

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

REVISION APPLICATION NO. 744 OF 2018

MARCO M.S. KATABI.....APPLICANT

VERSUS

HABIB AFRICAN BANK (T) LTD RESPONDENT

JUDGMENT

Date of last Order: 05/06/2020

Date of Judgment: 09/06/2020

Z.G.Muruke, J.

Marco Katabi, the applicant, filed this application, seeking for revision of the decision issued by Commission for Mediation and Arbitration, (herein to be referred as CMA) on 10th October, 2018, in Labour dispute no. CMA/DSM/ILA/R.618/13/720 by Hon.Gerald. J, Arbitrator which was in favour of the respondent. Application is supported by affidavit of Prosper William Mrema Applicant's Advocate. Challenging the application, respondent filed a counter affidavit sworn by Shakila Hameer, the respondent's Human Resource Officer. With leave of the court hearing was by way of written submission, both parties adhered to the schedule hence this judgment. The applicant was represented by TUICO counsels namely, Noel Nchimbi, Prosper Mrema and Jamael Ngowo, while the respondent was represented by George Shayo, Advocate.

Briefly are the facts of the case. On 1st December, 2003 the respondent was employed by the applicant as a Bank Clerk. He worked with the applicant until 31st August , 2013 where he was terminated on reason of loss of faith and trust for being implicated on the theft that occurred on 29th , October 2012, leading to the loss of 10,000,000/-. Being resentful with the termination, the respondent referred the dispute to the CMA where the decision favored the respondent, aggrieved with the decision the applicant filed the present application.

On the first ground for revision he submitted that, the arbitrator negligently failed to record the key testimony words and evidence of the applicant while cross examining DW1 and DW2. Rule 32(3) of the Labour institution (mediation and Arbitration) Rules, GN 64 requires the arbitrator to record all the key words and issue relating to the dispute and summarize the evidence and the submitted arguments. The arbitrator denied the applicant with a fare justice.

On the 2nd ground the applicant's counsel argued that the arbitrator erred in law and fact by deciding the termination was fair both substantively and subsidiary. The respondent neither conducted investigation nor tendered any investigation report before CMA and during disciplinary hearing so as to prove that there was loss of 10,000,000/= and the applicant was responsible for that loss. There was no any evidence adduced by the respondent to state why they are suspecting the applicant and why the applicant was terminated for lack of trust. The respondent failed to execute his duty as required under section 39 of the Employment and Labour Relations Act, Cap 366 RE 2019 and sections 110 and 112 of

the law of Evidence Act, Cap 6/2002. The applicant was charged with different charges of theft and lack of trust which led to his termination without any justification.

Regarding procedure, the applicant was not afforded with a fair hearing as the charge and the minutes were not in Kiswahili which was familiar to him despite requesting for the same. During the Disciplinary hearing, the respondent never tendered the evidence in support of his claim. There was no any CCTV camera or investigation report which was tendered so as to give the applicant an opportunity to see and examine the evidence contrary to rule 13(5) of Employment and Labour Relations (Code of good Practice) GN 42, (herein to be referred as GN 42). The CCTV camera footage was brought before CMA contrary to the rules of natural justice.

Further, the applicant contended that, the meeting which recommended his termination was chaired by Mr. Herman Lameck a bank teller who was not a senior management employee which was contrary to Rule 4(1) a, b, c of the Guidelines for disciplinary incapacity and incompatibility policy and procedure under GN42. In all three Disciplinary hearing the positions of the chairpersons was not disclosed, referring the case of **The Parastatal Pension Fund Vs. Siriel Mchembe**, Rev.No.389/2013,2014 LCCD part 1.

Applicant added that the disciplinary hearing was conducted on 26th July, 2017 and the outcome of the hearing was served to the applicant on 13th August, 2017 contrary to prescribed time by the law, referring Rule 4(9) of Guidelines for disciplinary incapacity and incompatibility policy and procedure under GN 42. More so, the applicant was not afforded with a chance to mitigate contrary to the law.

On the third ground the applicant's counsel stated that the arbitrator failed to consider and evaluate the evidence before him. There is nowhere in the award the arbitrator has analyzed the issue of loss of faith and mistrust. Due to that failure, it is not clear as to what allegations that the applicant was found guilty with, and how did the arbitrator satisfied himself that the applicant was guilty, from which investigation report, who conducted the same and what were the results of the investigation. That abnormality caused injustice to the applicant. On the Fourth and Fifth grounds the applicant contended that the arbitrator erred in law and fact by holding that the applicant's prayers have no legal stance and dismissed the same. The dismissal was not fair since the termination was both substantively and procedurally unfair. He prayed for reinstatement without loss of remuneration for 79 months to the tune of 79,000,000/=.

In response to the applicant's averments, the respondent counsel submitted that, there is no basis on the First ground of revision. The arbitrator complied with the requirement of 32(2),(3) of GN 42. The applicant has failed to prove his allegations and showing the injustice. On the 2nd ground he argued that investigation in misconduct is conducted when the alleged misconduct is not obvious. Investigation is done to

ascertain if there are grounds for hearing to be held or not as per Rule 13 (1) of GN 42. A misconduct is proved by evidence and not an investigation report, and if an investigation forms part of the evidence, its absence does not exonerate the applicant from his misconduct or charges against him.

Regarding procedure for termination Mr. George Shayo submitted that the respondent complied with all the required procedure while terminating the applicant. That there were no multiple disciplinary meetings as alleged by the applicant. What happened was just a continuation of the hearing as conducted on 14th November, 2012 and on 26th November, 2012. He further argued that the respondent dropped the 1st charge against the applicant and the new charge of loss of trust /faith as per the notice dated 19th July 2012. All the procedure were adhered. The applicant was terminated on 30th August , 2013 as he was found guilty for breach of trust considering that the respondent was a financial institution. It was further submitted that the applicant's allegation regarding the position of the chairman is misplaced on the ground that , at this stage it denies the respondent's right to challenge the same.

Further, the applicant's counsel submitted that the CCTV camera was also used in the second disciplinary hearing and was viewed by everyone including the applicant as stated in page 1-6 of the 2nd disciplinary hearing. Regarding the delay of the outcome of the disciplinary hearing, it was submitted that there was no any delay as stated by the applicant. The proceedings were signed on 12th August ,2012 and the applicant received it on 13th August ,2012. That the applicant was afforded with a chance to give mitigating factors.

Moreover, the applicant's counsel added that the respondent is a legal person working through DW1, DW2. He never breached the principle of Nemo judex in causa sua since he was empowered to suspend, warn and demand explanation from the applicant on the ground that he was a senior to the applicant. Since he was not a chairperson of the disciplinary committee or appellate board, therefore the applicant could not claim on such termination violation. He further stated that DW1 was a senior Officer of the respondent had authority of issuing a termination letter as it is just a matter of delegation.

The respondent's Counsel insisted that applicant's allegation of hearing in absentia lacks legal stand as the law does not provide for the applicant to appear physically in the appeal. The right was observed since the applicant appealed by letter and it was replied .

On the Fourth and Fifth grounds the respondent counsel submitted that the arbitrator was right to decide that there was valid reason for termination and the procedure were adhered prior to his termination. The arbitrator did not dismissed the CMA award but he dismissed the applicant's dispute and prayer. He prayed for dismissal of the application. In rejoinder, the applicant reiterated what he has submitted in submission in chief.

Having gone through the rival submission by both parties, issues for determination are:-

- i. Whether the respondent had valid reason for terminating the applicant.
- ii. Whether the procedure for termination were adhered

iii. What are the reliefs entitled to the parties?

In regard to the 1st issue for determination, It is settled principle of law that, termination of employment must be on valid and fair reasons and procedure. 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, No. 6 of 2004** which states that:-

"Section 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."**

In the case of **Tanzania Revenue Authority Vs. Andrew Mapunda**, Labour Rev. No. 104 of 2014, Aboud J. held that:-

"(i) It is the 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, Section 37(2) of the Act.

From records it is apparent that the applicant was terminated for lack of faith / trust as per **exhibit H13** (letter of termination).

DW1 testified that the applicant was implicated in the theft of 10,000,000/= occurred at Kariakoo Branch on 29th October 2012. On the alleged date all the employees were restricted not to go out of the office so as to investigate on the alleged theft. The applicant forced to go to the outside washrooms. That upon viewing the CCTV camera footage his conduct was suspicious. While DW1 was being cross examined he explained the scenario how they found the applicant suspicions, it worth to reproduce the same as testified at page 22 of the CMA typed proceedings. I quote;

Qn: Briefly explain the scenario of the CCTV footage as seen.

Ans: The 1st clip shows where the strong room is. There is washroom allocated and bulk cash counting was there. That clips shows his (Marco) movements when (going to the washroom and peeping into the bulk cash counting he went to the washroom without even switching the light.

The 2nd clip shows he visited the watchmen washroom in the back entrance twice washroom is there inside the bank.

The 3rd clip shows his desk herein.

Qn: When was the purported money taken?

Ans: the suspicion was between 12:00 (the strong room clip) to 12: 48 (the bank entrance clip.

In his reply to the notice of intention to terminate, during the disciplinary hearing, and in his CMA's testimony the applicant did not state the reasons why he acted suspiciously on that date. He was just inquiring his withdrawn charges. The respondent tendered the CCTV camera footage at the disciplinary committee as well as before CMA to prove that the applicant acted suspiciously. Basing on the above analysis, I find the

respondent has adduced sufficient evidence to prove his suspicions against the applicant. On the other hand the applicant willful neglected to respond to the charge against him.

It should be borne in mind that the respondent is a banking institution, doing banking business, the nature of the business trust worth is very vital. Once there is mistrust, whatever little it might be, it is not health for an employer to continue with such employee. Dishonest employee not only lower down reputation of the bank, but also causes loss. Therefore banks should be very carefully in the recruitment process. Thus I find no need to fault the arbitrator's finding that the respondent had valid reason for terminating the applicant.

On the 2nd issue the procedures for termination are provided under Rule 13 of GN 42 /2007, which amongst others, it requires investigation to be carried out , hearing to be conducted and finalized within a reasonable time and chaired by a Sufficiently senior Management representative who shall 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. In the case at hand, the applicant alleged that the procedures were not adhered, including investigation, and the language used was not familiar to him and he was not afforded a chance to mitigate.

I have gone through the records, I have noted that the termination procedure were observed. It is apparent that the investigation regarding lack of trust/faith was conducted as evidenced by **Exhibit H2**

(Investigation Report), the applicant was served with a notice of intention to terminate his employment **(exhibit H7)**, the applicant filed his reply on the letter dated 5/6/2013 **(exhibit H8)**, again the applicant was served with notice to attend disciplinary hearing **(exhibit H9)** and the Disciplinary hearing was conducted on 26th July, 2013 as per the minutes of the meeting **(exhibit H10)**. From that proceedings it clearly shows that the applicant was afforded with a right to be heard and even examining the evidence through CCTV camera footage.

The applicant claimed that he was not afforded with the right of mitigating, from the disciplinary proceedings, that is not right. Applicant stated his mitigation, as shown below.

"Last but not least I would like to say since my joining to the services of the bank, and I have worked with three branch manager and I had no problem before as I am honest and trustworthy employee."

The applicant alleged that language used in disciplinary records that the charge and proceedings were in English language only during the Disciplinary hearing the Swahili language was used. Equally applicant did not raise at the disciplinary hearing. More so he was able to respond to all the proceedings. He did not explain how he was prejudiced with the same. I believe that the applicant was in a good position to understand the charge and defended himself, as correctly reflected in his mitigation factors reproduced above.

Therefore, I find that the respondent adhered to the procedure for termination basing on the principles of natural justice. Regarding the 3rd

issue, since it is also the finding of this court that the termination was both substantively and procedurally fair, I hereby uphold the arbitrator's award. The application is dismissed for want of merit.


Z.G. Muruke

JUDGE

09/06/2020

Judgment delivered in presence of applicant in person and George Shayo, Learned Counsel for the respondent.


Z.G. Muruke

JUDGE

09/06/2020