

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION NO. 66 OF 2019

BETWEEN

DAUDI MIGANI..... APPLICANT

VERSUS

MANTRA TANZANIA LTD..... RESPONDENT

JUDGMENT

Date of Last Order: 11/09/2020

Date of Judgment: 18/09/2020

A. E. MWIPOPO, J.

The applicants herein Daudi Migani has preferred this Revision application against the Commission for Mediation and Arbitration (CMA) Award in Labour Dispute No. CMA/DSM/ILA/R.493/14. The applicant is praying for the Court to revise the proceedings and the decision pronounced by Commission in the respective labour dispute. The applicant also prays for this Honourable Court to quash the Commission decision dated 31st December, 2018, which orders the Respondent to pay the complainant Tanzania Shillings 15,503,734/= only. Further the applicant prays for the Court to grant any other relief deemed appropriate. The application is

supported by the affidavit of the Applicant. The affidavit contains four legal issues the applicant asserts that the Commission misdirected itself. The legal issues are as follows:-

1. That the Commission erred in relying on the allegation of fraud and forgery when deciding that there was a valid reason for the termination while the said allegation were not proved.
2. That the Commission erred in relying on Elite Security Report to justify the reasons for termination while the said report was not tendered as an exhibit before the Commission nor was the same tendered as an exhibit during disciplinary hearing.
3. That the Commission failed to consider that since the applicant was not accorded right to be heard on appeal by the Board and the its ruling was tainted with material irregularities.
4. The Commission failed to consider that since the respondent failed to tender evidence of money transactions whether online or manual that would verify the allegations of misappropriation of funds and as such loss by the Company and there was need for the valuation report to justify the loss, the said allegations stand to be mere speculations as the same were not proved.

The Applicant was employed by the Respondent as Accounts Officer on 15th November, 2010 and was terminated on 15th April, 2014, for misconduct. Dissatisfied by the respondent's decision the Applicant referred the dispute to the CMA where the Commission awarded the applicant to be paid by the respondent Tanzania Shillings 15,503,734/= being 3 months' salary compensation and terminal benefits. Aggrieved by the CMA decision the applicant filed the present application for revision.

Both parties in the application were represented, Mr. Ngemelwa Sixbert Advocate appeared for the applicant whereas Mr. Tumaini Michael Advocate appeared for the respondent. The hearing of the application was by way of written submissions.

The applicant's first legal issue is that the Commission erred in relying on the allegation of fraud and forgery when deciding that there was a valid reason for the termination while the said allegation were not proved. Submitting on the issue, the applicant argued that there was no evidence which was tendered by the respondent before the Commission and during disciplinary hearing to prove the offences of misappropriation of funds, fraud and forgery against the applicant. There is nowhere in the proceedings where it was established that the applicant committed theft. The High Court

in **Said Mohamed Abdallah (Administrator of the Estate) vs. Stanbic Bank (T)** and 4 others, Misc. Commercial Application No. 267 of 2018, High Court of Tanzania, at Dar Es Salaam, at page 10 held that:-

"whenever a question as to whether someone has committed a crime whis raised in civil proceedings that allegation need be established on a higher degree of probability than which is required in ordinary civil case."

The Arbitrator at page 32 of the Award held that the offences were proved by mere reasonable belief and did not consider the standard of proof required by the law. The applicant was charged for the offence of an act amounting to fraud, forgery or dishonesty in performance of duty, but was convicted for the offence of misappropriation of company fund. The applicant was never heard of the offence which he was terminated with.

The applicant's second legal issue is that the Commission erred in relying on Elite Security Report to justify the reasons for termination while the said report was not tendered as an exhibit before the Commission nor was the same tendered as an exhibit during disciplinary hearing. The applicant submitted on the issue that the report of the investigation conducted by the Elite Security which led to disciplinary hearing was not produced at the disciplinary hearing or tendered during the hearing before

the Commission. The Commission relied on the report in page 34 paragraph 1 and 2 of the Commission Award in reaching the decision despite the fact that the report was not tendered hence not party of the proceedings. This was the position of the Court of Appeal in the case of **Ismael Rashid vs. Mariam Msati**, Civil Appeal No. 75 of 2015, Court of Appeal of Tanzania, at Dar Es Salaam (Unreported).

The Applicant third legal issue is that the Commission failed to consider that since the applicant was not accorded right to be heard on appeal by the Board and then its ruling was tainted with material irregularities. Submitting on the issue, the applicant stated that he was not heard on his appeal contrary to Regulation 7:1:5 bullet 8 of the Respondent's Policy and Proceedings. After the Commission has found that the applicant was denied the right to be heard it ought to quash that entire proceedings before disciplinary Committee and the appeal. To support the position the applicant cited the case of **Elia Kasalile and 17 Others, vs. Institute of Social Work**, Civil Application No. 187/18 of 2018, Court of Appeal of Tanzania, at Dar Es Salaam, (Unreported).

The Applicant's fourth legal issue is that Commission failed to consider that since the respondent failed to tender evidence of money transactions

whether online or manual that would verify the allegations of misappropriation of funds and as such loss by the Company and there was need for the valuation report to justify the loss, the said allegations stand to be mere speculations as the same were not proved. The applicant argued that the offence of misappropriation of fund, fraud and forgery were not proved for the failure of the respondent to prove the alleged money lost and to tender M-PESA. There is no evidence to show that the applicant occasioned loss of Tanzania Shillings 73 million. The allegation was supposed to be proved under Rule 13 (5) of the Employment and Labour relations (Code of Good Practice) Rules, 2007. The alleged loss must be proved and there is no proof of the same. In the Case of **Zuberi Augustino vs. Anicet Mugabe, [1992], TLR 137** the Court held that loss of business must be proved.

The applicant prayed for the Court to allow the Revision, The Commission decision be revised and set aside and declare that the termination was unfair procedurally and substantively.

In reply, the Respondent submitted on the first issue that the employer may terminate the employee who have committed serious misconduct that makes a continued employment relationship intolerable. Rule 12 (3) of the

Employment and Labour relations (Code of Good Practice) Rules, 2007, list down serious misconduct and gross dishonesty is listed as one of the serious misconduct. Applicant's fraudulent misappropriation of fund is one offence falling under gross dishonesty. The applicant was terminated after fair procedure as provided in Rule 13 was followed. Rule 13 (1) of the Rules provides for requirement of the employer to conduct the investigation to ascertain the alleged misconduct. The rule does not indicate the modality of the investigation hence Elite Security Report served the purpose and there was no need for police report. The Respondent opted to terminate the Applicant without instituting criminal suit against him.

The respondent distinguished cases of **Halmashauri ya Kijiji cha Mabwegere vs. Hamis Msabaha and 32 Others**, (Supra), and the case of **Said Mohamed Abdallah (Administrator of Estate) vs. Stanbic Bank Tanzania, (Supra)**, that the dispute in those cases were not labour dispute as the present application.

Regarding the second issue as submitted by the applicant, the respondent is of the view that making investigation and availing the same to the employee is procedural issue and the same was decided by Commission against the respondent hence resulting to the Award of three months salaries

to the applicant at the tune of Tanzania Shillings 9,000,000/=. The applicant proved that there was fair valid reason for termination as shown in exhibit D3 Respondent's Disciplinary Code (the code). Also it is in the record shows that Disciplinary Hearing Proceedings – Exhibit D1 at page 3, 6 and 9 the applicant admitted during disciplinary hearing that he transferred 73 million among them 23 million were transferred to his three relatives.

The Elite Security Report was read to the applicant during disciplinary hearing and the applicant admitted to send 73 million without following the Respondent's financial control procedures. The Commission relied to Applicant's statement – Exhibit D4 where the applicant admitted to commit the offence. Thus the Commission did not rely to the Elite Security Report as alleged by the Applicant. The Commission also questioned the credibility of the Applicant testimony because of the contradiction when testifying before the disciplinary committee that during opening statement he mentioned Joaquim Bonaventura as the authorizing officer but during hearing he mentioned Mr. Calla Van Der Westhuizen.

On the applicant's third issue, the respondent argued that the Commission faulted the procedure of informing the applicant to appear before the respondent's appellate Board which is the Board. The Commission

decided this issue on applicant favour. The Commission awarded the applicant with 3 months' salary compensation for procedural unfair termination. Thus the issue is misplaced.

The respondent submitted on the fourth applicant's issue that this issue has already submitted while submitting on the second issue that the respondent proved that the termination was fair. The applicant admitted to the offence hence the same was not disputed hence the fact became undisputed facts. The applicant cannot raise it as an issue before the Court.

The respondent submitted that the applicant is devoid of merits and prayed for the Court to dismiss it.

In rejoinder, the applicant retaliated the submission in chief and prayed for the application be granted.

From the submissions, the CMA record and the CMA award, issues for determination are as following hereunder:

- i. Whether there was valid reason for termination of respondent employment.
- ii. Whether the procedure for termination was fair.
- iii. What are remedies to the parties?

The Employment and Labour Relations Act, 2004 provides in section 37 (1) that it is unlawful for an employer to terminate the employment of an employee unfairly. The Act provides in 37 (2) that the termination has to be on the basis of valid reason and fair procedure. Section 37 (2) reads as follows:

37 (2) A termination of employment by an employer is unfair if the employer fails to prove -

(a) that the reason for the termination is valid;

(b) that the reason is a fair reason -

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

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

From above provision, it is the duty of the employer to prove that the termination of employment is fair. And the termination of employment is

considered to be fair if it is based on valid reason and fair procedure. In the case of **Tanzania Railway Limited V. Mwajuma Said Semkiwa, Revision No. 239 of 2014, High Court Labour Division at Dar Es Salaam**, this Court held that:-

"It is 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".

The first issue for determination in the application is whether there was a valid reason for termination of respondent employment. The Employment and Labour Relations Act, 2004, provides in section 37 (2) (a) (b) (i) that a termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid and that the reason is a fair reason related to the employee's conduct.

The evidence available in record shows that the applicant was terminated after he was found guilty for the offence of misappropriation of company funds according to termination letter – Exhibit D2. Rule 12 (3) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007, list down serious misconducts. Gross dishonesty is listed among the serious misconduct that makes a continued employment relationship intolerable as

result the employer may terminate the employee for the offence. The respondent is of opinion that the misconduct offence of fraudulent misappropriation of fund is one offence falling under gross dishonesty. I agree with this respondent reasoning that the offence of misappropriation is among the offences falling under gross dishonesty. As result, I find that the reason for termination was valid reason.

The applicant submitted that there was no evidence which was tendered by the respondent before the Commission and during disciplinary hearing to prove the offences of misappropriation of funds, fraud and forgery against the applicant. In contention the Respondent argued that there was fair valid reason for termination as shown in exhibit D3 Respondent's Disciplinary Code (the code) and in the Disciplinary Hearing Proceedings – Exhibit D1 at page 3, 6 and 9 where the applicant admitted during disciplinary hearing that he transferred 73 million alleged to be misappropriated.

I agree with the respondent that the evidence available is sufficient to prove that the applicant misappropriated his employer's fund. The respondent witnesses testified before the Commission that the total amount Misappropriated by the applicant was Tanzania Shillings 73 million. The

Disciplinary Hearing Proceedings – Exhibit D1 shows that applicant admitted to send 23 million to himself and to his relatives namely Mugabe Migani and Humphrey Migani who are applicant's relatives. The applicant testified that he made those transactions to his relatives as payment for his fuel and telephone claims. The respondent witness Calla Westhuzen – DW1 testified that the applicant claims for fuel do not exceed 1 million shilling only. Therefore, this prove that there was misappropriation of shillings 23 million by the applicant. The respondent charged the applicant in the disciplinary hearing with misappropriation of 73 million shillings of respondent's fund but there is only proof for 23 million which the applicant admitted to initiate the payment. Thus, I find that the reason for termination was fair. Therefore, as I find both reason for termination was valid and fair then the answer to the first issue is positive.

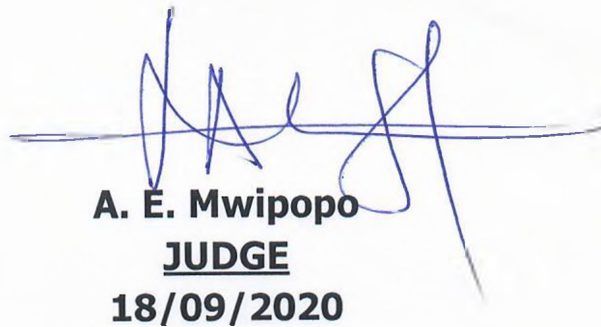
The second issue for determination is whether the procedure for termination was fair. The applicant argued that there are several procedure which were not observed by the employer such as the investigation report was not tendered to prove that inquiry was conducted as provided under Rule 13 (1) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007, and he was denied right to defend before the Appellate Board.

The Commission Award shows that the Commission held that the procedure for termination was not fair for the failure of the respondent to avail the applicant right to be heard in the appeal as provided by Regulation 7:1:5 bullet 8 of the Respondent's Policy and Proceedings. The failure is denying the applicant right to be heard. The respondent did not dispute this facts, but he submitted that the applicant has already been awarded in the Commission Award with a payment of 3 months' salary compensation for procedural unfair termination. I'm of the same opinion that there is no need to waste time in determining this issue which the Commission disposed of in applicant favour that the procedure for termination was not adhered. Thus the answer to the issue is negative.

The last issue is what are remedies to the parties? The Commission awarded the applicant to be paid by the respondent Shillings 9,000,000/=, being a 3 months' salary compensation for procedural unfair termination, and shillings 6,503,734/= deducted by the employer from applicant's terminal benefits as compensation for the loss incurred. The total amount awarded to the applicant was Tanzania Shillings 15,503,734/=. The trial Arbitrator provided reasons for awarding the applicant with 3 months' salary compensation is based on the circumstances of the case where the applicant

contributed to the termination of his employment and the only errors on the part of the employer is his failure to follow the proper procedure. There is no reason to revise the Arbitrator decision on the award as I find it to be just and fair in circumstances of this case. Therefore, I find the Commission award was to be justified.

Therefore, the revision application is found to have no merits and I hereby dismiss it. The Commission Award is upheld. Each party to carry his own cost.



A. E. Mwipopo
JUDGE
18/09/2020