IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA SUB-REGISTRY

AT IRINGA

LABOUR REVISION NO 11 OF 2023

(Originating from Consolidated Labour Dispute No CMA/IR/26/2019, CMA/IR/27/2019 & CMA/IR/28 /2019)

BONIFACE GERSON MUNYI .....1st APPLICANT

GEORGE WEGESA RAPHAEL MWITA .....2nd APPLICANT

SELESTINA JOHN SABUNI .....3rd APPLICANT

VERSUS

NMB BANK PLC-MKWAWA BRANCH.....RESPONDENT

JUDGMENT

Date of last Order: 16/4/2024
Date of Judgement: 30/05/2024

LALTAIKA, J.

The Applicants herein are desirous of this court's revision of the Consolidated Labor Dispute No CMA/IR/26/2019, CMAIR/27/2019 & CMA/IR/28 /2019. Specifically, as penned down in their Notice of Application made under section 91(1) (a) and 91(2) (b) of the **Employment and Labour Relations Act,** Cap 366 R.E. 2019 read together with Rule 24(1),(2),(a),(b),(c),(d),(e), (f) Rule 24(3) a),(b),(c),(d) and Rule 28(1) of

the Labour Court Rules 2007 (G.N. 106/2007) the applicants prayed for an order of this court to quash and set aside the proceeding and award issued on 9/8/2023 and any other relief this Court may deem fir and just to grant.

The legal issues pointed out by the applicants as the crux of this application are reproduced hereunder for ease of reference:

(i) *The Hon. Arbitrator erred in law for failure to deriver (sic!) award within 30 days without any justifiable reason.*

(ii) The Hon. Arbitrator erred in law by delivering the award in absence of the parties.

(iii) That the Hon. Arbitrator erred in law and fact to hold that the applicants were fair terminated (sic!) while they were deprived the right to appeal against the decision of the disciplinary committee.

(iv) That the Hon. Arbitrator erred in law and facts to hold that the procedure for termination was followed while the applicants arraigned before the disciplinary committee without being supplied with investigation report.

(v) That the Hon. Arbitrator erred in law and fact to rule that the applicants were fair terminated (sic!) while the fact indicate that they were terminated before receiving the outcome of the disciplinary committee.

(vi) *The Hon Arbitrator erred in law and facts to hold that the respondent was correct to proceed with the internal disciplinary action from 22nd January 2019 to 20th March 2019 while the same matter was pending before the court of law.*

(vii) *The Hon Arbitrator erred in law to hold that the respondent was correct to receive the applicants written defense prior the scheduled date of disciplinary hearing.*

(viii) *The Hon arbitrator erred in law and facts to rule that the applicants were fair terminated (sic!) while the applicants received termination letters and their terminal dues before lodging their appeal before the respondent appellate machinery.*

(ix) *The Honorable Arbitrator erred in law and fact to conclude that the employer followed fare procedures and had a valid reason to terminate Applicant's contract on the same offence in which the prosecution entered nolle prosequi.*

A brief factual and contextual backdrop necessary to appreciate the application without going into merits is not difficult to re-count. On the 20th day of January 2019, around 1:00 AM, a burglar broke into the respondent's bank and disappeared with a total of TZS 40,000,000 (forty million shillings).

By then, the Applicants were employees of the Respondent bank in different capacities. They were arrested in connection with the incident and disciplinary proceedings against them commenced leading to termination of their employment. They unsuccessfully challenged the termination of their employment at the CMA hence this application.

When the application was called on for hearing on the 12/03/2024 the Applicants were in court enjoying the legal services **of Mr. Yusuph Luwumba** and **Joshua Chussy** learned Advocates. The respondent, on the other hand was represented **by Mr. Godfrey Paul** learned Advocate. Parties opted to dispose of the application by way of written submissions. With leave granted, the following schedule was ordered: (i) Filing of Applicants' written submission 26/3/2024 (ii) Filing of Respondent's reply 9/4/2024 (iii) Filing of Applicant's Rejoinder if any 16/4/2024 (iv) Mention for necessary orders to schedule for the date of judgment 16/4/2024.

I hereby register my commendations to the learned Counsel for their spotless adherence to the above scheduled order. I have also noted that the Respondent's documents were penned down by **Ms. Oliva Mkanzabi,** learned Advocate and not Mr. Paul as appears in the previous paragraph. The next part of this judgement is a summary of arguments by both parties.

Mr. Luwumba, Counsel for the Applicants, indicated that the first and second issues were abandoned. He submitted jointly on the third and eighth issues, as outlined in the supplementary affidavit. He argued that the Applicants were given 14 days to appeal against the disciplinary committee's decision (D17, D18, and D19), as reflected on pages 8 and 9 of the CMA proceedings, and DW2 admitted that the Applicants were paid their terminal dues and were arrested by the police.

Mr. Luwumba contended that these facts conclusively proved that the Respondent forfeited the Applicants' right to appeal, contrary to Regulation 4(12-14) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007. The learned Advocate emphasized that this regulation provides that an employee has the right to appeal against the disciplinary committee's decision, and the employer must hold the termination letter and terminal dues until the appeal is determined. He also argued that the Respondent's actions contravened their Human Resources Policies (D30), specifically paragraph 16.3(f) on page 105, which also provides a right to appeal.

Regarding the fourth issue, Mr. Luwumba submitted that the Applicants were not provided with the investigation report prior to the

disciplinary hearing. He argued that it was a gross error for the Arbitrator to hold that the termination was substantively and procedurally fair. He cited Rule 13(1) of the **Employment and Labor Relations (Code of Good Practice) G.N. No. 42 of 2007**, which mandates investigating and sharing the report with the employee. The CMA proceedings on page 10 show that DW2 admitted there was no proof the Applicants received the investigation reports before the disciplinary hearing, and these reports were not attached to the charges.

For the fifth issue, Mr. Luwumba argued that the Applicants were terminated before receiving the disciplinary hearing outcome, as evidenced by the termination letters issued on 19/3/2019, while the hearing outcome was issued on 20/3/2019. He argued that this was contrary to Rule 13(8) and (10) of the Employment and Labour Relations (Supra) which requires the employer to communicate the outcome before issuing a termination letter.

On the sixth issue, Mr. Luwumba highlighted that DW1 and DW2 admitted that the Respondent conducted an internal disciplinary investigation while the Applicants were detained by the police and facing a criminal case (Economic Case No. 4 of 2019). The investigation report (D-4)

dated 14/2/2019, Mr. Luwumba averred, was completed while the criminal charge was still pending. He argued that the Respondent's actions violated **Section 37(5) of the Employment and Labour Relations Act (supra),** which prohibits disciplinary action against an employee charged with a criminal offense until the final determination by the court.

He emphasized that all disciplinary actions from 4/2/2019 to 22/3/2019 were illegal and void ab initio because they were based on an investigation report conducted while the criminal case was pending. He cited the Court of Appeal decision in **CCBRT Hospital v. Daniel Celestine Kivumbi, Civil Appeal No. 437 of 2020**, which supported his argument that disciplinary proceedings should be paused when a criminal case is pending.

For the seventh issue, Mr. Luwumba argued that the Applicants were compelled to respond to the charges before the disciplinary hearing, violating Rule 13(5) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007. He referenced the case of **Tanzania Telecommunication Co. Ltd v. Nkayira Moshi, Labour Revision No. 29 of 2015** where it was held that the employee should be given a proper opportunity to respond to allegations during the hearing.

Finally, Mr. Luwumba pointed out that the Applicants were acquitted **in the criminal case on 24/03/2023,** yet the Respondent had terminated their employment based on the same charges. This was against the Respondent's Human Resources Policies, Mr. Luwumba reasoned, specifically paragraph 15.6 on page 85, which prohibits disciplinary proceedings on the same offense pending before a court of law.

Based on these submissions, Mr. Luwumba prayed for the Honorable Court to quash and set aside the CMA award and proceedings, and to order compensation for the Applicants as per their CMA Form No. 1 prayers, for being substantively and procedurally unfairly terminated.

Ms. Mkanzabi, Counsel for the Respondent, argued that according to bank policy, an appeal must be lodged upon receiving written confirmation of the sanction. She noted that the disciplinary hearing took place on March 18, 2019, as evidenced by exhibits DI4, D15, and D16, and concluded on the same day. The hearing form and recommendations were completed on March 18, 2019, averred Ms. Mkanzabi, but **the parties signed the documents on three different dates as per page 5 of exhibits D20, D21, and D22.** Therefore, asserted the learned Advocate, the employees received the form and written confirmation of the sanction

on March 22, 2019, as stipulated in paragraph 15.9(b) of exhibit D30, which was prepared on March 19, 2019, the day after the disciplinary hearing.

Ms. Mkanzabi emphasized that the exhibits clearly indicated that the Applicants could appeal the decision within 14 days from receiving the letter, thereby proving that they were given a fair opportunity to appeal within the designated timeframe, more than the five days provided for by Exhibit D30 of the NMB Bank Plc Human Resource Policy. She argued that this demonstrated that the Respondent adhered to due process for fair termination, ensuring the Applicants had ample opportunity to challenge the disciplinary decision.

Furthermore, Ms. Mkanzabi highlighted that the Respondent did not violate the Human Resource Policy (D30), as paragraph 16.3(f) on pages 105-106 provided steps to handle grievance procedures rather than the right to appeal against disciplinary hearings. She also cited the Guidelines for Disciplinary, Incapacity, and Incompatibility Policy and Procedures G.N No. 42 of 2007, to the Employment and Labour Relations (Code of Good Practice) Guideline 4(12), which states that "an employee may appeal," meaning the obligation to appeal lies with the employee, not the employer. The learned Counsel emphasized that the use of the word "may" indicates it is not

mandatory, as per Section 53 of the **Interpretation of Laws Act CAP 1 RE 2019**.

Ms. Mkazabi also clarified that providing terminal benefits to the Applicants did not preclude **their right to appeal against the disciplinary decision.** As stated in Exhibits D20, D21, and D22, the Applicants had the opportunity to appeal within the stipulated timeframe. Their failure to do so constituted a waiver of that right, and they are estopped from alleging they were not given an opportunity to appeal, as established under Section 123 of the Law of Evidence Act Cap 6 R E 2019. Ms. Mkanzabi explained that Section 123 states that when a person's actions cause another to believe something to be true and act upon that belief, neither they nor their representatives can deny the truth of that thing in any proceedings.

Regarding the issuance of terminal benefits before an appeal, Ms. Mkazabi referred to the Guidelines for Disciplinary, Incapacity, and Incompatibility Policy and Procedures G.N No. 42 of 2007, which allow management the discretion to deviate from standard procedures to ensure fairness based on the circumstances of each case. She averred that the guidelines state that the disciplinary procedure serves as a guide for

disciplinary action and does not restrict management's right to adapt procedures to promote flexibility and consistency while ensuring fairness.

On the fourth issue, Ms. Mkanzabi **addressed Rule 13(1) of the Employment and Labour Relations (Code of Good Practice) GN No. 42 of 2007**, which requires the employer to conduct an investigation to determine if there are grounds for a hearing. She emphasized that while the investigation report may aid in decision-making, it is not mandated to be provided to the employee. The focus, averred Ms. Mkanzabi, is on ensuring procedural fairness by informing the employer of the grounds for a disciplinary hearing. She distinguished the present case from **Sovero Mutegti & Another vs Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DU WAS A)** (supra) where the employer failed to provide requested documents, compromising the employee's ability to participate in the process. In the present case, asserted Ms. Mkanzabi, the Applicants were aware of and admitted to the offense and did not request the investigation report.

Ms. Mkazabi emphasized that the Respondent adhered to procedural requirements for a fair disciplinary hearing, providing the Applicants with the opportunity to present their case and necessary documentation, as per Rule

13(1) of the Employment and Labour Relations (Code of Good Practice) (supra). Thus, the allegations against the Respondent should be disregarded.

On the fifth ground of revision, concerning the timeline of events, Ms. Mkanzabi clarified that the disciplinary hearing was conducted and concluded on March 18, 2019. The learned Counsel proceeded to explain that the hearing form was signed on three different days: **March 21, 2019, by the chairperson; March 20, 2019, by the secretary; and March 22, 2019, by the complainant.**

She argued strongly that this variation in the dates of signing the same document does not imply that the hearing took place on three different dates. The written outcome dated March 19, 2020, asserted Ms. Mkanzabi, was presented to the employee on March 22, 2019, after the hearing, and not before. She emphasized that the letter dated March 19, 2022, as per paragraph 15.8.3 of the NMB Bank Plc Human Resource Policy (Exhibit D30), clearly provided for an appeal within 14 days from receiving the letter. Therefore, Ms. Mkanzabi argued, the Applicants' claim that termination occurred before the hearing was misleading.

On the sixth ground of revision, Ms. Mkanzabi addressed the

Applicants' claim that the disciplinary actions were conducted concurrently with pending criminal charges, violating Section 37(5) of the Employment and Labour Relations Act Cap 366 RE 2019. She cited the Court of Appeal decision in **CCBRT Hospital vs Daniel Celestine Kivumbi** (supra) which clarified that the double jeopardy rule applies only to criminal offenses, not disciplinary proceedings.

Internal disciplinary proceedings and criminal investigations, argued Ms. Mkanzabi, are independent processes that can coincide without one barring the other. Ms. Mkanzabi emphasized that employers may need to take disciplinary action on offenses reported to the police to maintain workplace discipline, even in the presence of criminal charges. Ms. Mkanzabi strongly believes that the Court of Appeal's decision **CCBRT Hospital vs Daniel Celestine Kivumbi** (supra) highlighted the need to balance an employer's prerogative to manage workplace discipline with the rights of an employee.

On the seventh and ninth grounds for revision, Ms. Mkanzabi addressed the Applicants' claims that they presented their evidence before the commencement of the disciplinary hearing and that the Respondent erred in terminating them after a nolle prosequi was entered. She referred

to the testimony of DW2 on page 7 of the Award by the Commission for Mediation and Arbitration, which stated that the Applicants did not present any evidence prior to the commencement of the disciplinary hearing.

It was Ms. Mkanzabi's submission further that the disciplinary hearing was conducted in accordance with established procedures, giving the Applicants ample opportunity to present their evidence on March 18, 2019. Regarding the termination following the entry of nolle prosequi, Ms. Mkanzabi reiterated the Court of Appeal's clarification that disciplinary actions and criminal proceedings are distinct processes. She emphasized that the Respondent acted within the law by proceeding with disciplinary actions concurrently with criminal proceedings.

In conclusion, Ms. Mkanzabi argued that the Respondent adhered to all procedural requirements and legal obligations, ensuring fairness in the disciplinary process hence the grounds for revision should be dismissed.

Mr. Luwumba, in his rejoinder submission, stated that the Respondent had replied that the third and eighth grounds for revision regarding the right to appeal were unfounded and that the Applicants were indeed provided with the opportunity to appeal against the decision of the disciplinary committee. However, Mr. Luwumba maintained that the

Respondent curtailed the Applicants' right to appeal. He emphasized that although the Applicants were given 14 days to appeal as per exhibits D17, D18, and D19, they were arrested by the police officers for the same offense on the same date, **and criminal case no.4 of 2019 (P-1 and P-2) was restored.**

Regarding the issuance of terminal dues before the determination of the appeal, Mr. Luwumba acknowledged that the Respondent argued that management has the discretion to deviate from standard procedures to accommodate flexibility. He countered that the person who departs from the code or guidelines must justify the grounds for such departure. He pointed out that the Respondent failed to justify this deviation, thereby contravening section 99(3) of The Employment and Labour Relations Act (Supra).

Mr. Luwumba reiterated that the issuance of terminal dues before the determination of the appeal is contrary to the law as per regulation 4 (12-14) of The Employment and Labour Relations (Code of Good Practice) G.N.No.42 of 2007. He argued that the law provides that the employee has a right to appeal against the decision of the disciplinary committee, and once such right has been provided, the employer must hold the termination letter and terminal dues until the determination of the employee's appeal. If no

appeal is preferred, argued Mr. Luwumba, the employer may proceed after the lapse of the appeal duration.

On the fourth issue, Mr. Luwumba responded to the Respondent's claim that it is not mandatory for the employer to provide the employee with the investigation report. He submitted that Rule 13 (1) of the Employment and Labour Relations (Code of Good Practice) GN NO 42 of 2007 clearly states that the employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held. He noted that the statute uses "shall," which makes it a mandatory requirement as per section 53 (2) of the **Interpretation of Laws Act** (supra)

Mr. Luwumba maintained that failure to supply an employee with the investigation report amounts to the denial of the right to be heard. He cited the case of **Sovero Mutegcti & Another vs. Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma** (DUWASA) Civil Appeal No. 343 of 2019 (unreported), where the Court of Appeal emphasized that non-involvement of the appellant and subsequent conviction based on the investigation report was irregular, as it disadvantaged the appellant.

Addressing the fifth ground of revision, Mr. Luwumba contested the Respondent's argument that the disciplinary hearing was on 18th March

2019 and the outcome was written on the same date. He submitted that the documents indicate that the termination letter was issued on 19th March 2019, while the hearing outcome was issued on 20th March 2019, as per the typed proceeding of CMA at page 19. This, he argued, shows that the Applicants were terminated before the hearing outcome was served to them, contrary to Rule 13 (8) of the Employment and Labour Relations (Code of Good Practice) (supra)

Regarding the sixth ground, Mr. Luwumba refuted the Respondent's submission that the employer may proceed with disciplinary action on offenses pending before the police and court of law. He asserted that it is trite law that when a matter is pending before the court, the employer is forbidden from initiating and proceeding with any disciplinary actions, as emphasized under section 37 (5) of the Employment and Labour Relations Act (supra).

Mr. Luwumba insisted that the Respondent's act of initiating disciplinary actions while the matter was pending before the court was void and strictly prohibited, constituting a gross violation of the law. He referred to the case of **CCBRT** (supra), where the Court of Appeal clarified that section 37(5) of the ELRA bars any disciplinary action on an employee

charged with a criminal offense until the final determination by the court.

On the seventh and ninth grounds for revision, Mr. Luwumba rejected the Respondent's claim that the allegations were misleading and based on misconstrued facts. He maintained that the applicants presented their evidence prior to the disciplinary hearing, contrary to rule 13 (5) of the Employment and Labour Relations (Code of Good Practice) (supra). He supported this by citing the case of **Tanzania Telecommunication Co. Ltd vs. Nkayira Moshi**, (supra) where it was emphasized that evidence in support of the allegations against the employee must be presented at the hearing, giving the employee a proper opportunity to respond.

In conclusion, Mr. Luwumba prayed for the Honorable Court to quash and set aside the CMA award and proceedings, with costs, and to order that the Applicants be compensated by the Respondent for being substantively and procedurally unfairly terminated, as per their CMA Form No. 1 prayers.

Having dispassionately considered the rival submissions, issues for revision and thoroughly reviewed the court records, I am inclined to state that the society as a whole expects employers such as the respondent to take immediate actions against an employee who fails to

measure up with the level of diligence and trustworthiness required of a bank staff. The nature of the industry makes it difficult to "tolerate" with an employee who fails to measure up with those often above the mark requirements. Pressure to terminate employment of unfaithful or negligent staff may come not only from the society at large but also shareholders, the regulator and, most often, senior most directors. This is understandable. In the competitive economy our country is heading to, no court of law should be seen to condone sloppiness, negligence or utter thievery.

Without prejudice to the above preface to my analysis, the importance of adhering to procedural laws regulating fair trial and rules of natural justice in general cannot be overemphasized. These procedural "rituals" touch upon the very fabrics of the rule of law. In my opinion, vital procedural issues need to be taken care of in the course of taking actions against the Applicants. I substantiate this as I discuss the following five issues that have emerged in the discussion.

One, the Applicants argued that their right to appeal against the decision of the disciplinary committee was curtailed by the Respondent. They maintained that although they were given 14 days to appeal, they were arrested on the same date, thus rendering their right to appeal ineffective.

The Respondent contended that the grounds for appeal were unfounded and that the Applicants had been given the opportunity to appeal.

I find merit in the Applicants' submission that their right to appeal was effectively curtailed by their simultaneous arrest. The legal provision cited (exhibits D17, D18, and D19) supports their claim of being provided a 14-day appeal period, which was negated by their arrest. Therefore, the Respondent's actions indeed impeded the Applicants' right to a fair appeal process.

Two, the Applicants contended that issuing terminal dues before the appeal determination contravenes Regulation 4 (12-14) of The Employment and Labour Relations (Code of Good Practice) G.N.No.42 of 2007. They emphasized that the employer must hold the termination letter and terminal dues until the appeal's determination. The Respondent on his part, argued for management's discretion to deviate from standard procedures for flexibility.

I have given some reflection on this, and I cannot help but be reminded on the Kiswahili saying "Kufa Kufaana." I can imagine how needy the applicants were as they faced a criminal charge. I concur with the Applicants, noting that Section 99 (3) of The Employment and Labour

Relations Act (supra) mandates justification for any departure from established guidelines. The Respondent's failure to justify such a departure indeed contravenes the Act. Therefore, the issuance of terminal dues prior to the appeal's determination was unlawful.

Three: the Applicants submitted that not providing the investigation report amounted to denial of their right to be heard, citing Rule 13 (1) of the Employment and Labour Relations (Code of Good Practice) GN NO 42 of 2007, which uses "shall" to indicate a mandatory requirement. They referenced the case **of Sovero Mutegcti & Another vs. Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA)** (Supra)

I think this goes to the very root of fair trial. This Court agrees that the Respondent's failure to provide the investigation report contravened Rule 13 (1) and Section 53 (2) of the Interpretation of Laws Act Cap 1 Re 2019. As emphasized in the cited case, withholding the investigation report denied the Applicants the opportunity to prepare adequately for the hearing, thereby violating their right to a fair hearing. Although I do not want to go back to the criminal charges, or disciplinary offences, it appears there was no attempt to distinguish between instances of admitting that an undesirable event has occurred (with or without contributory negligence of a given

employee) and admission to having committed the undesirable act such as stealing. In the future, disciplinary committees may need to be more reflective on this fine line to avoid one size-fits-all approach.

Four: the Applicants asserted that they were terminated before receiving the outcome of the disciplinary hearing, as evidenced by the record showing the termination letter issued **on 19th March 2019**, and the hearing outcome issued on 20th March 2019. The Respondent contended the hearing and outcome were on the same date.

The evidence supports the Applicants' claim. The Respondent's issuance of the termination letter before the hearing outcome was communicated contravenes Rule 13 (8) of the Employment and Labour Relations (Code of Good Practice) GN NO 42 of 2007. The law requires the outcome to be communicated before any termination action.

Five: the Applicants argued that initiating disciplinary action while the matter was pending in court was unlawful, referencing Section 37 (5) of the Employment and Labour Relations Act Cap 366 RE 2019. The Respondent acknowledged the pending court matter but maintained the right to uphold workplace discipline.

I have taken some time to review the apex Court cases cited by both

counsels to buttress their argument for or against. I find the Applicants' argument persuasive. Section 37 (5) clearly prohibits any disciplinary action while criminal proceedings on the same matter are pending. I would think that the cases cited have enlarged the contours to allow employers to take disciplinary actions, but I tend to think outright dismissal is out of this bracket. The convention that matters submitted in court are not interfered with to their finalization should guide parties to employment disputes as well especially where sacking is involved.

In the upshot, I find merit in the application. I hereby quash and set aside the CMA award and proceedings thereof. Consequently, this Court orders that the Applicants be compensated by the Respondent as per their **CMA Form No. 1** prayers. This being a labour matter, I make no orders as to costs.

It is so ordered.

E.I. LALTAIKA
JUDGE
30.05.2024

Court

Judgement delivered under my hand and the seal of this Court this 30th day of May 2024 in the presence of Mr. Cleopas Mheluka, learned Advocate holding brief for Mr. Yusuph Luwumba, Counsel for the Applicants, and in the Absence of the Respondents.

E.I. LALTAIKA
JUDGE
30.05.2024

Court

The right to appeal to the Court of Appeal of Tanzania is fully explained.

E.I. LALTAIKA
JUDGE
30.05.2024