IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

CONSOLIDATED REVISION NO. 891 AND 933 OF 2018

BETWEEN

NATIONAL BANK OF COMMERCE LTD.................................. APPLICANT

AND

JANE KASAMBALA.. RESPONDENT

JUDGMENT

Date of Last Order: 19/02/2021
Date of Judgment: 05/03/2021

A. E. MWIPOPO. J

This consolidated revision application is filed in this Court against the decision of the Commission for Mediation and Arbitration (CMA) which was delivered on 30/10/2018 by Hon. Mwalongo, Arbitrator. Both Jane Kasambala, the employee who, was plaintiff at the CMA and National Bank of Commerce Limited, the employer, who was respondent at the CMA, filed Revision applications before this court against the decision of the CMA in labour dispute no. CMA/DSM/ILA/R.1060/16. Employer instituted Revision no. 891 of 2018, whereas employee instituted Revision no. 933 of 2018.

Both Revision application were made under section 91(1) (a) (b), (2) (a) (b) (c) and section 94 (1) (b) (i) of the Employment and

Labour Relations Act, No. 6 of 2004 and Rule 24 (1), (2) (a) (b) (c) (d) (e) (f), (3) (a) (b) (c) (d) and Rule 28 (1) (c) (d) (e) of the Labour Court Rules, GN No. 106 of 2007.

The grounds for revision in Revision no. 891 of 2018 were as follows;

i. That the Arbitrator erred in law and fact by holding that the termination was unfair only on the ground that the respondent was not given investigation report.
ii. That the Arbitrator erred in law and fact to put into consideration that the respondent was also found guilty basing on her admission of the charge.
iii. That the arbitrator erred in law and in fact failing to award appropriate remedy.

In Revision no. 933 of 2018, the grounds for revision were;

i. That the Honorable Arbitrator decision and findings that the termination was substantively fair is not supported by evidence on record.
ii. That the Arbitrator erred in law and fact for failure to address and decide on all issues raised by the applicant.
iii. That the arbitrator erred in law to hold that the applicant had power to defy her manager's orders and instructions.

iv. That the Honorable Arbitrator erred in law in using a distinguishable precedent in arriving to a decision that the respondent had a fair reason to terminate the applicant.

The briefly background leading to the present application was that, Respondent was employed by the Applicant in 1983 as a Personal Secretary up to 01/11/2016 when she was terminated for misconduct. At the time of termination, she was holding a position of Customer Experience Officer. Dissatisfied with the Arbitrator's decision the employee filed the matter at CMA which delivered its award on 30/10/2018. The CMA award aggrieved both parties and each filed Revision application in this court. Employer filed application for Revision no. 891 of 2018, whereas an employee instituted Revision no. 933 of 2018.

The above-mentioned revisions were consolidated on 04/03/2020 via this Court's Order, after the parties' consent to the said consolidation.

At the hearing of the consolidated revision employer was represented by Mr. Innocent Mushi Learned Counsel while employee was represented by Ms. Kulwa Shilemba Learned Counsel and the hearing was proceeded *Viva Vorce.*

Mr. Mushi prayed to adopt the affidavit of Sweetbert Mapulo in Revision No. 891 of 2018 and counter affidavit of Sweetbert Mapolu in Revision No. 933 of 2013 to form part of his submission. Then he submitted ground no 1 and 2 jointly that the arbitrator erred to hold that the termination was unfairly on the ground that the Respondent was not given investigation report while all procedure where adhered. He stated that since the Applicant admitted to commit the misconduct and the arbitrator was right to hold that the termination was substantively fair.

Mr. Mushi submitted that the basic procedures for termination are well provided under Section 38 of the Employment and Labour Relation Act, (herein referred as ELRA), read together with Rule 23 and 24 of the Employment and Labour Relations (Code of Good Practice) Rules, G.N No. 42 of 2007. He added that in this matter all procedures in terminating respondent were followed. Thus, investigation report was not among the basic procedure for termination to be followed bearing in mind that the respondent admitted the offence.

On 3rd ground regarding remedies, Mr. Mushi Submitted that since the reason for termination was fair basing on employee admission that she committed the disciplinary offence and basic

procedures for termination were adhered, then the termination was fair. Thus, the arbitrator erred in law in awarding 12 month's salary in relation to degree of unfairness regarding procedure for termination. To support his argument, he cited the case of **Felicia Rutwaza v. World Vision Tanzania**, Civil Appeal No. 213 of 2019, CAT at Bukoba (unreported). Thus, he prayed for the application to be allowed and dismissal of Revision no. 933 filed by the employee.

In reply, regarding 1st and 2nd grounds of revision, Ms. Kulwa Shilemba submitted that Section 38 of the Employment and Labour Relation Act, 2004 and Rule 23 and 24 of G.N No. 42 of 2007 are not applicable in this case. She stated that the relevant provision is rule 13 of the G.N No. 42 of 2007. The Arbitrator rightly held that the termination was procedurally unfair for failure to give the employee investigation report before disciplinary hearing on the ground that failure to furnish the report to the employee is the infringement of employee natural justice. In strengthening her submission, she cited different cases including the case of **Mutegeki and Another v. Mamlaka ya Maji na Usafi Wa Mazingira Mjini Dodoma** {DUWASA}, Civil Appeal No. 343 of 2019, CAT at Dodoma.

Ms. Kulwa Shilemba submitted further that the respondent admission regarding the approval of her Senior Officers in paying the

customer who his/ her signature was not endorsed in the system does not mean employee admitted the offence as was testified by DW-2. She added that there is nothing showing that the employee admitted to commit the disciplinary offence. To cement her argument, she cited the case of **NBC v. Leila Mringo and 2 Others**, Civil Appeal No. 30 of 2018, Court of Appeal of Tanzania at Tanga, (Unreported).

Regarding the remedies, she submitted that Section 40 of Employment and Labour Relation Act, 2004 gives discretion to the Arbitrator to award compensation to the employee on unfair termination for a period of not less than 12 months. Therefore, the Arbitrator awarded the minimum remedy for unfair termination.

Thereafter, Ms. Kulwa proceeded to submit on the grounds of revision in Revision No. 933 of 2018. She prayed to adopt the affidavit of Jane Kasambala to form part of the submission. Then, she submitted on the first ground that the Hon. Arbitrator erred in law to hold that the termination was substantively fair without supporting evidence. The employer failed to prove that there was offence of gross negligence committed by the respondent as the NBC Disciplinary and Grievance policy which it is alleged that was infringed by the employee was not tendered before CMA to justify the alleged

offence. Also, there is witness who testified for the same and the Respondent confirmed the cheque based on her supervisor instructions during the performance. Thus, the Arbitrator erred in law by holding that the employee admitted to commit the offence while she did not. In supporting her argument, she cited different cases including the case of **Multi Choice Tanzania Ltd v. Felix Nyari,** Revision no. 9 of 2018, High Court, Labour Division at Mbeya (unreported). She averred further that DW-1 and D-5 at page 7 and 5 shows that the employee confirmed only 3 cheques but she was charged for confirming several other checques which were confirmed by other employees. On such stand, the arbitrator erred to hold that the employee committed the offence of gross misconduct as stated at page 11 of the CMA's award while she confirmed only 3 cheques for shilling 14.6 million only.

Regarding the second issue the employee's counsel submitted that the arbitrator erred in law by not determining the actual amount of loss caused by the respondent whether is Shillings 44 million or 14.6 million, hence reaching a wrong decision by holding that there was a valid reason for termination. The Inquiry Report and the testimony of DW-1 shows that Supervisor and Branch Manager have never been questioned to establish whether they approved the

respondent to confirm payment of the respective cheques. Thus, she is of the opinion that by failure to question the witness the Court should draw adverse inference regarding the allegation. To support her position, she cited the case of **Hemed Said v. Mohamed Mbilu** (1984) TLR.

She further argued that the Arbitrator failed to address the issue whether the authority terminated the respondent was proper or not. The testimony of DW-1, DW-2, DW-3 and PW-1 shows that Geofrey Ndoso who was a Chairman of Disciplinary Committee is the one who signed the termination letter (Exhbit D-3). This is contrary to G.N No. 42 of 2007. She added that the Arbitrator erred to hold that the employee was not supposed to confirm payment of cheque even if it was authorized by Supervisor and Branch Manager as she had a right to reject to do something which is not right without considering that failure to do so amount to insubordination.

Further, Ms. Kulwa Shilemba submitted that the Arbitrator relied in the case of **NMB PLC v. Andrew Loyce,** Rev. No. 1 of 2013, High Court Labour Division at Musoma (unreported), where the disciplinary offence was dishonesty in the banking industry while in the present case the disciplinary offence is gross negligence. There are circumstances where gross negligence does not warrant termination.

To support her argument as it was in the case **NMB v. Victor Bunda,** Revision No. 16 of 2015, High Court, Labour Revision at Tanga (unreported).

Finally, Ms. Kulwa stated that the Arbitrator has discretion to give appropriate award where the termination was not fair substantively and procedurally. She prays for the employee to be reinstated without loss of renumeration. In support of the prayer the counsel cited the case of **NMB v. Victor Modest Bunda,** Revision No. 16 of 2015, High Court, Labour Revision at Tanga {unreported}.

In rejoinder Mr. Mushi reiterated his submission in chief but insisted that the respondent was charged for disciplinary offence of gross negligence and not loss of money. There was sufficient evidence from DW1, DW2, D3 and PW1 to prove that the respondent committed the disciplinary offence.

Regarding the submission that Arbitrator did not address some of the issues, there are only three issues as found in page no 1 of the award. The matters raised by the employee's counsel are not issues for purpose of this case.

On the employee's 3rd ground of the revision regarding Arbitrator comment that the employee could have rejected to confirm

the cheque authorized by the Supervisor and Branch Manager he submitted that was not a decision of the arbitrator but it was *obita.*

Regarding the last issue, the counsel for the employer stated that the arbitrator rightly used the case of **NMB vs Adrew Loyce** in deciding the case as circumstances are similar. The remaining cases cited by employee's counsel are irrelevant to the present case.

In rejoinder Ms. Kulwa, stated that the issues which were not addressed by the arbitrator were fatal and important in reaching the just decision. The issues or matters were part of the main issues hence they have to be decided before reaching conclusion. The Counsel did not state as to how the cited cases are irrelevant to the present application. She thus prayed for the revision No. 933 of 2018 to be allowed and the employee be reinstated.

Having considered parties submission there three main issues for determination. The issues are follows; -

i) Whether the reason for termination of respondent's employment was valid and fair.

ii) Whether the procedure for termination was fair.

iii) What are remedies to both parties?

Before addressing the stated issues, I must briefly state that the Arbitrator addressed the issue framed as shown at page 1 of the

CMA award. I concur with the Respondent's counsel on that aspect as parties herein argued on the same issues. All the matters were addressed and determined when the commission determined the respective issues.

The Employment and Labour Relation Act, 2004 provides in Section 37(2) for the duty of the employer in dispute for termination of employment to prove that the termination was fair substantively and procedurally. The section reads as follows; -

> "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."

The same position was stated in the case of **Tanzania Revenue Authority vs. Andrew Mapunda**, Labour Rev. No. 104 of 2014, High Court Labour Division at Dar es salaam, {unreported} where Aboud, J held that: -

> 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. I have no doubt that the intention of the legislature is to

require employers to terminate employees only basing on valid reasons and not their will or whims."

It is well established principle of law that once there is an issue of unfair termination the duty to prove the reason for termination was fair and valid lies to employer. (See. **Association of Tanzania Tobacco Traders v. Ahmed Ally Ahmed,** Revision No. 11 of 2012, High Court of Tanzania, Labour Division at Tabora, unreported}.

In this Consolidated Revision the respondent submitted that the reason for the Applicant to terminate the employee was not fair and valid on the ground that she endorsed payments after getting approval from her Supervisor and Branch Manager. In contention the applicant submitted that the payment confirmed by the respondent to the customer who his or her checque has been submitted and have name of signatory endorsed in a system amounts to gross negligence as it was contrary to NBC Disciplinary Policy.

Gross negligence is among the acts which may justify termination of the employee according to Rule 12 of G.N No. 42 of 2007. The employee was charged for disciplinary offence of a gross negligence and not loss of money. The applicants witness demonstrated at the hearing in the CMA on how the act of respondent amount to misconduct. The employee herself at page 45 of the typed proceeding admitted to confirm the payment of three

cheques for the total amount of Tsh 14,600,000/=. On such basis the respondent's allegation regarding actual amount of money which was lost lacks legal stance.

It has to be clear that the employee's negligence was her act of telling other Bank tellers to proceed with payment of the cheque while there was a person added as signatory but was not yet approved and registered in the bank system. This was testified by DW-2 that the signatory which the Restless Development want to add in SPW account was not in the system as he was not endorsed by the bank. Also, DW-3 who was a key witness during hearing at the CMA testified that during internal meeting she asked the employee {Jane Kasambala} as to why the signatory was not added in the system and she answered that there is an error and she was still working on it. She said that she was communicating with the customer. The respective internal meeting was attended by Branch Manager and the Supervisor among other employee.

I have read the application form to open account (part of Exhibit D4) which is the form used for changing signatory. The form was signed by the respondent herself and not manager. In the form there is a space for the manager to sign but it was not signed. All this prove that there was gross negligence. There is no any evidence

tendered before CMA to support the respondent's allegation that she made payment after getting approval from her Supervisor and Branch Manager.

The standard of proof in labour disputes is on balance of probabilities which I'm convinced that the evidence available has proved that the reason for termination was fair and according to the required standards.

The second issue for determination is whether the procedure for termination was fair. The Employee (respondent) submitted that the applicant failed to observe procedure in terminating her employment on the ground that Chairperson signed the letter of termination while he had no such power. Also, she submitted that the employee was denied investigation report which is contrary to Rule 13(1) of the G.N No. 42 of 2007. The applicant's Counsel submitted that the omission were minor and the basic procedures for termination were followed.

Having gone through CMA record it is clear that Geoffrey Ndosa who was the Chairperson in Disciplinary Hearing signed the letter of termination Exhibit D-2. This is contrary to Guideline 4(9) of the Guidelines for Disciplinary Hearing which is the Schedule to the G.N No. 42 of 2007. The guideline requires the Chairman to sign

Disciplinary Form only and his recommendation to be forward to the Management. Thus, the act of the chairperson to sign the termination letter it affects the impartiality of the whole process.

Further, as it was held by the Arbitrator the employee was not given the investigation report. This is contrary to Rule 13(1) of the G.N No. 42 of 2007. Failure to accord the employee with the report which is the basis of allegation amount to deny the employee right to be heard. This position was taken by the Court of Appeal in the case of **Severo Mutegeki and Another vs. Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA),** Civil Appeal No. 343 of 2019, Court of Appeal of Tanzania at Dodoma, (unreported), where the Court held that; -

> "It is our considered view that, though the Internal Auditor's ultimate reporting responsibility lies to the Director General it is not in dispute that, those actually audited where the appellants and it is the audit report which triggered the charges against them. In that regard, the non-involvement of the appellants and subsequent conviction based on that report was irregular because they could not adequately prepare for the hearing before the disciplinary committee of the respondent. Instead, it is the respondent who being in possession of the report had all the ammunition to make a stronger case which was to the disadvantage of the appellants which rendered what followed to be unprocedural...."

As a result, I find that the termination of respondent employment was unfair procedurally.

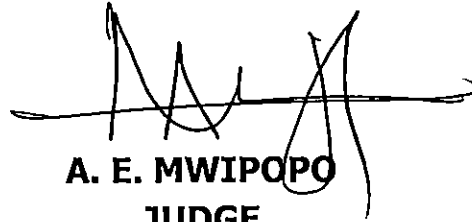
Having found that the termination is unfair procedurally, then the last issue to be disposed is remedies available to the employee. Under Section 40(1) of the Employment and Labour Relation Act, there three are types of remedies for unfair termination including reinstatement without loss of remuneration, re-engagement or payment of compensation to the employee. Since the termination was substantively fair in plain language it means that the employee was terminated on her wrongful act. Thus, such employee whose termination was unfair procedurally is not supposed to enjoy full payment as the one who is substantively unfairly terminated.

In the case of **Felician Rutwaza vs. World Vision Tanzania,** Civil Appeal No. 213 of 2019, Court of Appeal of Tanzania at Bukoba (unreported), it was held that; -

> "........Under the circumstances, since the learned Judge found the reasons for the appellant's termination were valid and fair, She was right in exercising her discretion ordering lesser Compensation than that awarded by the CMA........"

On above cited decision, the Court awarded the employee who was terminated unlawful procedurally the compensation for less than 12 months' salary. I am of the same view that the employee has to be compensated for salary of less than 12 months.

Therefore, The Employer has to pay six months' salary as a compensation to the Employee for unfair termination. The CMA award is hereby set aside. No order as to the cost of the suit.



A. E. MWIPOPO

JUDGE

05/03/2021