IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 419 OF 2020

(Arising from Labour Dispute No. CMA/PWN/MKG/R.17/411/13)

BETWEEN

SWAIBU SHUJAA.....APPLICANT

VERSUS

TANZANIA ELECTRIC SUPPLY COMPANY LTD.....RESPONDENT

JUDGMENT

Date of Last Order: 02/12/2021

Date of Judgment: 04/03/2022

I. ARUFANI, J.

The applicant, filed the present application in this court to challenge the decision of the Commission for Mediation and Arbitration (henceforth, the CMA) delivered in Labour Dispute No. CMA/PWN/MKG/R.17/411/13. The brief background of the dispute is to the effect that, the applicant was employed by the respondent on 6th May, 1992 as an Accountant. On 17th August, 2013 he was terminated from his employment on ground of serious misconduct.

It was alleged by the respondent that, the applicant who was their Accountant at Mkuranga District caused the respondent to suffer

a loss of TZS 9,759,747.41 through under banking the money collected from various payments made to the respondent by their customers. After being terminated from his employment and being dissatisfied by the termination, the applicant filed the dispute before the CMA seeking to be reinstated in his employment but the dispute was decided against his favour.

Having being aggrieved by the decision of the CMA he has filed the present application in this court. The application is supported by the affidavit of the applicant and it was challenged by the counter affidavit sworn by Elias Mkumbo, the State Attorney and Principal Officer of the respondent. The legal issues upon which the applicant is basing his application as stated at paragraph 3 of his affidavit are as follows:-

i. *Whether the arbitrator erred in law and fact to hold the termination was fair despite of having different short falls.*
ii. *Whether the arbitrator erred in fact and law to hold that the procedure was fair by ignoring witness testimonies.*
iii. *Whether by writing Exhibit Tanesco 1 the respondent was not duty bound to prove the charges against me before terminating me.*

When the matter came for hearing the applicant was represented by Ms. Stella Simkoko, Learned Advocate and the respondent was represented by Ms. Wemaeli Msuya, Learned State Attorney from the respondent's legal Department. By consent of the counsel for the parties the matter was argued by way of written submission. In supporting the application, the counsel for the applicant argued the issues raised by the applicant seriatim.

The counsel for the applicant argued in relation to the first issue that, no witness was brought before the hearing held at Mkuranga on 6th March, 2012. She submitted that, section 39 of Employment and Labour Relations Act, Cap 366 R.E 2019 (ELRA) requires in any proceedings concerning unfair termination of an employee by an employer, the employer to prove termination of employment of an employee was fair. She also referred the court to Rule 13 (5) of the GN. No. 42 of 2007 which states that, evidence in support of the allegation against an employee shall be presented at the hearing.

She argued that, in the meeting held at Mkuranga on 6th March, 2012 there is no witness was called in the meeting as indicated in item 9 of exhibit Tanesco 8. That caused the counsel for the applicant to submit that, the offence levelled against the applicant was not

proved. She went on arguing that, the applicant informed the Auditors through exhibit Tanesco 1, he also stated in his defence admitted in the matter as exhibit Tanesco 6, he furthermore stated before the hearing committee as evidenced by exhibit Tanesco 8 and in the defence he adduced before the CMA as appearing at pages 39 to 41 that, one of the reasons led to the alleged loss was mixing up of the daily cash collections.

She argued that, in fact there was no actual loss and stated the applicant gave example of the mix up done by the Auditors as reflected in the evidence he adduced at page 39 to 41 of the proceedings of the CMA. She stated that, the applicant stated in his evidence that it is not true that he was not differentiating daily collections and it is not true that he was not taking the money collected to the bank. The counsel for the applicant based on the above arguments to submit that, the applicant was terminated from his employment on allegation of loss which was not proved.

With regards to the practices of collecting money at the applicant's station his counsel submitted the applicant testified that, when he was transferred to Mkuranga he found the practice of recording daily cash collections without drawing a line to differentiate

the dates and continued with the said practice. She was of the view that, if the same had been inappropriate, the applicant would have been ordered to change it before the audit of 2012, taking into account that reconciliation was being done on monthly basis as testified by DW4.

The counsel for the applicant argued that, there was transportation problem at the station of work of the applicant as testified by the applicant and as stated in exhibit Tanesco 6 at page 5 item 6 of the Audit Report which caused the applicant to delay to deposit the collected money into the bank. She argued further that, the applicant was accused for non-banking and under banking without stating the specific dates when there was non-banking or under banking. She submitted that the applicant was never afforded with an opportunity of being heard at the second disciplinary hearing which was conducted on 20th June 2013 as testified by DW4 (Naomi Fwemula) at page 29 of the CMA proceedings.

Coming to the second issue which relates to the procedural aspect, the counsel for the applicant submitted that, the evidence on record shows that the Auditors audited the applicant and ordered him orally to make his defence in writing. She argued that, there is no

investigation which was conducted to ascertain justification of the applicant's defence. Thereafter a disciplinary hearing was held as testified by DW4 at page 29 of the CMA's proceedings.

It was further argued by the counsel for the applicant that, the applicant had never been served with auditors' report while there were two different allegations of causing loss of Tshs. 9,759,747.41 as testified by PW1, PW3 and PW4 and loss of Tshs. 12,436,752.96 as testified by PW2 and PW5. She cited in her submission the cases of **Ezekia Samwel Ndehaki V. Tanzania One Mining Ltd.,** Revision No. 59 of 2013 where it was stated that, the intention of the legislature is to require employers to terminate employees only on valid reason and not at their own whims.

She also cited the case of **Severo Mutegeki and another V. Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA),** Civil Appeal No. 343 of 2019 (Unreported) where the Court of Appeal of Tanzania found that, as the appellant was not served with audit report before the disciplinary hearing commenced, it was irregular as he could have not managed to prepare his defence. She also cited the case of **KCB (T) Limited V. Dickson**

Mwinuka Revision No. 45 of 2013 where a right to be heard was emphasized.

As for the third issue which states whether writing exhibit Tanesco 1 the respondent was not duty bound to prove the charge levelled against the applicant the counsel for the applicant submitted that, the respondent was still duty bound to prove charges levelled against the applicant. She argued that, even if there has been established possibility of the applicant being negligent in performing his duty, suspected negligence which was not proved cannot be a fair and valid ground to warrant termination of hie employment.

To support her submission the counsel for the applicant referred the court to section 37 (1) and (2) (a) and (b) of the ELRA where it was stated that, it shall be lawful for the employer to terminate the employment of an employee but the employer is duty bound to prove termination was made on fair and valid reason and fair procedure was adhered. She went on arguing in relation to the relief of reinstatement sought by the applicant and its alternative remedy and supported the same with the case of **Elia Kasalile and 17 Other V. Institute of Social Work,** Civil Application No. 187 of 2018 which emphasized about the use of discretionary power of the court and

arbitrator judiciously in issuing an award. At the end she prayed for the CMA award to be revised.

In his reply the counsel for the respondent, submitted that, the Arbitrator did not error in facts or in law to hold the termination of employment of the applicant was fair. She stated that is due to the fact that, the applicant himself admitted that the loss occurred during his leadership, and that it was due to negligence which was resulted by him mixing up the daily collections instead of separating them on a daily basis. He argued further that, the applicant defended himself by saying that he found that practice there and he never changed it.

The counsel for the respondent submitted that, the applicant being an accountant for not less than 21 years until the time of his termination, the respondent believed he was competent enough and he knows the required standard operating procedures. She stated that, a mere admission that there was an abnormal practice which he found going on at his station of work and he did not change the same, it shows he was negligent. All these resulted towards the decision to terminate his employment hence the arbitrator was right to find termination of the applicant's employment was fair. In supporting her argument, she cited the case of **Nickson Alex Vs.**

Plan International, Labour Revision No. 22 of 2014, High Court of Tanzania, at Dar es salaam, (unreported) where the court dealt with the issue of unfair termination of an employee.

As for the issue which states whether the arbitrator erred in facts or in law to hold the procedure followed in terminating the applicant's employment was fair by ignoring the different testimonies and on the allegation that no investigation was conducted; the counsel for the respondent submitted that, it is clear on records that when the applicant was required by Auditors to explain what transpired at his station of work, he clearly admitted that, the said anomalies had occurred. She stated the applicant stated further that, the said anomalies were caused by non-closure of the end of the day collections. He stated that, the said omission caused the loss which he admitted to have occurred under his leadership and he promised to pay.

What followed after the applicant failed to honour his promise, was for him to be charged on the 4th December, 2012 as per the charge sheet filed by the respondent before the disciplinary hearing committee which he begs to make reference to the same for clarity. He stated that on the 10th December, 2012 is when the applicant

replied to the charges and came up with an afterthought explanation which could not suffice since most of his answers were mere justifications which did not hold water. He submitted that, the disciplinary hearing was conducted and the applicant was found guilty of the offence levelled against him.

As for the allegation that he was not given the Auditors reports, the counsel for the respondent argued that, from when the applicant was informed the loss and asked to explain what happened, he admitted the loss. She stated that, the allegation that he was condemned unheard is not true because he was afforded the right of being heard from the outset. She stated further that, from the time the audit was conducted to the date of suspension he was in the office for 2 months. She submitted that, if there was anything the applicant wanted to put right, he had an ample time to request for the same to be put right.

Concerning exhibit Tanesco 1, the counsel for the respondent argued that, after being written the respondent was not duty bound to prove the charges against the Applicant. He submitted that, the Applicant's advocate forgot that her client admitted that the mistake happened, and that he was ready to pay the occasioned loss. By

admitting that the loss had really occurred, and by even promising to pay it means that the offence was committed, and the charge was aimed at asking him to explain why strict measures should not be taken against him.

Being charged with a disciplinary offence does not mean that he was accused, but rather that there was an offence and he had to explain why he should not be punished. She was of the view that when a person has admitted that he has done an offence then no need for proving a charge leaving alone conducting disciplinary hearing, but the Respondent herein afforded the applicant chance to be heard and found him guilty. To support her submission, she referred the court to the case of **Nickson Alex V. PLAN International**, HCLD Revision No. 22 of 2014 (unreported). At the end the counsel for the respondent prayed the application be decided against the applicant. In his rejoinder the applicant reiterated most of what he argued in his submission in chief.

The court has carefully gone through the submission filed in this court by the counsel for the parties. It has also gone through the record of the matter and the grounds of revision presented to the court by the applicant. The court has found the issues for

determination in the present application is whether the applicant's termination was both substantively and procedurally fair and what reliefs are the parties entitled. Fairness of termination of employment of an employee by an employer is governed by section 37(2) of the ELRA which states as follows:-

> *"A termination of employment by an employer is unfair if the employer fails to prove:-*
>
> *(a) That the reasons for 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."*

The position of the law as provided under section 39 of the ELRA is very clear that, once there is an issue of unfair termination of employment of an employee by the employer the duty to prove reason for termination of employment of an employee was valid and fair lies to the employer. The position of the law stated hereinabove has been emphasized in range of cases, one of them being **Amina Ramadhani V. Staywell Apartment Limited,** Revision No. 461 of 2016, High Court Labour Division, at Dar es Salaam cited by this

Court in the case of **Boni Mabusi V. The General Manager (T) Cigarette Co. Ltd.,** Consolidated Revision No. 418 and 619 of 2019).

That being the position of the law the court has found in relation to the present application that, the applicant was terminated from his employment on the ground of committing the offence of serious misconduct of under banking daily collections from the respondent's customers which resulted into the respondent to suffer a loss of TZS 9,759,747.41. The evidence adduced before the CMA by the respondent to prove the stated offence was the evidence of five witnesses who also tendered eighteen documentary exhibits to support their evidence. In rebuttal the respondent testified himself.

As stated earlier in this judgment the trial Arbitrator found termination of employment of the applicant was both substantively and procedurally fair and dismissed the applicant's dispute. The question to determine here is whether the trial Arbitrator was correct in arriving to the stated decision. The court has found the counsel for the applicant argued the trial Arbitrator was wrong in arriving to the stated decision as there was no witness brought before the

disciplinary hearing held at Mkuranga or before the Disciplinary Hearing held at the regional level to prove the alleged misconduct.

The court is in agreement with the counsel for the applicant that, as stated earlier in this judgment it is the requirement of the law as provided under section 39 of the ELRA that, an employer is required to prove termination of employment of an employee was fair. The court is also in agreement with the counsel that, as provided under Rule 13 (5) of the GN. No. 42 of 2007, evidence in support of the allegations against the employee is required to be presented at the hearing.

That being the position of the law the court has found that throughout the record of the matter there is nowhere stated there was witness or witnesses called before the disciplinary hearing committees which heard the applicant's case to prove the misconduct levelled against the applicant as required by Rule 13 (5) of the GN. No. 42 of 2007 cited hereinabove. The above finding is supported by the evidence adduced by DW4 who said before the CMA that there was no witness called before the disciplinary committees to prove the offence leveled against the applicant. The court has considered the argument by the counsel for the respondent that as the applicant

admitted the alleged misconduct in exhibit Tanesco 1 and promised to pay the loss there was no need of calling witness to prove the said misconduct but failed to agree with her submission.

The court has arrived to the above finding after seeing that, although it is true it is stated in the case of **National Microfinance Bank PLC V. Andrew Aloyce,** [2013] LCCD 84 that where an employee has admitted misconduct there is no need for the employer to call witness to prove the misconduct but in the present case there was no clear admission of the alleged misconduct made by the applicant which can be said would have not require evidence to prove the same. The court has arrived to the above finding after seeing that, although the respondent's witnesses said the applicant admitted the alleged misconduct and support their evidence with what is stated in exhibit Tanesco 1 but after going through the said exhibit the court has failed to see a clear admission of the alleged misconduct by the applicant.

The court has found what can be said was admitted by the applicant in the said exhibit Tanesco 1 is the occurrence of the loss and the promise by the applicant to pay the loss as he was the leader of the station where the loss was discovered and not admission that

he caused the loss. The court has found that, under that circumstances there was a need for the evidence to be adduced by the respondent before the disciplinary hearing committees to prove the loss alleged was caused by the applicant before reaching the decision to terminate her employment.

The court has arrived to the above finding after seeing that, as rightly argued by the counsel for the applicant it was not clear as to what actual loss was discovered by the Auditors went to audit the station of the applicant. The court has found that, as rightly argued by the counsel for the applicant some of the witnesses testified before the CMA were not consistent about the actual loss discovered at the station of the applicant as while PW1, PW3 AND PW4 said the loss was Tshs. 9,759,747.41 but PW2 and PW4 said the loss was Tshs. 12,436,752.96. That caused the court to find the argument by the counsel for the respondent that there was no need for calling witnesses to prove the misconduct levelled against the applicant cannot be relied upon to find there was no need of evidence to prove the alleged misconduct.

Coming to the argument of mixing up the daily collections, the court has found the alleged shortfall could have not been a reason of

causing the loss discovered in the auditing conducted at the applicant station of work. The court has arrived to the above view after seeing that, it is true that the applicant stated there was mixing up of the collection of different dates as appearing in exhibits Tanesco 1, Tanesco 6, Tanesco 8 as well as in his defence he adduced before the CMA. He also stated the alleged loss was caused by the act of not drawing lines to differentiate the dates.

However, the court has found that as rightly argued by the counsel for the respondent the applicant would have not admitted there was the alleged loss at his station of work and promised to pay the same if he believed there was no loss at his station of work. Besides, the court has found that, as rightly argued by the counsel for the respondent if the problem was omission to draw the line which would have differentiated the collections of each day the applicant had an ample time to rectify the stated problem and reported the same to his employer from when the audit was conducted but he didn't do so until when he was suspended from his employment and later on terminated from his employment.

The court has also considered the other shortfalls raised by the applicant relating to the practice of work at his station of work of not

drawing the line to differentiated the collection of a day and lack of transport as reasons for the cause of the discovered loss but failed to see how the said shortfalls would have been reasons or justification for the discovered or alleged loss. It is the view of this court that, if the applicant was doing his work properly not negligently, the alleged loss would have not occurred at his station of work or he would have been able to show where the money collected in the audited period of time were kept if were not banked and caused the alleged under banking.

The court has considered the argument relating to the promise of the applicant to pay the loss discovered at his place of work as appearing in exhibit Tanesco 1 and find that, it is true that the applicant promised to pay the loss by the end of the year 2012. The said promise was accepted by the respondent through exhibit Tanesco 3. However, before the end of the year 2012 the applicant was suspended from his employment and charged with the offence of serious misconduct which resulted into the alleged loss and thereafter, he was terminated from his employment.

Although it is true as argued by the counsel for the respondent that up to when the applicant was suspended from his employment

he had not paid any part of the loss he promised to pay but the court is of the view that, as the parties had agreed the loss would have been paid at the end of the year it was not proper for the respondent to suspend the applicant and charged him with the offence relating to the loss he had promised to pay while the respondent had already accepted the applicant's promise to pay the loss. The court has come to the stated view after seeing that, the applicant made the promise on 2nd October, 2012 to pay the loss by the end of the year 2012 but he was suspended from his employment on 4th December, 2012 which was after passing only two months and it was before the end of the year 2012 when he had promised to pay the alleged loss.

The argument by the counsel for the respondent that the charge was not intended to accuse the applicant but to ask him to explain why strict measures should not be taken against him has been found by the court has no any merit as there is no law supporting the same. To the contrary the court has found the respondent violated what they had agreed with the applicant. The above stated view of this court is getting support from the case of **Hotel Sultan Palace Zanzibar V. Daniel Laizer & Another**, Civil Application No. 104 of 2004, where it was stated that, the employer and employee are

supposed to be governed by what they have agreed and they are not left freely to do as they wish in relation to the terms of their agreement.

The court has also found that, although it is true that the applicant admitted there was a loss occurred at his station of work and promised to pay the same but there was no direct evidence tendered before the CMA to show the applicant took the money which caused the alleged loss to the respondent as alleged by the respondent's witnesses. To the contrary the court has found that, as stated by the applicant in the defence he adduced before the CMA and supported by the evidence of DW4 he admitted the loss and promised to pay the same as he was the leader and the loss had occurred at his station of work.

The court has found that, despite the fact that the applicant admitted the loss discovered at his working station and promised to pay the same but the stated misconduct was not sufficient enough to justify termination of his employment. The court has arrived to the above finding after seeing that as stated by DW4, it was the first misconduct to be committed by the applicant and he was associated

with the loss discovered as he was the leader at the station of work where the loss was discovered.

As the applicant had promised to pay the loss and the respondent had accepted his promise the court has found it cannot be said the misconduct was so serious to the extent of making his employment relationship with the respondent intolerable to the extent that they could have not continued with their relationship. The above view of this court is getting support from Rule 12 (2) of the GN. No. 42 of 2007 which states that, there are some circumstances where a first offence of an employee cannot justify termination of his or her employment unless it is proved that the misconduct is so serious to the extent of causing a continued employment relationship intolerable.

After finding the applicant was a first offender and he admitted the loss discovered at his place of work and promised to pay the same the court has found that, the respondent was required to take into consideration the factors provided under Rule 12 (4) of the GN. No. 42 of 2007 to look for an alternative sanction to be imposed to the applicant instead of terminating his employment. To the view of this court the respondent could have warned the applicant and give

him time to pay the loss as he had promised to pay the same or give him any other sanction which might have been seen is appropriate.

As the court has found the procedure of termination of employment of the applicant was not fair as there is no proof that there was proper hearing conducted before the disciplinary hearing committees to establish the applicant committed the alleged misconducted and the applicant was terminated from his employment without considering the requirement provided under Rule 12 (2) and (4) of the GN. No. 42 of 2007 the court has found it cannot be said termination of his employment was substantively made on fair and valid reason. In the premises the court has found termination of employment of the applicant was both substantively and procedurally unfair.

Coming to the reliefs the parties are entitled the court has found the applicant sought to be reinstated in his employment. After taking into consideration the time which has passed from when the applicant was terminated from his employment to date the court has found about nine years has passed. To the view of this court, it is not appropriate to order the respondent to reinstate the applicant in his former position of his employment as he sought in the CMA F1.

The court has arrived to the stated view after seeing there is a great possibility that, the position he was holding might not be available from that period of time to date. There is a possibility that the position he was holding has already been filled by another employee. In the premises the court has found an appropriate order which can be made by the court is to order as provided under section 40 (1) (c) of the ELRA that, the applicant be paid compensation for unfair termination of his employment in lieu of being reinstated in his employment as he prayed in the CMA F1.

Consequently, the application of the applicant is hereby granted by finding that, termination of employment of the applicant was procedurally and substantively unfair. In the premises the award of the CMA is hereby quashed and set aside. In lieu thereof the court is ordering the applicant to be paid compensation of twelve months salaries for unfair termination of his employment.

As the evidence available shows the salary of the applicant was Tshs. 1,346,973.00/= per month, he will be paid Tshs. 16,346,973/= being twelve months salaries as a compensation for unfair termination of his employment. He will also be entitled to be paid

terminal benefits stated in the letter of termination of his employment if he has not been paid. It is so ordered.

Dated at Dar es Salaam this 04th day of March, 2022.

I. Arufani
JUDGE
04/03/2022

Court: Judgment delivered today 04th day of March, 2022 in the presence of the applicant in person and in the absence of the respondent. Right of appeal to the Court of Appeal is fully explained.

I. Arufani
JUDGE
04/03/2022