to rule that termination was unfair, the applicant be reinstated, there be compensation of his salary, payment of Notice of Termination, Severance pay and other reliefs as this court may deem fit and just to grant.

In countering the applicant's submission in support of the application, Ms Marina Mashimba, learned advocate first prayed that the contents of the counter affidavit and the supplementary affidavit, be adopted by the court and be used by this court in considering the appropriate verdict of this case.

In opposing the application, she first attacked the applicant's considered affidavit as it does not state where the arbitrator erred. The applicant ought to have explicitly stated where the Arbitrator erred. It is so general. She stated that the pointed-out errors during oral submission are not contained in affidavit. This is not proper. All facts that need determination must be proved. Since an affidavit is self-proof, and oral submission is not, she considered it as contravention as per rule 24 (3) of the L/R GN 106 of 2007.

She clarified that as per first issue raised whether there was lawful termination, she is of the firm view that it was fair. The argument that the said notice was not issued and that the same being an issue, it was not deliberated by CMA. She admitted that notice is a legal requirement (section 41 of ELRA). However, it is not true that the said notice was not issued. As per section 41 (5) of ELRA, Cap 366 R. E. 2019, there is an alternative to issuance of notice of termination (D.8 exhibit). Amongst the terminal benefits enumerated/attached was payment of one-month Salary in lieu of notice of termination. Since the contents of these annexures to exhibits were never challenged, she is of the view that the issue of notice of termination was dully dealt with by the CMA.

Since parties are bound by their pleadings, as per nature of this case, she submitted that the CMA F.1 is clear. The issue of Notice of termination was not amongst the disputed issues as the applicant himself on this pleading waived it.

As per D14 exhibit, and P.2 that suspension letter was given after investigation had already been conducted while the applicant was in duty, thus it was not fair. She admitted that the investigation report was issued in October, 2019 but suspension letter was issued November, 2019. On this, she clarified that it is not mandatory that whenever investigation is conducted an employee must be suspended. However, where the said investigation would interfere with the investigation to be conducted, then suspension can be opted. As per Rule 27 (1) of GN 42 of 2007 (code of good conduct) provides that "...employer **may suspend** the employee)". Therefore, it is not hard and fast rule that during investigation, there must be suspension as there can be investigation on going while the employee is also going on with his duties. As per this case, investigation report was issued on 14/10/2019 while the employer was still in work. This has not breached any law and in any way prejudiced the applicant. The fact of being given suspension letter in November was a discretionary power of the employer,

submitted Ms Mashimba. Therefore, as regards to the suspension letter being issued after the investigation, it was not unlawful as per law (Rule 27 (1) of GN of 2007, she clarified.

On the argument that the investigation was on misappropriation of fund, but the charges levelled against him were different, she clarified that during the said investigations there emerged issues that the investigating officers recommended to the Human Resource Officer, that's why the disciplinary charges had to bear other established offences during the investigations as recommended by the investigating officers. She clarified further that the differences encountered between the findings in the investigation report and charge sheet (D3) i.e **misappropriation of fund vs Gross dishonest** while DW1 talked of fraud and forgeries is because what was being investigated was misappropriation of fund and according to GN 42 of 2007 rule 12 (3), that is gross dishonest. It is the same offence but only that such offences amount to gross dishonest.

That the trial Arbitrator shifted burden of proof to the complainant is not true, countered Ms Marina relying on CMA'S award at page 9. It is her view that, what the arbitrator meant (at page 9), it was on the aspect of double jeopardy (double punishment). On this, trial Arbitrator

was satisfied that there was no proof as per law. As per this fact, the trial arbitrator was justified in her considered view. In totality, she is of the considered view that termination was fair.

On the second issue is whether it was proper for CMA not to award severance pay as per section 42 of ELRA of 2007. As per law, severance is not payable where the grounds of termination were fair. As his termination was on ground of misconduct, the termination was fair. Thus, there was no severance pay. See also rule 26 (2) b of GN 42 of 2007 and the case of **Knight support (T) Ltd vs Bwiko Nyamasyesei**, Labour Revision no 927 of 2019 page 8 and 9.

On the third issue, she considered it as repetitive to ground on notice of termination. She could not add anything, but urged this Court to consider as dully done in the above submission.

On fourth ground, it is the issue of double punishment. This is pursuant to 10.4.3 of CRDB internal manual (punishments). That the applicant was double punished, she opposed it as well. That he was demoted, changed job department is not true. What is in record is this, that following the client's complaints (leading to the investigation and eventually this dismissal), she replied that the Branch manager called him to give statements on the raised claims. The applicant admitted the

claims and promised to pay. That after the said findings and payment, there is evidence that he himself asked to be changed the department. That was not punishment. This is because punishment is only issued where it is preceded by the disciplinary hearings, convictions and sentences. In this case, there is no proof that there was a disciplinary committee's findings. What money the applicant himself admitted taking from the Bank's clients and promised to pay back and he did it was not a punishment as per law but his own admission and thus was tasked so by his own devotion. What was later decided by the Disciplinary Hearing upon his conviction was termination. She submitted that, that was the only punishment by the employer. So, he was just given one punishment. The change of department was a normal job rotation and it was, by the way geared by his own request. Thus, the case **Chai Bora** referred by Mr. Joseph Rhobi is irrelevant in the current situation.

With the last issue, i.e circumvention of evidence, it is very general. She failed to capture it well. However, she reiterated her submissions above that all things were well considered by the trial arbitrator. Thus, it be considered that there was no any circumvention of evidence.

On prayers before this court by the applicant, she responded as follows.

The applicant's termination was lawful.

On the prayer of the payment of TZS: **36 918 450** is unfounded. It is not stated where it is originated.

However, with reinstating prayer and compensation at the same time, it is impossible as per law. Where there is unfair termination, the law grants remedies in alternatives. Reinstatement and compensation cannot go together. It is either one of the two.

With payment of notice of termination, she reiterated that it was dully covered in his termination package.

She equally countered the prayer on severance pay as he was fairly terminated.

Conclusively, she prayed that the CMA's award be confirmed and the revision application be dismissed. This is because the termination was fairly done both substantively and procedurally.

In his rejoinder submission, Mr. Joseph Rhobi Maritinus, learned advocate reiterated his submission in chief and maintained that there is no proof that the said notice of termination was paid as alleged. The

allegation that he will be paid so is not conclusive proof that he has been paid.

With the affidavit proof, he submitted that what he submitted is just a clarification of the applicant's affidavit and not more. Otherwise, he maintained all his previous submissions on the remaining issues.

Having heard the submissions from both sides, the vital question to ask here is whether the revision application is merited. In arriving to that end, the important question to ask is whether the applicant's termination was lawful. To answer that, I must make some clarifications.

What is unlawful or unfair termination can be expressed to refer the process of dismissing employee in the absence of a substantial reason. It is the removing of someone from a work for reasons which are not legally accepted. Unfair dismissal normally cannot be valid in the grounds where an employee is dismissed for genuine redundancy, incapability, or misconduct and more importantly when the procedures prescribed by the laws are not adhered to (section 37(2) ELRA).

A termination of employment by an employer is unfair if the employer fails to prove that the reason for termination is valid; that the reason is a fair reason, related to the employee's conduct capacity or

compatibility or based on the operational requirements of the employer, and that the employment was terminated in accordance with a fair procedure (The Employment and Labour Relations Act No. 6 of 2004 (Tanzania), s 37(2)).

Unfair termination has also been defined in **Abubakar Haji Yakubu v Air Tanzania Co. Ltd**, Rev. No. 162 of 2011, Labour Division., DSM, (Hon Rweyemamu, J.)

> *"Refers to termination for an invalid reason and or using improper procedure as enumerated under section 37(2) of the Act"*

In my traverse to the CMA's record, the reason why the applicant was terminated from his employment was due to misconduct of the applicant. He based his conclusion relying on exhibit P1, D11, D12, D13 and the testimony of DW3. In essence, through exhibits D.11, D.12 and D13, the testimony of DW3, it is evidently clear that the applicant to this revision application withdrew/withheld money from client's account number 01J2050742800 (Exhibit D12 and Exhibit D13) amounting TZS: 8,000,000 and 3,800,000/= without any justifiable reasons. There was written explanation by the applicant as requested by the Bank in which

the applicant admitted to have transacted with the said client's bank accounts (Exhibit D13).

In totality, I agree with Ms Marina, that the applicant's termination was lawful. The challenge that it was not lawful because of notice of termination has been clearly countered, and the reply/rejoinder explanation by Mr. Maritinus does not hold any valid explanations. There ought to have been a clear proof that the said money – payment of one month salary in lieu of notice was not received. But with the explanations given from the respondent it is clear that through exhibit D8 an amount of money TZS: 1,261,380.4 was paid to the applicant as one-month basic salary in lieu of notice and leave pay of 1,261,380.4. After the tax due, he was paid a total amount of 1,717,702.02 for both one-month basic salary in lieu of notice and leave pay. Therefore, there was full compliance as per law (as per section 41 (5) of ELRA, Cap 366 R. E. 2019).

On the sub issue in ground number one regarding suspension letter being given while investigation had already been commenced, I agree with Ms Marina that as per law, it is not mandatorily provided that whenever investigation is mounted, then there should be a prompt suspension unless the employer finds it necessary to do so. Therefore, in

my considered view, a suspension letter, depending on the gravity or nature of the complaint being investigated, (suspension letter) can be given at any stage in the course of investigation. Otherwise, it is not necessary that suspension letter be issued if there can be no interference with the employer's investigation. Yet, other disciplinary actions may follow suit even without suspension action. As per Rule 27 (1) of GN 42 of 2007 (code of good conduct) provides that "...employer **may suspend** the employee". Therefore, it is not hard and fast rule that before any termination, there must be suspension as there can be investigation on going while the employee is also going on with his duties. As per this case, investigation report was issued on 14/10/2019 while the employer was still in work. This has not breached any law and in any way has not prejudiced the applicant. The fact of being given suspension letter in November was a discretionary power of the employer, as rightly submitted by Ms Mashimba. Therefore, as regards to the suspension letter being issued after the investigation, it was not unlawful as per law (Rule 27 (1) of GN of 2007.

On the argument that the investigation was on misappropriation of fund, but the charges levelled against him were on gross dishonesty, I am satisfied with the evidence in record and the explanations given that

the findings in the investigation report and charge sheet (D3) i.e **misappropriation of fund vs Gross dishonest** while DW1 talked of fraud and forgeries is because what was being investigated was misappropriation of fund, according to **GN 42 of 2007 rule 12 (3),** that is gross dishonest. Though as per CMA's proceedings at page 5, the witnesses testified on section 2:10 (fraud and forgeries), section 7:7 (b), which is contrary to D.14 (investigation report). The charge sheet dated 13/3/2020 talks of gross-dishonesty (Ref. No. CRDB/PCF. 22075). Close reading, it is vivid that they both talk of the same thing but just choice of words. I agree that it is the same offence but only that stated in other phrases/words.

That the trial Arbitrator shifted burden of proof to the complainant is not true, as the Hon Trial Arbitrator was satisfied that there was no proof as per law. As per this fact, the trial arbitrator was justified in her considered view to hold that termination was fair as. This is because it is the established principle that for the termination of employment to be considered fair, it should be based on valid reason and fair procedure. In other words, there must be substantive fairness and procedural fairness of termination of employment (Section 37 (2) of the ELRA). I have no doubt that the intention of the legislature is to require employers to

terminate employees only basing on valid reasons and not their will or whims. This is also the position of the International Labour Organization Convention (ILO) 158 of 1982, Article 4. In this case, both substantive and procedural justice were well complied with in reaching the justice of the case. There is no shifting of burden as argued but it was the applicant's duty as well to establish the unfairness of his termination on both substantive and procedural fairness, the applicant having discharged it properly.

A similar line of thought was well articulated by labour court in **Tanzania Revenue Authority v Andrew Mapunda**, Revision No. 104 of 2014 Labour Division at DSM.

On the second ground is whether it was proper for CMA not to award severance pay as per section 42 of ELRA of 2007. As per law, severance is not payable where the grounds of termination were fair. As his termination was positively established on ground of misconduct, the termination was fair. A finding that a termination is unfair is a conditional precedent for ordering a remedy. In this regard, South African court when interpreted section 193 of LRA in De Beers Consolidated Mines Ltd v CCMA and Others, (2000) 9 BLLR, 995(LCA) at 1007 where the court had the following opinions:

"The onus is on the employer to prove the fact upon which it relies for the dismissal. If the facts upon which the employer relies are not proven at the end of arbitration proceedings, then cadit quaestio, the employer has failed to prove the fairness of the dismissal. On the other hand if the employer does prove the fact upon which it relies, then the arbitrator must make a determination as to whether or not the dismissal is unfair and only if the arbitrator is so satisfied may he or she order a remedy. ..... Moreover, an opinion that finds a particular decision unfair or not is quantitatively different from one concerned with whether it is fair or not...".

Thus, there was no severance pay pursuant to rule 26 (2) b of GN 42 of 2007 as long as the termination of the applicant's employment was fair. See the case of **Knight support (T) Ltd vs Bwiko Nyamasyesei**, Labour Revision no 927 of 2019 page 8 and 9.

Having dealt with grounds number one and two of the application satisfactorily, I find ground number three taken into board as per that response. I say so because the issue of lawfulness in the termination of the applicant's employment has been well dealt with. Reading CMA F.1, (part A and B) the applicant is praying in item no.4 (Part A) for two things (1&2) and in Part B also two things (3&4):

1. Reinstatement without losing any entitlements

2. Compensation of Tsh. 36,918,450/=.

3. That his termination was flawed with legal procedures by the employer.

4. And that his termination was unfair because the rules of natural justice were flawed by being punished twice.

In digest to the applicant's affidavit and what transpired at the CMA proceedings, these prayers are not backed up by any relevant evidence for this Court's consideration. It is so clear that the CMA reached a proper verdict on this. There could only be reinstatement if there was unlawful termination. As it was rightly ruled so and approved by this Court, the prayer is of no merit any more.

As to how the figure of Tsh. **36,918,450/=** was arrived, the applicant's calculations and explanations are not supported with any material evidence. Therefore it may be considered as a mere general damage, the applicant was seeking for court's consideration.

Equally, the claims that his termination was unfair because the rules of natural justice were flawed by being punished twice as per available records at CMA, I have failed to get the clear material from the applicant for me to link it with his complaint in ground number three. In essence it is short of stuff for further consideration. Otherwise, I am

satisfied that as parties are bound their pleadings, the respondent has sufficiently established how both substantive and procedural fairness were observed by the employer before the applicant's employment was terminated.

On fourth ground, it is the issue of double punishment. That the applicant complaints that he was double punished as he was ordered first to pay the loss, was demoted, changed department of work and then was lastly terminated. The respondent's counsel submitted that pursuant to 10.4.3 of CRDB internal manual (punishments) she denied the fact of there being double punishment. She submitted that what is in record is this, that following the client's complaints (leading to the investigation and eventually the applicant's dismissal), the Branch Manager only called him to give statements on the raised claims, he admitted the claims and promised to pay. The change of department as per circumstances of this case was not punishment. This is because punishment is only issued, where there are disciplinary hearings, convictions and sentences. In this case, there is no proof that was a disciplinary committee's findings. What money the applicant himself admitted taking from the Bank's clients and promised to pay back and he did it was not a punishment as per law but his own admission and

thus was tasked so by his own devotion. What was later decided by the Disciplinary Hearing upon his conviction was termination.

I am persuaded by Ms Marina with her reasoning and it is my finding that as the applicant admitted withholding/ deducting the client's moneys, that was against the employers' working disciplinary rules. In other words, it is equivalent with theft and it is misconduct. That he advanced his personal money to the client's children and failed to refund them as agreed didn't entitle him having a claim of right when doing banking transaction at the respondent's office. That was purely a misconduct as per law. Therefore admitting it and promised to pay back was his first obligation and was not a punishment by itself. Furthermore, the change of department is just a normal job routine as per circumstances of this case. Unless there ought to be proof that the change of the department was preceded by a disciplinary hearing lowered his income or status and later other disciplinary measures were taken over. Otherwise, I am convinced that the change of department was a normal job rotation and it was, by the way geared by his own request. Thus, the case **Chai Bora** referred by Mr. Joseph Rhobi is irrelevant in the current situation and distinguishable.

On the last issue whether it was fair for the trial arbitrator to circumvent and flyover the evidence adduced by the applicant, I am of the view that this ground is very general and in essence it is embodied in ground number one on unfair termination which the same was well taken care of. The same is bound to fail.

That said, the revision application is dismissed. The termination of the applicant for offences committed during his employment amounted to a fair termination. And that he was fairly terminated basing on both substantive and procedural fairness. On that basis, the issue of severance pay does not arise, the arbitrator disposed of the matter fairly. It is so ordered.

DATED at MUSOMA this 19th day of September, 2022.

F. H. Mahimbali

JUDGE

Court: Judgement delivered 19th day of September, 2022 in the presence of Maritinus Rhobi, advocate for the applicant, Mary Joachim advocate for George Mwaisindore advocate for the respondent and Mr. Gidion Mugoa RMA.

Right to appeal explained.

F. H. Mahimbali

JUDGE