IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO.738 OF 2018

BETWEEN

JOEL KUNG'E..... APPLICANT

VERSUS

KCB BANK TANZANIA LIMITED..... RESPONDENT

JUDGMENT

Date of Last Order: 05/06/2020

Date of Judgment: 10/06/2020

Z. G. Muruke, J.

Aggrieved by the award of the Commission of Mediation and Arbitration [herein to be referred as CMA] in the Labour Dispute No. CMA/DSM/ILA/R.587/15/16/1065 dated 14th September 2018, in favour of the respondent **KCB BANK,** the applicant **JOEL KUNG'E** has filed this application to set aside and revise the CMA's award. It is supported by the affidavit sworn by the applicant.

Challenging the application, the respondent filed counter affidavit sworn by Mr. Damas Mwagange his Legal Manager. The applicant was represented by Mr. Francis K. Stolla and Mr. Peter Nyangi, Advocates while the respondent was represented by Advocate Arbogast Mseke, and Neema Ndosi at a different times.

The brief background of the dispute is that, on 05th November, 2007 the applicant was employed as the Bank Clerk by the respondent. He worked with the respondent until 29th September, 2015 when he was terminated on ground of serious breach of operations procedures and causing loss to the respondent.

It was alleged that on 29th September 2015, applicant authorized the transfer of USD 484,000/= from account No. 3300669561 held at KCB BT, Oyster Bay Branch. The account named Lake Trans Limited to account No. 3301201946 at KCB Stone Jewells Town, Zanzibar named Zenj Motors Company Limited. Authorization was without confirming or validating veracity of purported e-mail instruction forwarded by Customer Relations Manager one Hassan Pindo, who fraudulently requested the said transfer. The said transfer was against the transfer guidelines provided in respondent circular No. 11 of 2012. With leave of the court hearing was by way of written submissions, I thank both counsels for filling their submissions as scheduled.

The applicant's counsel abandon the 1st ground and continued with the other grounds. On the 2nd ground it was submitted that, the arbitrator erred in law and facts to hold that the applicant had no knowledge of the existence of circular No.11/2012 before the transaction to transfer the fund without any proof. That the said circular came to the applicant's knowledge on 15th Septermber,2015 when he was summoned by the respondent and not before the alleged misconduct which occurred in 29th June

2015,reffering Rule 12 (1), (a),(b) (iii) of the Employment and Labour Relations (Code of Good Practice) of 2007 referred as the Code.

On the 3rd ground it was submitted that, the arbitrator erred in law and fact to hold that the TISS/SWIFT instruments were applicable to the transactions to transfer the fund in question. TISS and SWIFT instruments are not applicable for Intra Bank KCB and KCB branches. The instruments are applicable in transferring money out of the country and not within the country.

On the 4th ground it was contended that, the applicant was not afforded with a reasonable time to prepare for his defence as required by the law that, it shall not be less than 48 hours. It was evidenced by one of the respondent's witness that after the investigation was completed she informed the applicant to prepare for his defence. That was contrary to Rule 13(3) of the Code.

Regarding the 5th ground, it was submitted that, the disciplinary hearing was conducted with a committee created by the respondent and not a senior manager as required by the law, referring Clause 4(1), (2). (7) and (9) of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures, in the Code, (herein referred as the Guideline)

He further stated that, the recommendation was given by a committee and not the chairperson contrary to clause 4(7) of the Guidelines. And that the award and the evidence were silence as to when did the chairperson of the disciplinary hearing informed the applicant of the outcome of the hearing as soon possible contrary to clause 4(9) of

the Guidelines. On the 5th ground the applicant counsel contended that , the appeal of the applicant was heard by the four member's committee organized by the respondent and not by a most senior manager as required by the law under clause 4 (14) of the guidelines.

Regarding the 6th ground, the applicant alleged that he was not afforded with a right to be heard at Disciplinary hearing. The recommendation of the Disciplinary Committee were forwarded to the Human Resource Manager and terminated the applicant That neither the committee nor the Human resource officer afforded him with the right to be heard. On the 7th ground, the applicant counsel argued that the arbitrator erred to hold that the respondent was wrong for the omission to treat conviction and sentence of the appellant separately thus denying the appellant to offer mitigation.

In reply to the applicant's averment, the respondent's counsel submitted on the second ground that, the applicant was pretty aware of the existence of the Circular No.11/2012. As evidenced by **exhibit D 14** the disciplinary meeting minutes and in his appeal letter, **exhibit D 16.**

On the 3rd ground it was submitted that, the issue of TISS and SWIFT was deliberated and decided by the arbitrator at paragraph 1 of page 9 of the award. There is no nowhere in the applicant's brief submission faulting the arbitrator with substantive evidence for holding that the TISS and SWIFT were used for both transactions.

On the 4th ground it was stated that the respondent exhausted all prescribed termination procedures, the applicant was served with a charge

on 18th September, 2015 and was required to attend the disciplinary hearing on 23rd September, 2015. What the applicant is contesting was before he was formally charged. Regarding the 5th ground, it was submitted that the issue of constitution of the Disciplinary Committee was an afterthought as it was not raised accordingly. At page 11, 12 and 13 of the award, the issue of procedure was contested and deliberated and concluded.

It was further stated that, revision does not include new issues which were never brought before the arbitrator. The purpose of the same is to revise legality and correctness of an arbitral award arrived at within the limits of what was disposed by an arbitrator.

On the 6th ground, the respondent's counsel contended that, this ground carries a new issue which was never raised and discussed or failed to get discussed at the CMA, He referred the case of **Richard Majenga Vs. Specioza Sylvester,** Civil Appeal No. 108 of 2018, CAT where it was held that: "It is a settled principle of law that, at an appellate level the court only deals with matter that have been decided upon by the lower court. There are number of authorities by this court on this point for instance the case of **Hotel Traventine Ltd and two Others Vs. National Bank of Commerce Ltd**. 2006 TLR 133 and **James Gwagilo Vs. Attorney General**, Civil Appeal No. of 2001 (unreported) Specifically in Hotel Traventine and 2 others (supra) the court stated that:

"As a general principle an appellate court cannot consider matters not taken or pleaded in the court below to be raised on appeal"

On the 7th ground it was contended that, the issue of mitigation is a new issue which was never raised before CMA hence the arbitrator could not have decided what was not brought before him. He thus payed for dismissal of the application.

Having gone through the submissions of both parties, I believe this court is called upon to determine the following issues:

i. **Whether the applicant was aware of the Circular No.11/2012?**
ii. **Whether the procedure for termination were adhered.**
iii. **Relief entitled to the parties.**

In regard to the 1st issue, it is undisputed fact that the applicant transferred the said amount as alleged. The alleged transfer was contrary to the respondent's circular dated 19/11/2012 **(Exhibit D8)** headed "Fraud through Outward TISS/Swift Transfers Revised process flow." The applicant alleged that the he was not aware of the circular until 15th September, 2015. I have gone through the records, particularly **exhibit P2** (disciplinary hearing statement) at page 3, I find it worth to reproduce the PW1's (the applicant) evidence:

Qn: **By nature of your work, have you ever acted on email instructions without confirming to client t effect payment?**

Ans: Yes, I have done that before KCB not only as instructed by Hassan Pindo the CRM in this scenario.

Qn: Do you know the circular No.11 issued in 2012 and you have read it?

Ans: Yes I know it and I have read it. It instructs that the documents of scenario require comfort from CRM on situations whereby one gets challenge to get hold of customer for it is believed that CRM knows best his /her customer.

From above evidence, it is clear that the applicant was aware of the 11/2012 circular prior to the alleged transaction. He alleged that the TISS instrument are not applicable for Intra Bank KCB and KCB branches. The instruments are applicable in transferring money out of the country and not within the country. However, I have gone through the Circular No.11/2012 provided by the respondent's Head of IT department, I find the scope of its application based on all the fund transfer instructions be it within or outside the country. Hence the applicant was supposed to adhere to the mandatory transaction procedures of the respondent. The allegation that it was a normal practice not to follow the laid down procedures are baseless and have no merit. If the bank was governed by normal practice there would be no need of the stipulated procedures and the respondent would have not insisted the use of the said circular in 2015.

Therefore, since the applicant negligently violated the laid down procedures, an action which resulted to the loss of USD 484,000 to the respondent, in my view, the respondent had a valid reason to terminate. I thus join hands with the Arbitrator that the respondent had a valid reason to terminate the applicant on ground of gross misconduct for breaching Bank's operations procedure.

Regarding the 2nd issue, for termination to be considered fair, it should be based on valid reasons and fair procedures. There must be substantive and procedural fairness of termination of employment as provided for in Section 37(2) of the Employment and Labour Relations Act, Cap 366 R.E 2019 (herein referred as Cap 366.

The procedures for termination are provided under Rule 13 of GN 42 /2007 (here in to be referred as the Code) as Which amongst others it requires investigation to be carried out, hearing to be conducted and finalized within a reasonable time and hearing to be chaired by a Sufficiently senior Management representative who shall not have been involved in the circumstances giving rise to the case. If the Disciplinary Committee finds the employee guilty he shall give his mitigation factor, and employer may make its decision and reasons thereto and explain the right of appeal to the employee.

The applicant claimed various procedurally irregularities, starting with the issue of not being afforded with a right to be heard, I have gone through the records I find that the applicant was issued with a notice to attend the Disciplinary hearing on 17th September, 2015 as per **exhibit D13** (Notice to appear before the Disciplinary committee). As per Disciplinary Hearing Statement dated **(exhibit D 14)** 25th September, 2015 signed by the applicant himself on 30th September, 2015 confirming that was the true record of the information that he provided in the Disciplinary hearing of 23rd September, 2015. Now I wonder how he was not afforded with the same while in the proceedings it shows that he gave

his defense regarding the allegation paused upon him. Therefore the claim has no merit.

The contention that the applicant was not afforded with a sufficient time to prepare for his defense has no merit as the law under Rule 13(3) of the Code, provides that:

> "The employee shall be entitled to a reasonable time to prepare for the hearing and to be assisted in the hearing by a trade union representative or fellow employee. What constitutes a reasonable time shall depend on the circumstances and the complexity of the case, but is shall not normally be less than 48 hours."

Time referred in that provision is time for the employee to prepare himself prior giving his defence before the disciplinary committee and not otherwise. It is from record that , the notice to attend the disciplinary Hearing was issued on 17th September, 2015 and the meeting was held on 23rd September, 2015 which is about 6 days. I find it to be sufficient for the applicant to prepare for his defence, hence the ground lacks merit.

The applicant contested that the recommendation of the Disciplinary Hearing was made by the committee and not the chairperson as required by the law. It is crystal clear from **Exhibit D 14** that the Chairman was the only person who signed the recommendations on behalf of other committee members. Hence the applicant mislead himself on that aspect.

Again in regard to the outcome of the meeting, with due diligence I have gone through the calendar of the disputed year, and found that the outcome of the hearing was dully served to the applicant on 30th

September,2015 which was within five working days as required by the law.

Moreover, the applicant alleged that the disciplinary hearing was not conducted by a senior officer. It is from record that Disciplinary hearing was chaired by **Uzauru Athuman** Head of Islamic Banking as seen under **exhibit D 14**. This has been clearly stated under Guideline 4(2) of the Code. Which provides that:

> "The chairperson of the hearing should be impartial and should not, if possible have been involved in the issues giving rise to the hearing. In appropriate circumstances, a senior manager from a different office may serve as chairperson."

Thus, basing on that provision, the disciplinary Committee was chaired by the right person.

Also the applicant alleged that he was not a given a chance to mitigate. The records reveals that the applicant mitigated as indicated at page 4 of the Disciplinary Hearing Statement. Basing on the above analysis, this court is of the view that the respondent adhered to the procedure for termination of the applicant. Hence no need to fault with the arbitrator's finding that the termination was procedurally fair.

Regarding the 3rd issue, since it is also the finding of this court that the termination was both substantively and procedurally fair, I find that the applicant is only entitled to the terminal benefits as provided under Section 43 of Cap 366,if any.

The applicant prayed for severance pay, but he is not entitled to the same as he has been terminated on ground of misconduct as provided under section 42 (3) (a) of the Act. Equally the applicant is not entitled to subsistence allowance, since he is the one who refuted to be paid his entitlements as he referred the matter to the CMA, so it is not the respondent's fault. In view of the above, I uphold the arbitrator's decision. Thus dismiss the application for want of merit.

Z.G.Muruke

JUDGE

10/06/2020

Judgment delivered in presence of Peter Nyangi, Learned Counsel for the applicant and Rozi Kashamba, Learned Counsel for the respondent.

Z.G.Muruke

JUDGE

10/06/2020