IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 784 OF 2019

BETWEEN

JACKLINE MATHIAS BIRUKILA.....APPLICANT

VERSUS

PREVENTION AND COMBATING OF

CORRUPTION BUREAU (PCCB)..... RESPONDENT

JUDGEMENT

Date of Last Order: 13/07/2020

Date of Judgement: 07/08/2020

Aboud, J.

The application was made under the provision of section 91 (1) (a) & (b), 91 (2) (a) (b) (c) and section 94 (1) (b) (i) of the Employment and Labour Relations Act No. 6 of 2004 (herein The Act). Rule 24 (1) 24 (2) (a) (b) (c) (d) (e) and (f) Rule 24 (3) (a) (b) (c) (d) and 28 (1) (c) and (e) of the Labour Court Rules GN No. 106 of 2007 (here forth the Labour Court Rules). The applicant moved the court for the orders that this Honourable court be

pleased to set aside and revise the award of the Commission for Mediation and Arbitration (CMA) in labour dispute No. CMA/DSM/ILA/685/2017/689 dated 02/09/2017 by Hon. Kachenje. J.J.M, Arbitrator.

The application is supported by the applicant's affidavit which set out the grounds for this revision.

The Respondent, **Prevention and Combating of Corruption Bureau** (herein **PCCB**) vehemently challenged this application through the counter affidavit of Tumaini Mwenisongole, respondent's Senior Administrative Officer.

Both parties were represented. Mr. Sammy Katerega appeared as Personal Representative for the applicant while Ms. Lilian William Katifi, Senior State Attorney was for the respondent. With leave of the court the matter proceeded by way of written submission.

Briefly are the fact led to this application: The applicant was employed by PCCB on 18/06/2005 as an Investigation Assistant II. On 03/03/2016 she was terminated from employment on the ground of misconduct that she forged signatures of the approved authorities to secure loan facility from CRDB bank. The applicant appealed

unsuccefully against such decision to the employer appellate authority the Appeal Committee. The appeal Committee confirmed the decision to terminate the applicant on 02/06/2015. Dissatisfied by the employer's decision she referred the dispute to the CMA. In its award the CMA pronounced that the applicant was fairly terminated both substantively and procedurally. Being resentful by the CMA's award she filed the present application.

Arguing the application Mr. Sammy Katerega submitted that, in the whole process of completing the bank loan forms there is no stage where the forms have to be approved by the applicant as the employer for the said loan to be secured. He stated that, the applicant was charged with 14 counts however she discovered that the charges were exaggerated in a sense that some charges were the same to wit number 1 & 2, 7 & 8, 9 & 10, 11 12 &14.

Mr. Sammy Katerega went on to submit that, the Arbitrator failed to analyze correctly the evidence and exhibits tendered before him. He stated that the applicant complained that there was no disciplinary hearing meeting in this dispute but the Arbitrator considered the Inquiry Committee which comprised of two persons to

conclude that, there was disciplinary hearing committee. He further submitted that the chairperson of the meeting was not impartial because he was appointed by the Director General and acted under his instruction.

He stated that, the second person Mr. Osborn Paissi who was acting as a secretary to the Committee cannot pose as an active impartial member because he was also appointed by the employer's disciplinary authority. He added that during the session of the inquiry committee the applicant was not given chance to bring her witnesses or opportunity to defend herself. Mr. Sammy Katerega argued that according to Rule 9 (1) of the Employment and Labour Relations (Code of Good practice) Rules, GN. No. 42 of 2007 (herein GN. NO. 42 of 2007), it clearly provide that disciplinary action shall be recorded on the prescribed form, however in the present application the relevant form was not presented at the CMA.

Mr. Sammy Katerega said the evidence produced by the respondent and in the testimony of his witnesses there was no direct evidence which pointed out that, the applicant was directly involved in forgery rather it was just an assumption. He further argued that,

the document tendered as Exhibit PCCB 1, guarantee and undertaking by PCCB was wrongly dated 28/10/2054 but the Arbitrator proceeded to admit such document as evidence in this matter.

Mr. Sammy Katerega submitted that the applicant was not given reasonable time to prepare for her defense. He added that the applicant was notified on 07/10/2016 about the hearing which was conducted on 08/10/2016 contrary to 48 hours notice provided by the law. Mr. Sammy Katerega said there was no scientific verification which was done to prove the applicant's handwriting in comparison with the forged signatures. He also contended that the investigation report was not given to the applicant to enable her to prepare the defense. Mr. Sammy Katerega concluded by praying for the CMA's award be revised and set aside.

Resisting the application Ms. Lilian William Katifi submitted that, the Arbitrator properly analyzed evidence before him as reflected at pages 19, 20, 21, 22, 26, 27 and 28 of the award. She added that the applicant secured the loan from CRDB Bank without approval of the respondent's authorized signatories as evidenced by Forensic Report

(Exhibit PCCB 6). Ms. Lilian William Katifi stated that the applicant claimed to have followed the procedure in applying for the loan in question while at the same time she failed to mention the names of responsible officers who endorsed their signature to approve the said loan. Ms. Lilian William Katifi argued that, the applicant ought to have demonstrated in her submission as to what extent the Arbitrator contravened the provisions of the law and failed to analyze the evidence tendered before him.

Ms. Lilian William Katifi went on to submit that, this application should only be granted if there is a material illegality in the award as provided under section 91 (2) (a) (b) of the Act. The Learned State Attorney strongly submitted that the applicant was terminated on the basis of fair reasons and procedures as required in the law. As regard to the allegation that there was no disciplinary Committee she submitted that, the applicant was accorded all the opportunity to defend herself in accordance with the laws of the land and she appeared before the Inquiry Committee which was appointed in terms of Regulation 46 of the Public Service Regulations, GN. No. 168 of 2003 (herein the Public Service Regulations) and Rule 15.5 of the Public Service Disciplinary Code of Good Practice, GN. No. 53 of 2007.

Ms. Lilian William Katifi further submitted that, the applicant's termination was procedurally fair in accordance with Regulations 36, 44, 46, 47 and 48 of the Public Service Regulations where the applicant was issued with a notice on 05/12/2016 inviting her to state in writing and explain why disciplinary action should not be taken against her. The Learned State Attorney argued that, the applied termination procedures were in line with the procedures provided under Rule 13 of GN. 42 of 2007. She therefore prayed for the application to be dismissed in toto.

In rejoinder Mr. Sammy Katerega submitted that, the respondent failed to address the points which were the center of the applicant's dissatisfaction in the award. That, the Learned State Attorney failed to address the validity of 14 charges of which 4 of them were duplicated, non- existence of the Disciplinary Hearing Committee, denying the employee the right to be represented, denying the employee the Inquiry Committee report to enable her prepare her defense.

Mr. Sammy Katerega further submitted that, the employee was denied of her right to be heard before an independent Disciplinary

Hearing Committee. He said the allegation that, the employee was given a chance to select the date of hearing is not true because the employee was on her annual leave and when she resumed work on 25/01/2017 was required to attend the disciplinary hearing at Masasi (54km away) on the next day.

Mr. Sammy Katerega argued that, the Disciplinary Authority acted against the Rule 46(4) of the Public Service Regulation which requires members of the Disciplinary Authority to consist men and women as well as Rule 48 (6) of the Relevant Regulation. He also added that the Committee also contravened Rule 8.5 of the Public Service Disciplinary Code of Good Service GN. No. 53 of 2007 which is to the effect that:-

> "to ensure impartiality, transparency and fair decision, the disciplinary Authority shall appoint a chairman, secretary and members of the Committee from outside of the organization, whereas the secretariat shall be appointed by the disciplinary authority from within the organization. While appointing members of the Committee, Regulation No. 46

of the Regulations should be taken into account."

The Personal Representative added that, the Inquiry Committee submitted its report on 12/02/2017 though the termination letter is dated 03/03/2017 but the applicant was served with the decision on 08/04/2017 that being 56 days from the date the report was submitted. Mr. Sammy Katerega also submitted that, the responded did not mention anything about the applicant's previous disciplinary records to confirm that she was a habitual offender to deserve termination punishment as provided under Rule 12 (2) of GN. No. 42 of 2007. He therefore prayed for the application to be allowed.

Having gone through the CMA and Court's records as well as submissions by both parties, it is my considered view that the issues for determination before the Court are; whether the respondent had valid reason to terminate the applicant, whether the respondent adhered to laid down procedures in terminating the applicant's employment and lastly is to what reliefs are the parties entitled.

On the first issue as to whether the respondent had valid reason to terminate the applicant's employment, it is a trite law that

termination of employment should only be based on fair and valid reason. Employers should ensure that the employment of an employee is protected and not being terminated in the employer's whims, see section 37 of the Act. In the application at hand the applicant was terminated on the ground of misconduct, that she forged signatures of the organization authorized signatories to secure loan facility from CRDB Bank. The Arbitrator in his award found that the employer proved the allegation levied against the applicant.

The applicant alleges that the employer had no valid reason to terminate her because her charges were duplicated. As clearly indicated in the charge sheet (exhibit PCCB 2 collectively) the applicant was charged with 14 offences. In my view it was not wrong to charge the applicant with all the offenses as long as the respondent was able to prove those offenses against the applicant. As indicated in the disciplinary minutes some of the charges were not proved therefore, the respondent terminated the applicant on the basis of proved charges only. Hence, the allegation that the charges were exaggerated has no legal stand. After careful examining the record I found that the gist of the applicant's termination was

because she forged the signatures and stamp of the PCCB authorized personnel.

The applicant in her defense before the Inquiry Committee she stated that, she just signed the relevant form but all the procedures for securing the loan in question were completed the CRDB Bank Officer, Bwana Muba as reflected at page 61 of the Inquiry Committee Minutes. However, as rightly held by the Arbitrator the applicant failed to prove such fact. It is on record that, the CRDB Bank has its established bank policies for employees to obtain loan facility of which among them is that, employee are required mandatorily to seek approval from the employer. In this case the applicant was supposed to comply with the relevant bank policies, however she place such liability to the Bank Officer as she submitted that the Bank Officer was the one who processed her loan.

It is crystal clear that the respondent discharged his burden to prove charges against the applicant. Respondent tendered Forensic Document examination report (Exhibit PCCB 6) to prove that the signature in the applicant's guarantee form was not genuine but forged. In the applicant's submission she alleged that, there is no

direct evidence to prove her involvement in the said forgery. However, the discussion above reflects that, the loan forms were signed by the applicant and she is the one who secured a loan facility using the forged documents. Therefore, that shows how she was directly involved in the forgery transaction in question.

On the basis of the foregoing discussion, I fully agree with the Arbitrator's award that the whole evidence hooked the applicant's act of forging the signatures of the authorised officers of the respondent designated to sign the loan forms. Therefore the respondent had valid reason to terminate the applicant's employment because the forgery allegations were proved against her.

On the second issue of procedure, the applicant alleged that the respondent violated legal procedures in terminating her employment. Generally the procedures for terminating an employee under misconduct are provided under Rule 13 of the GN. No. 42 of 2004 as rightly decided by the Arbitrator. In this application the Arbitrator found that all the termination procedures were followed by the respondent. It should be noted that the applicant was terminated in accordance with the procedures stipulated under the Public Service

Regulations. The applicant strongly disputed such finding on the following grounds.

Firstly she was not given reasonable time to prepare for her defense. The applicant argued that when she resumed work after leave on 24/01/2017 she was served with a notice to attend disciplinary hearing on 25/01/2017, thus, she had no time to prepare for defense. The law requires service of notice to be not less than 48 hours as provided under Rule 13(3) of GN. No. 42 of 2007. It is on record the applicant was served with a notice to attend Disciplinary hearing (exhibit JM-5) on 23/01/2017 and she signed receiving the relevant document on the same date. In the event I find the applicant was afforded with a reasonable time to prepare for her defense.

The applicant also contended that there was no disciplinary hearing Committee because no evidence was produced to ascertain the members of the committee and the prescribed hearing forms were not tendered. As per the procedures stipulated under the Public Service Regulations is that there should be a disciplinary Authority as in accordance with Regulation 35 of the Public Service Regulations. In

the circumstances of this case where the applicant was under the operational service the formation of the disciplinary Authority is provided under Regulation 35 (2) (c) of the Public Service Regulations which is to the effect that:-

> "35 (2) subject to the provisions of this Part, the powers vested in the Chief Secretary for disciplinary control, shall be exercised by himself or other disciplinary authorities:-
>
> (c) in case of public servants in the Operational Service, shall be Head of Departments or Divisions."

The disciplinary authority is the body responsible to take disciplinary measures against any public servant. If the disciplinary authority is of the opinion that a disciplinary hearing should be convened the authority is required to appoint members of the Inquiry Committee. This power is vested under Regulation 45(1) Public Service Regulations which provides as follows:-

> "45 (1) where a public servant has been served with a charge in accordance with the provisions of Regulation 44 of these

> Regulations and fails to make representations in writing giving the grounds upon which he relied to exculpate himself within the period specified in the notice accompanying the charge or charges, or make representations which in the opinion of the disciplinary authority do not amount into a complete defense of which the accused public servant is charged, the disciplinary authority shall appoint two or more members, to hold an inquiry into the charges."

In the application at hand the respondent's disciplinary Authority appointed two members to conduct the Disciplinary Inquiry as reflected in the disciplinary Inquiry minutes (Exhibit PCCB 2 collectively). From the relevant exhibit the hearing was conducted from 25/01/2017 and ended on 08/02/2017 where the charges against the applicant were levied and the respondent brought four witnesses and tendered exhibits to prove the case against the applicant. As per procedures provided under the Public Service Regulations the Inquiry Committee is the body responsible to conduct

disciplinary hearing as they did in the present application. Therefore the applicant's submission that no disciplinary hearing was conducted is baseless. She also contended that the hearing was conducted by employer's inquiry committee; hence the employer was the judge of his own case. As discussed above the Inquiry Committee is appointed by the Disciplinary Authority and its members in this application were dully appointed in accordance with Regulation 46 of the Regulations.

The applicant further alleged that the disciplinary hearing forms were not tendered. The GN. No. 42 of 2007 at page 75 provides for a template form to be used in the disciplinary hearing. In this application it is my view that the Inquiry Committee Minutes (Exhibit PCCB 2 collectively) is in compliance with the template form. It is therefore my findings that the disciplinary form was tendered.

The applicant is also contesting that the members of the Disciplinary Inquiry were not impartial as there was no hearing. She argued that the Committee did not consist of both men and women and its members were not appointed from outside the organization. It is my view that such submission is unjustifiable because hearing was convened by the Disciplinary Committee authorised and the chairman

of the relevant Committee was Mr. Stephen A. Chami who was the Head of PCCB Lindi and Mr. Osborn Paissi, Committee's secretary who was an independent member from outside the organization. The record reveals that this issue was well addressed by the Appeal Committee. The Public Service Regulations, Regulation 62 (3) specifically provided that irregularity of the appointment of the Inquiry Committee so long as the irregularity did not occasion injustice. In my view I do not see any injustice in the composition of the Inquiry Committee.

The applicant further contended that she was denied with the right to be represented by an independent representative and brought her witnesses. The record reveals that the applicant was informed with her right to be represented but she opted not to choose one. This is clearly indicated at page 10 of the typed Hearing minutes (Exhibit PCCB7 collectively). She was also afforded with the chance to defend herself and brought her own witness however she did not bring any witness.

Furthermore the applicant alleged that she was denied with the Inquiry Committee report to enable her to prepare for her defense.

She argued that the relevant Committee was supposed to notify her on the report prepared so as to be able to prepare for the defense. In this aspect I am of the view that the applicant misdirected herself to construe the provision in relation to the issue concerned. The law is clear on that regard, the Inquiry Committee's report is supposed to be sent to the disciplinary authority and not to the applicant as claimed. This is in accordance with Regulation 48 (1) of the Regulations which is to the effect that:-

> "Upon the conclusion of Inquiry Committee conducting the Inquiry shall, forward the record of proceedings together with its report to the disciplinary authority."

On the basis of the above discussion I find no reason to fault with the Arbitrator's findings that the applicant's termination was fair both substantively and procedurally. As rightly held by the Arbitrator, the respondent's misconduct was serious enough to justify termination after taking into consideration that she had previous disciplinary record as indicated in a letter of Appeal outcome (Exhibit PCCB-4 collectively). The position of the Arbitrator is also supported by the provision of Rule 12 (4) (a) (b) of the Employment and Labour

Relations (Code of Good Practice) GN. No. 42 OF 2007, where it provides that, I quote:-

> "12 (4) - In determining whether or not termination is the appropriate sanction, the employer should consider:-
>
> (a) The seriousness of the misconduct in the light of the nature of the job and the circumstances in which it occurred, health and safety, and the likelihood of repetition; or
>
> (b) The circumstances of the employee such as the employee's employment record, length of service, previous disciplinary record and personal circumstances.

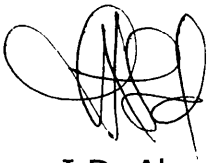
I therefore find no reason to fault the Arbitrator's finding that the applicant was rightly afforded with the right to be heard.

On the last issue as to what reliefs are the parties entitled, I will consider the applicant's relief sought in this application. The applicant

prayed for this court to revise and set aside CMA award, to declare that termination of applicant employment was procedurally unfair and lastly to issues any other orders and relief found fit and just to grant. Following the Court finding that the respondent terminated the applicant on valid reason and the procedures were fairly followed, I hesitated to grant the reliefs sought. The revision of CMA award need to have legs to stand in the sense that, it must be legally justified that the award was improperly procured and, the employer failed to observe the provisions of section 37 (1) (2) of the Act.

In conclusion I find this application has no merit, the applicant was fairly terminated both substantively and procedurally. Thus, the Arbitrator's award remains undisturbed and the applicant is not entitled to the reliefs sought. Consequently application is dismissed accordingly.

It is so ordered.



I.D. Aboud

JUDGE

07/08/2020