IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 259 OF 2020

BETWEEN

LUCK FREDRICK MWAKITALU ..... APPLICANT

VERSUS

KCB BANK TANZANIA ..... RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J:

The applicant herein was employed by the respondent on 21/02/2008 as a Bank Officer for about eleven (11) years. He was promoted to different positions up to the position of Service Quality Compliance Manager (SCQM), which he held until the 23/01/2019 when he was terminated from employment on the ground of misconduct namely; breach of bank's standard operating procedure. He unsuccessfully appealed to the disciplinary authority and subsequently referred the matter to the Commission for Mediation and Arbitration (CMA) which was registered as dispute No. CMA/DSM/KIN/178/19/121 ("the Dispute") claiming of unfair termination. The CMA did not find merits on the applicant's claim hence dismissed the same. Aggrieved by the CMA's award, the applicant filed the present revision application

under the provisions of Rule 24(2)(a),(b),(c),(d),(e),(f); 24(3)(a),(b),(c),(d); and Rule 28(1)(d),(d) and (e) of the Labour Court Rules Government Notice No. 106/2007 Section 91(1)(a)& 91(1)(b) & 91(2)(a),(b) & (c) and 94(1),(b),(i) of the Employment and Labour Relations Act No. 6 of 2004 moving the court for the following:

1. To revise and set aside the award entered at the CMA in the dispute.

2. Any other relief that the court may deem just and proper to grant in the circumstances of the case.

In his affidavit in support of the application, the applicant had seven grounds. However, in his submission he abandoned two grounds and remained with the following grounds: -

i. That the Honourable Arbitrator erred in law and fact by failing to understand the applicability of double jeopardy principle.

ii. That the Honourable Arbitrator erred in law and fact in failing to hold that in the absence of mitigation renders the whole disciplinary proceedings a nullity.

iii. That the Honourable Arbitrator erred in law and fact in failing to hold that the offence which was terminated does not amount to termination.

iv. That the Honourable Arbitrator erred in law and facts in failing to hold that the failure of the respondent to supply the applicant with copies of investigation report is fatal and nullify the proceedings.

v. That the Honourable Arbitrator erred in law for misinterpreting rule 11 (1) and 13 of Employment and Labour Relations (Code of Good Practice) GN 42 of 2007 (GN 42/2007).

The matter was argued by way of written submission. Both parties were represented, Mr. Gilbert Mushi, Learned Counsel appeared for the applicant whereas as Mr. Evold Mushi, Learned Counsel was for the respondent. Since the surnames of the two advocates are the same, I will address them through their first names, that is Mr. Gilbert for the applicant and Mr. Evold for the respondent.

I will start determination of the ground of revision because the ground touches the jurisdiction of the Disciplinary hearing and subsequently the CMA to have entertained the application. The applicant

argued that the Honourable Arbitrator erred in law and fact by failing to understand the applicability of double jeopardy principle.

In his submissions to support the application, Mr. Gilbert referred the court to the Black's Law Dictionary which defines double jeopardy as *"being prosecuted twice for substantially the same offense."* He then submitted that Double jeopardy principle aims to prohibit one person from being tried or punished twice for the same offence, a principle which is sometimes referred to as *"Once and for all principle".*

He then submitted that on the 27th September 2018, the Applicant was served with Cautionary letter (see exhibit P 2) from Brach manager which stated the offence and warned him of subsequent events. He argued that it is undisputed fact that at the branch level, the Branch Manager is the immediate supervisor overseeing all branch activities. That this fact prove that Branch Manager was the representative of the employer capable of issuing directives regarding work performance at the branch level to subordinates. He argued that it was assertion by the respondent through DW1 at page 3 of the award and page 16 of the proceedings that, Human resources department is the organ responsible for employee's discipline. That there was no evidence to collaborate her statement, no disciplinary procedure guideline to prove that Branch

manager had no authority to discipline applicant and that in absence of disciplinary procedure guideline, the CMA had to act cautious as testimony by DW1 was uncorroborated.

Mr. Gilbert submitted further that the only question that this Honourable Court needs to ask itself is what should be the remedy when the person is punished twice for the same offence. He provided an answer to this question by citing precedents set by this court in the case of **Security Group Tanzania Vs. Athumani Abdallah High Court of Tanzania Labour Division no 260 of 2018**, where it was held that:

> *"the issue of decision is whether on the evidence of record arbitrator properly found for the ground that termination was procedurally unfair for breach of double jeopardy principal or there was an error and material irregularity as alleged by the employer/ applicant. This question I procced to consider in light of the fact and factors enumerated above.*
>
> *I have already stated that as principle I agree with arbitrator holding that an employee cannot be subjected in two disciplinary hearings on the same fact*

After checking fact on the records, I also agree that the two disciplinary proceedings were based on the same fact otherwise the employer's witness (the human resources manager) who testified at the CMA could have given evidence on the different between the two or explained if there were exceptional circumstances necessitating the second hearing a few days after first one exonerated the employee"

He went pointing out that the above position was cemented in the case of **Hellman Worldwide Logistics Limited v Deepak Ashvin Josh Revision No.50 of 2019** High Court Labour Division at Dar es salaam where is was held that:-

"In the present case the respondent was already given last warning by the applicant when the applicant decided to initiate disciplinary hearing against the respondent on the same offences he was warned. It is my opinion that the respondent was punished twice by the applicant for the same offence.

According to Rule 11(5) of G.N No.42 of 2007 the effect of a warning is to notify the employee that a repetition of offence of a similar nature may result in more serious disciplinary action being taken. In the record there is no evidence to prove that the

respondent committed once again an offence of similar nature after the warning. For that reason, I agree with the arbitrator that the warning was still in operation when the applicant decided to call the disciplinary hearing."

That in order to cover her illegalities, the respondent opted to twist language and increase charges in the Disciplinary hearing, (see exhibit P 2, KCB 2,4 and 6). He point out that this position is well covered in the case of **Multchoice Tanzania Ltd VS Shaban Mchomvu ,HC Labour Divison, Revision no. 743/2019** at page 8 second paragraph that:

"the applicant being decision -making body, is bound by this principle".

There is no any evidence on record showing that the respondent had committed again the said offence of reconnecting the clients' accounts without payment. Since he was charged and sanctioned by a verbal warning in 201, it was not proper for the applicant to re charge and re convict the respondent, just by changing the names of the offence and looking in the greater penalty. I thus find no need to fault the arbitrator's finding that the respondent was unfairly terminated"

He concluded that so long as respondent had already issued a sanction of written warning by his immediate supervisor, it is apparent that the respondent was not allowed to hold second inquiry which led to termination applicant basing on the same issues that he had already been warned by the Branch Manager and the warning was still active. That the the applicant termination was unfair.

In reply, Mr. Evold submitted that Mr. Gilbert misdirected his mind on the meaning of double jeopardy basing on the facts of this case. He argued that the evidence on record does not show that the applicant was prosecuted twice but that in the course of discharging his duty, he was given a cautionary letter. That a cautionary letter does not amount to prosecution of an offence. He defined prosecution in line with the definition in the Oxford Dictionary which means "Institution and conducting of legal proceedings against the someone in respect of criminal charges." He argued that what was issued to the applicant is a cautionary letter and not disciplinary proceedings.

Referring to the evidence adduced during arbitration, Mr. Evold submitted that the evidence on record shows that applicant was given cautionary letter by his line manager (EXP2) on 27TH September, 2018 to the effect that he failed to report cash overage(excess amount) of

TZS 5,000,000/= which occurred on May, 2018. That despite that cautionary letter, he returned the said amount by depositing the said amount on 15th October, 2018 which was 30 days after being cautioned instead of three days as he clearly admitted during disciplinary hearing (EXKBC5) at page 5 last paragraph and page 5 first paragraph. He went on submitting that during disciplinary hearing, the applicant admitted that he was the one who knew where he kept this amount (exhibit P6 and exhibit KCB5) and after been given cautionary letter exhibit P2 he still withheld the said amount for thirty days instead of three days. Basing on that, he argued that it was right for respondent to institute disciplinary action against the applicant despite the cautionary letter because he failed to deposit the same amount as it took him 30 days instead of 3 days.

He submitted that when someone is given warning or caution, he need to be careful not to continue with violation of the laid down procedures. That any continue breach cannot bar the employer to take more serious action and in this circumstance the principle of double jeopardy does not apply. He argued that in this case, there was no violation of principle of double jeopardy and all cases cited by applicant do not apply in the circumstances of this case. That from the date he

was cautioned on 21st September, he could have done it immediately, but he deposited the same amount on 15th October, 2018 as clearly captured by honorable arbitrator on page 13 last paragraph and page 14 first paragraph of the award.

I rejoinder, Mr. Gilbert submitted that the respondent counsel has misconstrued the idea of double jeopardy specifically in labour issues. That Labour laws prohibit an employee be punished twice for the same and that at work place, punishment can be by way of warning or termination. That reading guideline to disciplinary hearing as provided for under Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007, it implies that disciplinary hearing can be convened in the event there is further misconduct following written warning or repeated written warnings for different offences.

He submitted further that in the case leading to this revision, both offences in which applicant were charged arose out of a single incident. There is no evidence on record led by respondent in his reply or in the CMA proceedings that shows that the incidence that lead to termination of applicant employment was a result of misconduct after being issued with the warning letter, rather they are charges referring to the misconduct in which applicant had already been warned by his line

manager. He urged the Court to consider the fact that there are common elements between misconduct of which applicant was warned against and misconduct of which applicant was summoned to disciplinary hearing and then terminated for.

Having considered the parties submissions for and against the first ground, I am in agreement with the applicant that the case is a violation of the principle of natural justice as defined in the cited Oxford definition. To begin with, it is pertinent to see what the contents of the cautionary letter are. The said warning/cautionary letter (EXP2) reads:

> "*This letter is to document the facts concerning your activities done in May/June and* ***to caution you of the consequences of further inappropriate conduct*** *while you are employed by the bank. It has come to my intention that end of May and early June you had an overage of TZS 5 million to bank Teller named Betty Harold and shortage of TZS 1.2 million of western union done by Magreth Salvi.*
>
> ***Your activities violated bank policy and standards of conduct of employee.***
>
> *In view of* ***the foregoing matters as an appropriate conduct which warrant the imposition of disciplinary***

action. Therefore, I am issuing you this cautionary letter and hereby formerly caution you that any future violations of Bank policies or procedures may result in additional disciplinary action, up to and possibly including termination. *A copy of this letter will be placed in your personnel file.*

I urge you to give the foregoing admonition serious consideration throughout the reminder of your employment with the Bank"

The letter was written by the Branch Manager Ms. Edina Mwailubi. In my strong view, looking at the cautionary letter, it was very clear that it was a disciplinary procedure of its own. It stated the misconduct committed by the applicant through the words:

"Your activities ***violated bank policy and standards*** *of conduct of employee."*

The conduct was well explained in that same letter. The magnitude of the conduct was elaborated through the words:

"the foregoing matters as ***an appropriate conduct*** *which* ***warrant the imposition of disciplinary action****."*

Hence the Branch manager went on imposing the disciplinary measure through the words"

*"I **am issuing you this cautionary letter** and hereby **formerly caution you that any future violations of Bank policies** or procedures **may result in additional disciplinary action**, up to and possibly including termination."*

The letter was conclusive that for that particular conduct, the punishment given was a caution against any future violations. It was the future violations that were to be subject of a disciplinary action. In the cited case of **Security Group Tanzania**(Supra), this court, Hon. Rweyemamu, J (as she then was) defined the principle in line with the objectives of the ELRA were she held:

"One of the objectives of the Employment and Labor Relations Act, (The Act) 6/2004 spelled out under Section 3 is: To give effect to the provisions of the constitution... in so far as they apply to labor relations and conditions of work,.

*In labor relations **the principle translates into a rule that an employee acquitted at a disciplinary enquiry cannot be subjected to a second disciplinary hearing on the same misconduct based on the same facts.** Apart from general considerations of fair labor practices enshrined in the constitution, the rule prevents never ending/harassing enquiries*

against an employee which disrupts harmonious labor relations" (Emphasis is mine).

As or the case at hand, the quoted wordings of the EXP2 are clear that an action was taken against the alleged misconduct of the applicant. He was issued with a warning where it was made clear that he was formerly cautioned against **any future violations** of Bank policies or procedures. He was further informed that it is those future violations that may result in additional disciplinary action, up to and possibly including termination. So what does the law say? The answer is found on Rule 11(4) & (5) of the Employment and Labor Relations (Code of Good Practice) Rule, G.N No. 42/2007 which provide:

"(4) Subject to sub-rule (3), ***discipline shall be corrective efforts and be made to correct employee behavior through*** *a system of graduated disciplinary measures such as* ***counseling and warnings.***

(5) ***The effect of a warning is to notify the employee*** *that a* ***further offence*** *of a similar nature* ***may result in more serious disciplinary action being taken****".*

The provisions of Rule 11(5) of the Code is the almost exact words of the Branch Manager vide EXP2. That any future violations of the Bank

Procedures may result into a disciplinary action up to termination. I have noted Mr. Evold's argument that the applicant did not return the money instantly, with respect I think he has misguided himself. The record is clear that the applicant was charged with the same offence like the one in the warning letter and not the offence of returning the money late so this argument is by all means misplaced. In the cited case **Hellman Worldwide Logistics Limited** (Supra) the court held:

> *"According to Rule 11(5) of G.N No.42 of 2007 the effect of a warning is to notify the employee that a repetition of offence of a similar nature may result in more serious disciplinary action being taken. In the record there is no evidence to prove that the respondent committed once again an offence of similar nature after the warning."*

Therefore from these obvious facts and evidence, the termination of the applicant would have been justified if it was a future similar offence, however, there has not been adduced any evidence in the record to prove that once again the respondent committed an offence of similar to the one he got the warning for, he should not have been punished for the same offence whereby a corrective discipline had been imposed to him through a warning letter (EXP2).

Up to this point, it is conclusive that the applicant ought not to have been charged on the same offence again as it was so done by the respondent since in the said letter, the Manager said he is issuing the applicant the cautionary letter as a formal caution that in future violations of the Bank Policies and Procedures may result in additional disciplinary action up to possibility and including termination. Therefore am in agreement with the applicant that the letter of the Manager constituted an disciplinary action under Rule 11(4)&(5) of the Code. He was warned and a subject to the disciplinary hearing only upon occurrence of future misconduct like the one alleged to have been committed. However, if we go to the proceedings, the applicant was charged with the same offence as he was charged with in the written warning.

Owing to the above, it is my conclusive finding that indeed the applicant suffered a double jeopardy as he was punished for the same offence twice. Therefore the whole termination of the applicant was unfair as it resulted into double jeopardy as the issue had been settled through EXP2.

Having found that the termination of the applicant was double jeopardy, it means that there was no substantive reason for terminating

the applicant hence, this ripped off the jurisdiction of not only the CMA, but even the Disciplinary Committee of the respondent did not have jurisdiction as it violated the principles of natural justice which prohibit punishment of an individual twice for the same offence. The whole preceding proceedings and decisions are hereby nullified.

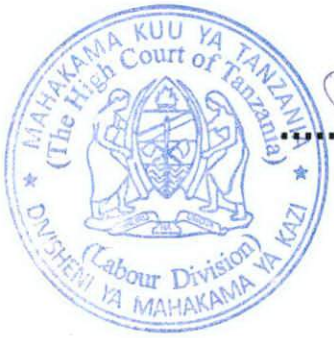
Having so nullified the proceedings for violation of fundamental rights of the applicant, I need not dwell on the procedural aspect of the termination and the other grounds of revision because even if they are right, they were a nullity. In conclusion, this application is hereby allowed. The decision of the CMA which dismissed the dispute and the disciplinary proceedings of the applicant by the respondent are hereby nullified and should be stripped off the applicant's employment records by an order of this court.

Coming to the reliefs that the parties are entitled to, it appears that the respondent has already pay the applicant the salary up to and including January 2019, annual leave and salary in lieu of notice and certificate of service. This is according to the termination letter. However, if those were not paid, then the applicant is entitled for them.

As for the unfairness of the termination, since it has been found to be a nullity, then the applicant is entitled to compensation under Section

40(1)(c) of the ELRA. I have considered the time that the applicant had served the respondent, the fact that he was charged twice for the same offence, I find that he is entitled to be paid 24 months' salary as compensation. He is also entitle to two months' salary in lieu of notice and severance pay for 7 years. It is so ordered.

Dated at Dar es Salaam this 08th day of December, 2021.



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S.M. MAGHIMBI
JUDGE