IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI SUB REGISTRY
AT MOSHI
REVISION NO. 2 OF 2022
(C/F Labour Dispute No. CMA/KLM/MOS/ARB/23/2021)

EXIM BANK (TANZANIA) LIMITED .....APPLICANT
VERSUS
SIA KIWELU..... RESPONDENT

JUDGMENT

Last Order: 30th March,2023
Judgment: 4th May, 2023

MASABO, J.: -

The applicant has moved this court by way of revision praying that this court be pleaded to examine, revise and set aside the proceedings, decision, orders and the award made by the arbitrator in Labour Dispute No. CMA/KLM/MOS/ARB/23/2021. The abbreviated background of the revision are as follows: The respondent worked as an employee of the appellant from 01/02/2013 to 25/02/2021 when her contract was terminated on allegations that between 8/10/2018 and 12/10/2018 she was involved in endorsing payment of fraudulent cheque transactions from an account of one ELAETE 1927 Limited without confirming the customer's signature and calling the customer to confirm the checks. The endorsement caused the applicant to suffer reputational and monetary loss totaling Tzs 19,925,000/-.

Following this incidence, the respondent was subjected to a disciplinary hearing which culminated into her termination from employment. Her attempt to challenge the dismissal ended futile thus, she referred the

matter to the Commission for Mediation and Arbitration (CMA), Kilimanjaro challenging the termination. The arbitration ended in the respondent's favour after the arbitrator found her termination to be unfair both substantively and procedurally. Subsequently, she was awarded a compensation worth twenty months' salary and severance pay the sum of which was Tzs. 36,268,061/-.

Disgruntled, the applicant has filed the revision. In the affidavit bracing the chamber summons, as deponed by one Edward Mwasaga, who is identified as her principal officer, it has been averred that the respondent was in gross negligence which caused the applicant the above stated financial loss and disrepute. He has also stated that, the applicant adhered to all procedures of termination of the respondent, thus the termination was fair. Specifically, his main discontentment is as stated below:

1. The arbitrator erred in law and in fact by concluding that there were no substantial reasons to terminate the respondent;
2. The arbitrator erred in law in holding that the procedures for termination were not adhered to by the applicant;
3. The arbitrator erred in law and fact to base his decision that there were no substantial reasons to terminate the respondent.
4. The arbitrator erred in law and fact in awarding compensation to the respondent while providing and relying on unrelated reasons from the matter in issue.
5. The arbitrator erred in law and in fact by arriving to a conclusion that the respondent was not negligent while she has in fact admitted and confessed of the gross negligence on her part.

Contesting the affidavit of Edward Mwasunga, the respondent she was unlawfully dismissed on allegations that she committed gross negligence despite not being charged with gross negligent. She also maintained that she made calls to the customer one, Alfred Orono Orono before endorsing the cheque hence her termination was unfair.

Hearing of the application proceeded in writing. The applicant was represented by Ms. Hamisa Nkya, while the respondent was represented by Mr. Mnyiwala Mapembe, both learned counsels.

In her submission in chief, Ms. Nkya adopted the contents of the affidavit of Mr. Edmund Mwasaga and proceeded to consolidate the 1st, 2nd, 3rd and 5th legal issues in the affidavit and submitted on the 4th ground separately. On the four consolidated grounds, she submitted that the arbitrator did not address the misconduct against which the respondent was charged. Had the arbitrator addressed the misconduct and evidence thereto, she would have noted that respondent was terminated on a sole reason of gross negligence based on the fact that she endorsed payment of fraudulent cheques from the customer's account without verifying the signature and confirming with the customer. Ms. Nkya referred the court to page 6 and 10 of the award noting that the respondent admitted that she failed to fulfil the two requirements which meant that there was negligence hence a valid reason for her termination, a fact which was overlooked by the arbitrator. On the procedural compliance, Ms. Nkya submitted that there was full compliance with all procedures as the respondent was served with the letter for termination, the disciplinary

hearing was held and she was informed of the decision thereto on the same day of the hearing.

On the 4th ground, Ms. Nkya submitted that section 40(1) of the Employment and Labour Relations Act, 2004 (ELRA) provides three remedies for unlawful termination, namely reinstatement, re-engagement and compensation. In exercising her discretion in selecting the suitable award among these three, the Arbitrator had to consider all the reliefs prayed. She was duty bound to scrutinize the circumstances of the termination to see whether the procedures were adhered to, the demeanor of the applicant and if the respondent was indeed unfairly terminated. She proceeded that, the award that the respondent be compensated a 24 months' salary instead of 12 months' salary was unwarranted and contrary to the law. Fortifying this point, she cited the case of **Brookside Dairy (T) Ltd vs Ally Kombo Mwakichobe,** Labour Revision No. 645 of 2019 where this court faulted the compensation of 24 months' salary granted by the arbitrator because the applicant's business was also negatively affected. In the present application, the arbitrator ignored the fact that the applicant was negatively affected as she suffered a financial loss of Tzs. 19,000,000/-, disreputate and loss of business.

Moreover, Ms. faulted the grant of severance pay arguing that the respondent did not deserve the same as she was terminated on grounds of misconduct as provided for under section 42(3)(a) of the ELRA.
Ms. Nkya proceeded that, the arbitrator ought to be impartial, independent and to act with due diligence without any pressure from outsiders as set under Rule 5(a) and (b) of the Labour Institutions (Ethics

and Code of Conduct for Mediators and Arbitrator) Rules, G.N No. 66 of 2007. Without divulging further explanation as to the arbitrator's impartiality and the failure to act diligently, she prayed that the award be set aside as it was arbitrator offended the above law. Concluding her submission, Ms. Nkya argued that, payment of severance pay and the 24 moths salary was akin to a double punishment to the applicant as she had already incurred a loss of TZs 19,00,000/-. She prayed that this court revises and set aside/ squash the proceedings and award in the labour dispute.

In reply, Mr. Mapembe adopted the content of the counter affidavit of the respondent. Replying to the consolidated 1st, 3rd, and 5th ground of appeal, he submitted that there si nothing to fault the arbitrator and the award as the respondent was terminated of the offence different from the one she stood charged with. The offence she was charged with was endorsing payment of fraudulent cheque transactions without verifying the customer's signature and obtaining the signatory's confirmation whereas the letter of termination, exhibit E-12, stated that she was terminated for gross negligence. He proceeded that, the testimony of DW2 confirmed that the respondent (SIAK) had indeed called Mr. Orono who confirmed the issuance of the cheques as displayed in exhibit E-13. However, the said Mr. Orono was not called as a witness in substantiation that there was indeed a breach of duty by the respondent the omission which triggered the arbitrator to draw an adverse inference against the applicant. Fortifying his case, he cited the case of **Hemedi Daud vs Mohamed Mbilu [1984] TLR 113.**

Mr. Mapembe argued further that, the respondent's was faulty since item VII of the General Code of Conduct of the Applicant stated that, the punishment for causing loss is to meet the liability in whole or partly and the respondent was ready to do the same. He cited Rule 12(1)(a) and (b)(v) of Employment and Labour Relations (Code of Good Practice) GN 42/2007 which requires employers, arbitrators and judges to ascertain if termination is an appropriate sanction for contravened offence arguing that the respondent did not contravene item VII of the Code of conduct as she confirmed the cheques with the Mr. Orono and that even if she contravened the same, termination was not an appropriate sanction. He further argued that the respondent took the necessary steps to compensate the loss including selling her assets so as to offset her previous loan with the applicant and apply for another that would settle the loss as advised by one Shirima. She procured the fund and she inquired on when should she make the compensation only to be informed to await a disciplinary hearing.

On the 2nd ground, Mr. Mapembe submitted that the applicant did not adhere to the procedures for termination. The minutes and decision of the disciplinary hearing were not availed to the respondent within 5 working days from date of the hearing. Instead, they were supplied to her on 9/06/2020 eight months from date of the hearing which was 17/10/2019 (exhibit E5 and E6). Such delay, he argued, offended Rule 13(8) of the Employment and Labour Relations (Code of Good Practice) Rules and Guideline 4(9) of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedure of the Employment and Labour Relations (Code of Good Practice) Rules. He fortified his argument with

the case of **Exim Bank Tanzania Limited vs Nyamhanga Mhagachi** Labour Revision No. 14/2016. He added that, the essence of the 5-day rule is that the employee should not stay forever waiting for her fate to be decided and that she is allowed to appeal on time. In this case, filed her appeal on 12/06/2020 and the same was heard on 06/07/2020 but the decision was served on 25/02/2021 (see exhibits E7, E8 and E9).

Moreover, Mr. Mapembe argued that the respondents was denied the right to state her mitigation as seen in Exhibits E5 and E6. The denial offended Rule 13(7) of the Employment and Labour Relations (code of good Practice) Rules read together with guideline 4(8) of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedure for Employment and Labour Relations (Code of good practice) Rules. He fortified this argument with the case of **Jumanne A. Josiah vs Ukerewe SACCOS Ltd.** Revision Application No. 26/2019 where the court found the termination unfair because the employee was not afforded the right to advance his mitigation.

As to the 4th ground, Mr. Mapembe submitted that there is a plethora of authorities in support of the award of compensation of more than 24 months' salary if the termination is found to be both substantively and procedurally unfair and this include the case of **Brookside Dairy (T) Ltd vs Ally Kombo Mwakichobe**, Labour Revision No. 645/2019. He reasoned further that, by inviting this court to vary the award, the applicant is inviting this court to interfere with the exercise of Arbitrator's discretion under Section 40(1)(c) of ELRA, an enterferance can only be done in the event of the four factors expounded in **PANGEA Minerals**

Limited vs Gwandu Majali Civil Appeal No. 504 of 2020, that is, where the court has misdirected itself, when it has acted on matters it should have not acted on, if the court failed to consider matters it ought to have considered and when, in doing so, the court arrived at a wrong conclusion none of which is present in the instant application. The extent of termination of the respondent was both substantively and procedurally unfair hence the arbitrator was justified to order the 24 months' salary compensation. In support he referred to Rule 32(5)(b) of Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN 67/2007 which lists extent of termination as one of grounds to be considered in awarding compensation. He also cited the case of **Tanzania Cigarette company Limited vs Hassan Marua** Revision No. 154/2014 in which it was held that if an arbitrator assigns reasons to awarding compensation above 12 months' salary, this court would not interfere with the said discretion. In the present case, the arbitrator assigned reasons for awarding 24 month's salaries compensation hence there is no justification for interference by this court.

While dispassionately considering the submission and the CMA records placed before me, I have noted that there are two issues to be resolved, namely: **one,** whether the termination of the respondent was procedurally and substantively fair and **two,** whether the arbitrator justly awarded the compensation to the respondent.

On the first issue on whether the termination of the respondent was procedurally and substantively fair; Ms. Nkya has argued that the arbitrator erred in holding that the termination was unfair because one, the arbitrator did not address the misconduct on which the respondent

was charged in that she had admitted not to have verified the customer's signature and calling him to verify the cheque. Two, the applicant had adhered to all procedures for termination. On his party, Mr. Mapembe has, argued that the respondent dutifully performed her duty as she called the customer to verify the cheque and verified the signature. He has also argued that, the offence of gross negligence against which the respondent was found guilty and terminated for, is not the one she stood charged before the disciplinary hearing meeting. He has also argued that there were multiple procedural irregularities which I shall address as I answer this issue.

In prelude, it is trite that, much as the employer is vested with a right to terminate the contract of any employee, such right is not obsolete. The termination need be fair short of which it shall be deemed unlawful under section 37(1) of the Employment and Labour Relations Act [Cap 366 RE 2019]. The fairness of termination which is now at issue is twofold, comprising of substantive and procedural aspects, both of which must be complied with. These two aspects are depicted under section 37(2) of Employment and Labour Relations Act, Cap 366, which states that,

> "(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."

Further, and as correctly argued by Mr. Mapembe, Rule 12 (1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42/2007 provides thus:

> 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 it.**

In the present case, the respondent was terminated after she was found guilty of gross negligence contrary to Rule 12(3) (d) of the Employment and Labour Relations (Code of Good Practice) Rules. In her appeal before the mediator, she alleged that her termination was substantively faulty as the offence against which she was terminated was at variance with the one she was charged with, an argument which has been passionately submitted by her counsel. Having assessed the evidence on record, notably, the charge sheet (Exhibit E3) and the result of the hearing (Exhibit E6), I have found this argument seriously wanting as both documents make reference to gross negligence contrary to Rule 12(3)(d) of the Employment and Labour Relations (Code of Good Practice) Rules

and amplify that the gross misconduct so committed comprised of failure to verify the signature and to call the signatory. Hence, there is no variance.

The next point for consideration is whether, the said gross negligence was established and if it was, whether it sufficed as a reason for termination. Ms. Nkya has argued that, the arbitrator wrongly skipped to address the respondent's misconduct and had she done so, she would have come to the conclusion that the respondent committed the misconduct she was charged with as she admitted to have failed to verify the signature and to have authorized the payment without notification to the account signatory a submission which was sternly opposed by Mr. Mapembe who has argued that the respondent committed no wrong as she verified the signature and phoned the signatory.

The question to be answered from these competing submissions is whether there was proof that the respondent committed the gross negligence she was charged with. As the gross negligence against which the appellant was charged had two constituents, that is, failure to verify the customer's signature and the omission to call the customer, it was incumbent that both be proved. The burden of proof rested on no other than the appellant. Interpreting the above provision in **Dew Drop Co. Ltd vs Ibrahim Simwanza** (Civil Appeal 244 of 2020) [2021] TZCA 525 [Tanzlii] at Page 7 the Court of Appeal stated that:

> "From the above provision of the law, the burden of proof is placed upon the employer to prove that there was valid and fair reason to terminate the employee and the due process in terminating such an employee was observed.

From the record and the submission made by Ms. Nkya, I have observed that, the appellant has placed much reliance on the respondent's admission as proof to the alleged gross negligence. However, in my scrutiny of the evidence in record, I have observed that the admission if any was partial because, when the respondent appeared before the hearing meeting after she was formally charged, she told the meeting that she diligently performed her duty by following all the requisite procedures. She checked the balance, verified the customer's signature by comparing the one on the cheques and the one on 'CBS' and she phoned the customer but later on, the customer came to complain and when she looked at the signatures, she noticed slight differences. Cross examined as to why she did not notice the difference which appears as major one (complete different), she replied that, that might have been a human error considering that on the said day she was overworked. For this reason, she offered to compensate the loss incurred.

There is nowhere in the record where she admitted the omission to phone the customer. Even the two witnesses who testified in favour of the appellant rendered no proof for the allegation that the respondent did not call the customer as alleged. All they testified is that, the customer told them that she received no phone call from the respondent. Thus, it was the customer's world against the respondent's world. No further evidence was brought to show who between the two was lying. Surprisingly, the appellant chose to believe the customer while assigning no reasons for disbelieving the respondent who had worked for her for a duration of 8 years which a fairly long period. The failure to assign such reasons and to

render more concrete proof was a serious omission as it left this aspect unproved. In the foregoing, it can be fairly concluded that, whereas it is crystal clear that the respondent did not accurately verify the signature, there was no proof that she did not phone the customer and her offer to make good of the loss was only in acknowledgment of the negligence committed in verification of the signatures and the loss occasioned.

The next issue I have to consider in respect of the substantive fairness of the respondent's termination is the appropriateness of termination as a sanction. Rule VII of the Appellant's code of conduct states: -

> "Loss of banks funds through negligence or fault: - if at any time the bank incurs a loss as a consequence of the neglect or fault of an employee, he/ she will be held to have incurred a pecuniary liability in respect of the loss and if a satisfactory explanation or offer of restitution is not forthcoming, the employee will be required to meet this liability in whole or in part. The amount in question may be recovered from the employee's salary or any money due to the employee from the bank or may be used and recovered in any court of competent jurisdiction."

From the precise wording of this paragraph, it is crystal clear that the appropriate sanction was for the respondent to meet the liability of the loss she had occasioned to the bank. Under the premises, I hastily agree with Mr. Mapembe that, termination was not an appropriate sanction, considering that the respondent was ready to meet the liability as per the code and she had made the necessary steps to meet the said liability. It is further intriguing why the appellant opted to terminate the respondent who had worked for her for a long period and there is nothing on record to show that she previously committed a similar negligence and caused

the bank a financial and reputational loss. Certainly, her termination was substantially wanting and the arbitrator was indeed right to hold that there was no fair reason for the respondent's termination.

As to the procedural fairness of the termination, Ms. Nkya has passionately submitted that all procedures were observed. She has argued that the respondent was formally charged, disciplinary hearing was conducted, the outcome of the disciplinary hearing was communicated and she was accorded the right to appeal. On his party, Mr. Mapembe has argued that there were two major procedurally irregularities. First, the respondent was not accorded an opportunity for mitigation and second, she was not timely furnished with the written outcome of the disciplinary hearing. She was furnished with the same after the duration of 5 working days had lapsed.

Rule 13(9) of the Employment and Labour Relations (Code of Good Practice) Rules state that;

> "(9) The outcome of the meeting shall be communicated to the employee in writing, with brief reasons."

Further, Guideline 4(9) of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedure under the Employment and Labour Relations (Code of Good Practice) states thus;

> "(9) The chairperson should inform the employee of the outcome of the hearing as soon as possible, but not later than five working days after the hearing, giving brief reasons for a decision. The chairperson should sign the disciplinary form and give a copy to the employee."

Non observance of this rule is consequential as it entails, failure to follow required procedures (see **Exim Bank Tanzania Limited vs Nyamhanga Mhagachi** (supra). In the present case, the record show that the disciplinary hearing was held on 17/10/2019 but the written decision was served on 09/06/2020. Moreover, the appeal was heard on 06/07/2020 but the written decision was furnished upon the respondent on 25/02/2021 (exhibits E7, E8 and E9). In both circumstances, no reason was rendered in justification of such inordinate delays. Undoubtedly, there were procedural faults and the appellant can not escape the consequences. Needless to emphasize, the 5 days rule is neither a cosmetics nor decorative ornament. It is a substantial rule meant to spare the employee from instances such as the one in the present case where the employee is kept to wait indefinitely for the outcome of the hearing.

As to the failure to accord the respondent an opportunity to mitigate for the outcome which is the second alleged procedural irregularity, I have found no merit on it because, **one,** it was neither raised before the arbitrator and **two**, the last paragraph on the last page of the disciplinary hearing minutes (Exhibit E-5) prominently show that, she was accorded the said opportunity but forfeited her right to mitigate.

In the upshot of the substantive and procedural irregularities demonstrated above, I agree with the arbitrator that, the termination of the respondent from the employment was both, substantively and procedurally unfair. The 1st, 2nd,3rd and 5th grounds of this revision are thus dismissed for lack of merit.

The fourth ground of the revision concerns the appropriateness of the award. In Ms. Nkya's view, the arbitrator lucidly erred by awarding the respondent 24 months' salary as compensation and for awarding her severance pay. She has argued that the same was erroneously awarded in consequence of the arbitrator's omission to consider the reputational damage and monetary loss that her client suffered due to the respondent's negligence. For the respondent, Mr. Mapembe has argued that, the compensation was fairly awarded as the arbitrator gave reasons as to why she awarded a twenty-four month's salary as compensation. He has also argued that the severance pay was justified since the respondent was unfairly terminated.

Starting with the issue of compensation, Section 40 (1) (c) ELRA reads;

> "If an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer-
> (c) to pay compensation to the employee of not less than twelve months' remuneration."

Applying this provision in **Tanzania Cigarette Company Ltd vs Hassan Marua (supra)** the Court of Appeal stated thus; -

> "It stems out clearly that, first; an order for payment of compensation is discretionary and, secondly; is awardable to an employee only when the arbitrator or the Labour Court finds that his or her termination was unfair. The two conditions apply conjunctively or must cumulatively exist. To say it in other words, an order of payment of compensation is discretionary and is consequential to unfair termination." (Also see **Brookside Dairy Ltd vs Ally Kombo Mwakichobe** (supra)

I may also add here that, in exercising the discretion, the arbitrator can award a compensation higher than the 12 month's salaries provided there are justifiable grounds (see **Deus Wambura vs Mtibwa Sugar Estates Limited** Revision No. 3 of 2014 HC). Thus, when a higher compensation is contemplated, it is incumbent for the arbitrator to disclose the reasons for doing so. Unfortunately, in the present case, such reasons were not disclosed. Having cited the above authority as regards her powers to award a higher compensation, the arbitrator proceeded to award a compensation of 24 months salaries while assigning no reasons for doing so. The failure to assign the reasons was a fatal anomaly as it suggests that the discretion was arbitrary exercised in contravention of the trite law that, judicial discretion need be judiciously exercised. In the foregoing, I agree with Ms. Nkya that, the arbitrator committed a lucid error when she failed to assign a justification for awarding the respondent a compensation of 24 months' salaries which is over and above the minimum award stipulated by the law.

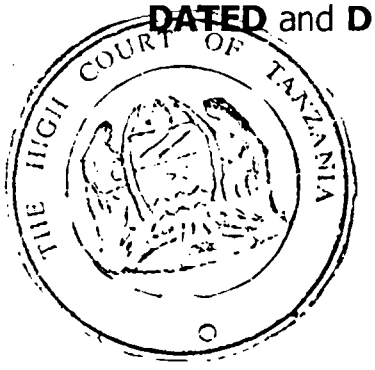
As for the severance pay, section 42 (1) and (2) of the ELRA provides that;

> "(1) For the purposes of this section, "severance pay" means an amount at least equal to 7 days' basic wage for each completed year of continuous service with that employer up to a maximum of ten years.
> (2) An employer shall pay severance pay on termination of 27 employment if-
>
> (a) the employee has completed 12 months continuous service with an employer;"

Looking at the facts of this revision, I find no faulty in the arbitrator's award of severance pay considering that the respondent was unfairly terminated after she had worked for the appellant 8 years reckoned from her date of employment on 01/02/2013 to the date of her termination on 25/02/2021. Accordingly, the 4th ground partially succeeds to the extent above.

In the foregoing, the revision partially succeeds only to the extent that, the award of compensation for 24 months salaries is reversed and substituted with the award of 12 months salaries. The rest of the award is undisturbed.

DATED and **DELIVERED** at Moshi this 4th Day of May 2023



J.L. MASABO
JUDGE
05/05/2023