IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 948 OF 2018

BETWEEN

ROCKSON KOMANGA..... APPLICANT

AND

MKOMBOZI COMMERCIAL BANK..... RESPONDENT

JUDGMENT

Date of Last Order: 18/09/2020

Date of Judgment: 16/10/2020

A. E. MWIPOPO, J

Rockson Komanga, who is the applicants herein, has preferred this Revision application against the decision of the Commission for Mediation and Arbitration in labour complaint no. CMA/DSM/KIN/R.470/2017 which was delivered on 2nd November, 2018 by Hon. Kachenje, Arbitrator. The applicant is praying for the Court to make the following orders:-

1. That this Court may be pleased to call for the records of proceedings of the Commission for Mediation and Arbitration in Labour Complaint No. CMA/DSM/KIN/R.470/2017, for the purpose of

satisfying itself to the correctness, legality or propriety of the decision by Hon. Kachenje J.J.Y.M., Arbitrator, dated 2nd November, 2018.

2. That, this Court be pleased to revise the above stated decision and set it aside.
3. That, this Court be pleased to clarify on the payment of the Applicant's been reinstated with all employment rights or remuneration and other benefits from the date of unfair termination to the date of reinstatement or to final payment of compensation for unfair termination.
4. That the Court may revise the proceedings and make such order as it deems fit.

The background of the dispute in brief is that: the Applicant was employed by the Respondent namely Mkombozi Commercial Bank PLC on 24th September, 2013 to the post of Loan Officer. The Applicant was terminated from the employment for misconduct on 24th May, 2017 following the disciplinary proceeding hearing held on 19th April, 2017 and the decision on appeal dated 3rd May, 2017. Dissatisfied by the applicant's decision the respondent referred the dispute to the CMA where the Commission dismissed

the complaint. Aggrieved by the CMA decision the applicant filed the present application for revision.

At the hearing of the application both parties were represented. Mr. Patrick David, Advocate, appeared for the applicant, whereas Mr. Oswald Mpangale, Advocate, appeared for the respondent.

Mr. Patrick David submitted in support of the application that the termination of the Applicant's employment was procedurally not fair for failure to follow procedure during disciplinary hearing. The applicant was suspended through a letter dated 23rd February, 2017, which was written by Mr. Simon Luoga who was Respondent's Human Resources Manager. The letter of calling the Applicant back to work was written by the same person on 28th March, 2017. The Applicant was required to give explanation as to why he should not be charged for the disciplinary hearing by a letter dated 30th March, 2017, which was written by the same Mr. Simon Luoga.

Further, the letter of invitation for the Applicant to attend disciplinary which is dated 15th April, 2017, was written by the same person and the same person Mr. Simon Luoga appeared during disciplinary hearing as prosecutor on 19th April, 2017. Mr. Luoga confirmed it during his testimony that he prepared all documents regarding disciplinary charges, he

prosecuted the disciplinary charges against the Applicant and also testified as witness before the Disciplinary Committee. All of these are against the principles of natural justice that no man can be the Judge of his own case.

The Applicant submitted further that the disciplinary charges against him kept changing in every stage of disciplinary process. That according to Exhibit Rock 3 he was suspended for misappropriation of bank fund amounting to 438,132,607 shillings. The disciplinary charges – Exhibit MB6 contained new charge of causing loss to the employer, and in the appeal recommendations the Chairman of the Disciplinary Committee added the charge of dishonesty. In the appeal stage before the Board the Applicant was not given right to defend. In the appeal as shown by part 2 of the hearing form, the Applicant stated that the Chairman of Disciplinary Committee was not impartial as he was involved in the investigation procedures. Also other member of the Disciplinary Committee Mr. Mutalemwa who was head of IT was not impartial as the Applicant in his defence he stated that the bank systems was not working properly. Thus, Mr. Mutalemwa has interests in the case.

In the disciplinary hearing, the charges were not proved as there is no record of any witness who testified. The hearing form is silent as to the calling of witnesses and the Applicant did not get chance to cross examine

them. This is contrary to Rule 13(5) of G.N. No. 42 of 2007 which requires for the employer to bring evidence and witnesses during disciplinary hearing and the employee to be given opportunity to cross examine them. The Applicant was not given opportunity to mitigate after he was found guilty before the decision to terminate him was imposed which is contrary to Rule 13(7) of the G.N. No. 42 of 2007.

The Applicant argued further that the respondent failed to prove in the disciplinary hearing and before the Commission that there was fair reason for termination. Mr. Luoga testimony was hearsay as he has knowledge of finance and there was no bank policy and procedure which were tendered. Also investigation report and audit reports were not tendered. There was no details provided in the alleged misappropriated account and Mr Luoga admitted in cross examination that there was no loss of cash. The Arbitrator erred to hold that the Applicant contravened the laid down bank standards, rules and procedures while they were not tendered as exhibit.

The Applicant stated that he was not paid repatriation cost or any terminal benefits as stated in the termination letter. Thus, he has to be paid the benefits stated in the termination letter plus subsistence allowance to the tune of monthly salary for the whole period he was not paid repatriation

cost. Also he prayed to be paid compensation of 24 months' salary for unfair termination or to be re-instated.

The Respondent replied to the Applicant submissions. The respondent stated that the Exhibit RO 3 – letter for suspension was for the purpose of informing the Applicant of his suspension prior to investigation of the misconduct. The Exhibit MB 3 was charge sheet which demonstrated the misconduct by the Applicant. The charge sheet mentioned the list of Exhibit which were attached to it. The assertion that there was a new offence during disciplinary hearing is not true. In part II of the hearing form – Exhibit MB 6, the Chairman of the Disciplinary Committee was mentioning the areas to be considered in convicting and punishing the employee. The termination letter – Exhibit MB7 shows that the termination was due to misconduct in the disciplinary hearing.

The hearing Form – Exhibit MB6 does not show that the witness testified. The same was not challenged in the CMA or pleaded in the Affidavit because the witnesses testified before the Disciplinary Committee. But, the same was not recorded in the Hearing Form. The Applicant also did not raise the issue of the right of the Applicant to cross examine the witness during disciplinary hearing and before the Commission hence it is a new fact. The Applicant was given opportunity to give his mitigation as it is witnessed in

the item 10 of the Hearing Form. The Chairman of the Disciplinary hearing and Yordan Mwitalema had no interest wit bank system as alleged by the Applicant hence they have no interest in the disciplinary hearing. There is no evidence that bank system has some problem. The issue was raised for the first time in the grounds of appeal.

It was argued further by the Respondent that Mr. Simon Luoga –DW1 appeared before the disciplinary hearing as witness. He was not a prosecutor as alleged by the Applicant. DW1 testimony was not a hearsay evidence. The allegation was raised for the first time by the Applicant during the submission. It was not raised during hearing of the complaint before the Commission or contained in the Applicant's Affidavit. The Respondent prays for the same to be disregarded as the Applicant had an opportunity to cross examine the witness while testifying before the Commission to impeach his evidence but he did not do so.

Regarding the Applicant's allegation that no bank policy, rules or standard procedures which were tendered, the respondent argued that the Applicant was a senior officer at the branch who is expected to exercise high due diligence in daily performance. The Exhibit MB3 collectively contained the reports on the investigation. Exhibit MB3 was served to the Applicant who replied through Exhibit MB4. Thus, the investigation was conducted and

its report was given to the Applicant. The Arbitrator award was proper as it was delivered after hearing the parties and analysed the evidence before it.

On the prayers by the Applicant, the Respondent submitted that the prayers are improper. Some of the remedies prayed can't be granted save for those provided in the termination letter. Then, the Respondent prayed for the application to be dismissed for lack of merits.

In rejoinder, the Applicant retaliated his submission in chief. He further insisted that in the Hearing Form – Exhibit MB6 item 9A the Applicant in his defence included the weakness in the bank system (BR Net) hence there was conflict of interest with the presence of the Head of IT to be member of Disciplinary Committee. The witness DW1 was impeached during cross examination on his testimony on issues of finance. The Hearing Form contained a new offence of causing loss to the employer for payment of fake loans which was not among the offence in the charge sheet. Also, there is no evidence to prove that the appeal was heard and the result was communicated to the Applicant.

From the submissions, the issues for determination are as following hereunder:

i. Whether there was valid reason for termination of Applicant's employment.

ii. Whether the procedure for termination was fair.

iii. What remedies are available to the parties?

In regards to the first issue, the Employment and Labour Relations Act, 2004 provides in section 37 (1) provides 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. It is the duty of the employer to prove that the termination of employment is fair. And for the termination of employment to be considered fair it should be 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".*

In this application, the Applicant submitted that there is no evidence in record to prove that the reason for termination was valid and fair. In

contention the Respondent submitted that the evidence available in record proved that the Applicant approved a list of Sahara Media Group employees with personal loan which was sent to the client namely Sahara Media Group. The list contain forged credit facilities (loans), overstated loan repayments, underrated (understated) loan repayments, undisclosed loan, charging lower interest rates for some loans and misuse of clients' money (Sahara Media Group) in payment of loans not in the client's list.

The evidence available in record shows that the Applicant who was Respondent's Mwanza Branch Credit Supervisor approved a list of 414 employees of Sahara Media Group who took loan from the Respondent – Exhibit MB3. The list was prepared by Credit Officer namely Joel Athanas Mgwesa – PW2 who was credit officer of the Respondent's Mwanza Branch. The PW1 testified before the Commission that he approved the list despite the fact that he was informed by PW2 that 7 employees who are in the list their loans were not processed for the reason that their forms have some anomalies. Further, the Applicant testified in defence before the Disciplinary Committee and before the Commission that there was some problems with banking systems at the material time which was caused by the maintenance of the respective system. The Applicant stated during cross examination that he did not report to the management banking system problems. I'm of the

opinion that this evidence prove that the Applicant was negligent to approve the list without satisfying himself to the correctness of the report.

The Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007, provides in rule 12 (1) (a) that the court shall consider whether or not the employee contravened a rule or standard regulating conduct relating to employment in deciding if the termination for misconduct is unfair. In the present application the Applicant in his testimony he stated the standard procedure to be followed before issuing a credit facility to client. Thus, he was aware of the Respondent's standard procedures of operation. This evidence prove that the Applicant was aware of the standard procedure regulating credit facilities considering the fact he was senior officer of the Respondent. The gross misconduct is among the offence which may justify termination according to Rule 12(2) of the G.N. No. 42 of 2007. The Arbitrator held that the Acts of the Applicant could have caused the client to lose trust in the bank, the holding which I support. Thus, the Applicant misconduct was gross and as result I find that there was valid and fair reason for terminating the Applicant's employment.

The second issue for determination is whether the procedure for termination was fair. The Employment and Labour Relations Act, 2004, provides in section 37 (2) (c) that the termination is unfair if the employer

fail to prove that that the employment was terminated in accordance with a fair procedure. The section is read together with Rule 13 of the G.N. No. 42 of 2007 which provides for the procedure of termination for misconduct.

The Applicant submitted that procedure for termination was no adhered in total during disciplinary hearing. He stated that the respondent did not furnish him with the investigation report, the witnesses were not called to testify, he never cross examined the witnesses, he was not given opportunity to mitigate after he was found guilty of the offence, he was no heard on appeal, termination letter contains no reason for termination and that the Chairman and one member of the disciplinary committee had interest hence the committee was biased. The Respondent submitted that all procedure for termination were adhered and the members of the Disciplinary Committee have no interest with the matter before them.

The evidence available in record show that on the 30th March, 2017, the Applicant was served with charges for disciplinary hearing which was attached with several documents. All those document were information of in support of the charges. These documents were sufficient to prove that investigation was conducted to ascertain whether there are grounds for a hearing to be held. Thereafter, the Applicant was invited through a letter

dated 15th April, 2017 – Exhibit MB5 to attend disciplinary hearing which was held 19th April, 2017.

The Applicant argued that the witnesses did not testify during disciplinary hearing as result his right to cross examine them was denied. The Respondent submitted that the witness testified but it was not recorded in the Hearing Form – Exhibit MB6. I read Exhibit MB6 which as submitted by both parties it does not show at all if Respondent's witnesses testified and if the Applicant did get opportunity to cross examine them. This is contrary to Rule 13(5) of the G.N. No. 42 of 2007. The Respondent was of the view that the same was not an issue before the Commission and was not stated in Applicant's affidavit, but there is evidence in record for this Court to determine the matter which is Exhibit MB6.

The Hearing form – Exhibit MB6 shows in the last statement of item 10 that the Applicant was given opportunity to mitigate after he was found guilty of the misconduct charged, however the mitigation put forward by the Applicant were not recorded. It is my opinion that failure to record the employee's mitigation is the same as failure to give him opportunity to mitigate. The reason is that the Appellate body, CMA and the Labour Court will miss the opportunity to know the respective mitigation if was sufficient to warrant reduced penalty.

The Applicant alleged that two members of the Disciplinary Committee have interest in the case. However, there is no proof that the Chairman of the Committee and the Head of IT of the bank had any interest in the case. Also, the allegation was raised for the first time in the reason for appealing against Disciplinary Committee decision after he was found guilty. It is not stated as to why the Applicant did not raise the issue before the commencement of the disciplinary hearing. Also, the available evidence shows that the Applicant's appeal was held. But, the decision on appeal was communicated through termination letter – Exhibit MB7. The said termination letter does not contain reasons for the termination which is contrary to Rule 13(10) of the G.N. No. 42 of 2007. Therefore, I find that the procedure for termination was not adhered and as result the termination is unfair procedurally.

The last issue for determination is what are remedies to the parties? It is in record that the termination letter provided that the Applicant will be entitled to Tshs. 1,648,333 being salary due for the work done before termination, Tshs. 576,917 for seven days accrued leave, Tshs. 3,438,000 being transportation cost for personal effects from Mwanza to Dar Es Salaam and Tshs. 250,000 for transport fair. The evidence available shows that the terminal benefits were not paid to the Applicant. I order for the Respondent

to pay the respective terminal benefits as provided in the termination letter. Further, as it was held that the termination was unfair procedurally, the Respondent has to pay the Applicant six months' salary compensation for unfair termination which the amount is Tshs. 14,835,000/=.

The Applicant prayed to be paid the substance allowance to the tune of monthly salary to the whole period the Applicant was not paid repatriation cost from the date of termination to the date of payment of the transportation cost. Section 43(1) (c) provides that where an employee's contract of employment is terminated at a place other than where the employee was recruited, the employer shall pay the employee daily subsistence expenses during the period, if any, between the date of termination of the contract and the date of transporting the employee and his family to the place of recruitment. However, there is no evidence which prove that the Applicant is still in Mwanza. Even the CMA typed proceedings shows in page 1 that the Applicant prayed for the complaints to be heard by CMA at Dar Es Salaam for the reason that the Applicant is now living in Dar Es Salaam after he was terminated from employment. Therefore, there is no justification for the Applicant's prayer to be paid subsistence allowance from the date of termination to the date of payment of repatriation cost. Thus, I order that the Respondent to pay 6 months' salary equal to Tshs. 14,835,000

to the Applicant being Applicant's subsistence allowance. Thus the Respondent has to pay a total of Tshs. 35,583,250/= to the Applicant.

Consequently, the CMA Award is hereby set aside. Each party to the application to cover its own cost of the suit.

A. E. MWIPOPO
JUDGE
16/10/2020