

**IN THE HIGH COURT OF TANZANIA  
(LABOUR COURT DIVISION)  
IN THE DISTRICT REGISTRY OF DODOMA  
AT DODOMA**

**LABOUR REVISION NO. 09 OF 2018**

**JOYCE NDAIGA .....APPLICANT**

**VERSUS**

**NATIONAL BANK OF COMMERCE.....RESPONDENT**

**(From Award of the Commission for Mediation and Arbitration - Singida)**

**(R. Matalis - Arbitrator)**

**Dated 28<sup>th</sup> June, 2018**

**In**

**Labour Dispute No. CMA/SGD/60/2017**

**JUDGMENT**

**30<sup>th</sup> November, 2022 & 17<sup>th</sup> February, 2023**

**MDEMU, J.:**

This is an application for revision. The Applicant one Joyce Ndaiga through notice of application and chamber summons supported by the affidavit of one Mwanakombo Chaponda, moved this Court to call for and examine the award of the Commission for Mediation and Arbitration (the CMA) for Singida dated 28<sup>th</sup> of June, 2018. According to the affidavit, the Applicant was an employee of the Respondent. In that employer-employee relationship, the Applicant breached the terms of contract that

is, being a Senior Teller at Singida Branch was responsible and accountable for verifying individual teller cash balance before cash is moved into cash vault. One Happiness Lymo, a teller while doing end of day cash counting and reconciliation, noticed cash shortage of Tanzania shillings 725,000/= . It was not reported by the Applicant as required by branch operation manual. This act led to Applicant's termination by the Respondent on gross negligence.

Disciplinary hearing was conducted following inspection conducted by branch accountant on 15<sup>th</sup> July 2017. The Applicant was served with show cause letter to explain why disciplinary measures should not be taken against her. It is said that, the Applicant, in her reply, admitted the misconduct and pleaded for leniency. Consequently, the Respondent terminated her on that basis. The Applicant was not satisfied thus referred a labour dispute to the CMA on two main grounds. **One**, that there was no fair trial and **two**, there was no valid reason for termination. She thus prayed for reinstatement.

After analysis of evidence, the Arbitrator was satisfied that there was gross negligence on the part of the Applicant and therefore, the Respondent had proved that the termination of the employment contract was with valid and fair reasons and procedures towards such termination

were dully followed. Aggrieved, the Applicant moved this Court to revise the said award on the following grounds as per paragraph 5 of the affidavit that:

- (a) *That, the Arbitrator erred in law and in fact to say termination was fair while no procedure was followed in terminating Applicant in terms of gross negligence.*
- (b) *That, the Arbitrator erred in law and in fact to rely upon the evidence of respondent alone while Applicant had never received any investigation report with regards to charges.*
- (c) *That, the Arbitrator erred in law and in fact for not considering Applicant's evidence.*

The application was heard by way of written submissions as ordered by the Court on 02<sup>nd</sup> of November, 2022. The Applicant was represented by Mr. Jamali Ngowo, Personal Representative who filed his written submissions on 16<sup>th</sup> of November, 2022 and the Respondent was represented by Miss Wivina Kaloli, Learned Advocate who filed her written submissions on 30<sup>th</sup> of November, 2022.

In support of the application, Mr. Ngowo consolidated grounds (c) and (d) and argued that, the Respondent didn't discharge his duty of proving that termination was substantially and procedurally fair as

required under sections 37 and 39 of the Employment and Labour Relations Act, Cap. 366 read together with Rule 9(1) of the Employment and Labour Relation (Code of Good Practice) Rules, 2007 GN. NO. 42 of 2007. He cited also the cases of **Fredy Ngodoki vs. Swissport Tanzania PLC**, Civil Appeal No. 232 of 2019 (unreported), **Tunakopesha Ltd vs. Moses Mwasiposya**, Labour Revision No. 17 of 2011 reported in LCD 2013 at page 130 and the case of **Tanzania Meat Company Ltd vs. Mohamed Ghost and Others**, labour Revision No. 1 of 2013 Lccd of 2013.

Arguing grounds (a) and (b) together, he said that, the Arbitrator erred in holding that Applicant's admission of her mistakes was good reason for her termination and contravened Rules 12 and 13 of Employment and Labour Relations (Code of Good Practice) Rule 2007 on acts justifying termination.

He added that, the committee must be chaired by a person who is a neutral party and must be outside the office so as to avoid biasness. It was his further submissions that, disciplinary hearing in this case was chaired by her branch manager who has interest over the matter.

He stated further that, the act of the Arbitrator holding that the action of Applicant to admit her mistake do not need other proof, and the

fact that the Applicant was given right to be heard violated Rule 12 and 13 of Employment and Labour Relation (Code of Good Practice Rule) 2007. He argued that, the Rules provides for Procedures to be followed namely employer to conduct investigation to ascertain whether there are grounds to charge the employee concerned and thereafter to conduct a disciplinary hearing. In his view, the above procedures were not followed.

It was his further submissions that, the Respondent failed to prove that the Applicant was given money for reconciliation and that documents tendered by DW1 and DW2 were cooked one with no explanation. The allegation were gross negligence, incapacity and dishonesty, he argued that these were to be proved by the Respondent. In conclusion, he argued the Court to find that the arbitral award was incorrectly procured and that the Applicant's application has merits.

Responding to the Applicant's written submissions, Ms. Wivina argued in respect to the first ground of revision that, procedures were followed in terminating the Applicant on gross negligence. She argued that, according to DW2's testimony, disciplinary hearing was conducted on 11<sup>th</sup> September, 2017 showing that the Applicant was found guilty and he was given chance to appeal. The appeal was held and on 11<sup>th</sup> September 2017 in which findings of disciplinary committee was

sustained. She said that, all the document evidencing the conduct of disciplinary hearing were tendered and admitted at CMA as exhibit D1, D2 and D3.

On the second grounds, she said that, the purpose of investigation is to help the employer to determine whether there are sufficient grounds to charge the employee. She argued that, the fact the employer charged the employee before disciplinary hearing committee shows that he was satisfied on good and sufficient grounds to charge the employee. It was her further submissions that, investigation report is only relevant to the employee if it is material in establishing the charges. She said therefore that, complaint on investigation report is unfounded and ought to be dismissed since the Applicant was not suspended to pave way for investigation. Equally, the Respondent did not use the alleged report in disciplinary hearing.

On the complaint that the Applicant's evidence was not considered, she argued that, both parties were given the right to present their evidence and it was considered by the CMA. She thought, under the premises, the application is without merits.

With the above submissions from the parties, the issue to be determined is whether there were valid reasons for terminating the

Applicant's employment and whether procedures for terminating were followed. Sections 37 (1) & (2) of employment and Labour Relations Act provides legal requirements leading to termination of Employment by the employer. Two issues must be established and proved. That is, the termination must be fair both substantially and procedurally. In other words, there should be valid reasons for termination accompanied with fair procedure.

In this, Section 37(2) provides circumstances upon which unfair termination may be constituted, that is if the employer fails to prove: -

- (a) That the reason for 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.*

This section has received interpretation in various labour cases, including **Tanzania Railway Limited vs. Mwajuma Said Semkiwa, Labour Revision No. 239 of 2014** and **MIC Tanzania plc vs. Sinai Mwakisisile, Labour Revision No. 387 of 2019** (both unreported).

Understandably, in labour laws of our jurisdiction, it is clear that the burden of proof on fair termination of an employee or otherwise, lies on the employer. The employer has to prove fair reasons for termination, that is valid reasons leading to termination of employment; that the reasons was a fair reason; and that employment was terminated in accordance with fair procedure. The latter connotes fair hearing, before a neutral disciplinary committee and be fairly heard. The employee should be given enough time to prepare himself for hearing understand the nature of accusations and be given right of representation when applicable. If that procedure is complied, then constitutes fair procedure.

Considering on reasons for termination, Rule 12(4) (a) of GN. No. 42 of 2007 provides methods upon which the employer may terminate the employment. The employer is obliged to consider seriousness of misconduct in the light of the nature of the job, circumstances in which it occurred and likelihood of repetition.

While being guided by the above position of the law, the CMA found that the Applicant was terminated from her employment on the offence of misconduct. That is lack of good conduct for being irresponsible (gross negligence). The immediate issue is, was this reason proved by the



Respondent? In resolving this issue, I will address first the second issue raised above on procedurally fairness.

In this, Rule 13 of GN. No. 42 provide clearly, procedure on fair termination of employment. This Rule requires the employer to conduct an investigation to ascertain whether there are grounds to charge the employee and thereafter conduct disciplinary hearing. Applicant's complaint's is that, procedures in terminating her were not followed. Section 37(2) (c) of ELRA provides that, termination of employment by an employer is unfair if the employer fails to prove that employment was terminated in accordance with fair procedure.

In that spirit, Rule 13 of the Code of Good Practice provides a clear and detailed procedure for termination of employment namely; investigation, disciplinary hearing and decision. These steps are also found in Exhibit D3 (Disciplinary, Capability and Grievance Policy). It provides that, investigation is to be carried out promptly and thoroughly into any matter that is reasonably suspected or believed to contravene any NBC's policies or rules which may otherwise be a disciplinary matter. It also provides for a person to carry it i.e manager or another appropriate staff. Principles for carrying it out include establishing what happened, who involved, gather statement from witnesses, collect all evidence as

soon as possible, consider whether suspension is appropriate, produce a summary report which should not recommend disciplinary action. Thereafter disciplinary meeting is to be conducted.

Back to the case at hand, investigation was not conducted. What is found on record particularly on the evidence adduced by DW1 at page 5 of the proceedings is that it was the Branch Accountant who discovered the loss. I quote part of the evidence for easy reference: -

*"J. Kosa liligundulika tarehe 15/7/2017 ambapo mhasibu wa tawi alipokuwa akitekeleza majukumu yake ya ukaguzi wa dharula. Alipofanya ukaguzi huo alibaini upungufu wa kiasi hicho cha fedha ambao ulitokea tarehe 8/7/2017 na ambao ulikuwa haujaripotiwa kwa uongozi wa tawi na kurekodiwa katika register ya cash shortage kama taratibu za benki zinavyoongoza."*

I am of the view that, following what was discovered by branch accountant; investigation was to be promptly conducted. Investigation report was then to be prepared which could have initiated disciplinary charges against the Applicant and disciplinary hearing was then to follow. Therefore, I find this to be procedural irregularity as submitted by the Applicant. It is such investigation which in my view, should have informed

the relationship between the Applicant and one Happiness Lyimo as to whom was responsible for the loss.

The other unprocedural irregularity lamented by the Applicant was the neutrality and independence of disciplinary committee as required by the law. The record speaks louder on attendance and composition of members of the committee. There were four persons, namely Regional Branch Manager-Morogoro, Branch Manager-Singida, Investigator and Human Resource Officer. All from the Respondent's office. In any event and by any standard, that committee was not independent for the purposes of disciplinary actions to the Applicant. I therefore find merits on Applicant's complaint on neutrality and impartiality of the committee, thus constituted procedural irregularity.

Back to the first issue on substantive fairness, since the procedures on investigation was not complied with, I find that there was no basis on framing charges and consequently holding of disciplinary committee for want of sufficient evidence which could have been gathered during investigation. It is such evidence through investigation which could have proved that the Applicant was really negligent in performing her duties which amounted to gross negligence to warrant termination. Therefore, I find that the termination was also substantively unfair.

The last issue is what are the remedies available to the Applicant. On the basis of the above position and having found that termination was unfair both procedurally and substantively, I reverse the award of the CMA and order the following reliefs: - The Applicant be reinstated in her employment and be paid all her entitlements. In case reinstatement is not done, then the Applicant is entitled to 12 months remuneration as compensation for unfair termination pursuant to section 40(1) (c ) of the Employment and Labour Relation Act. The Applicant is also entitled to severance pay and leave allowance. The application is thus allowed to that extent.

No order as to costs. It is so ordered.



**Gerson J. Mdemu**

**JUDGE**

**17/02/2023**

**DATED at DODOMA** this 17<sup>th</sup> day of February, 2023



**Gerson J. Mdemu**

**JUDGE**

**17/02/2023**