

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LABOUR DIVISION)
AT DAR ES SALAAM**

REVISION NO. 281 OF 2020

BETWEEN

DEO MNYAWAMI APPLICANT

VERSUS

BARCLAYS BANK TANZANIA LIMITED RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

The applicant herein was aggrieved with the award of the Commission for Mediation and Arbitration for Ilala ("CMA") in Labour Dispute No. CMA/DSM/ILA/R.1204/17/45 ("The Dispute") which was decided in favor of the respondent. At the CMA, the applicant had lodged a dispute claiming unfair termination by the respondent who was his employer, the CMA dismissed the complaint. Aggrieved by the decision of the CMA, under the provisions of Rule 24(1), 24(2)(a)(b)(c)(d)(e)(f), 24(3)(a)(b)(c)(d), 28(1)(a)(b)(c)(d)(e) of the Labour Court Rules GN No. 106 of 2007, Section 91(1)(a)(b), 91(2)(a)(b) and Section 94(1)(b)(i) of the Employment and

Labour Relations Act No.6 of 2004., the applicant has moved this court by way of Revision praying for:

1. This honourable court to call for and examine the proceedings and its arbitral award of the Commission for Mediation and Arbitration at Dar es Salaam in Labour Dispute No. CMA/DSM/ILA/R.1204/17/45 delivered on 19th June, 2020 by Hon. Nyagaya, P and be satisfied as to the legality, correctness and appropriateness of its decision and orders made therein, and in those respects, to revise the said proceedings.
2. This Honourable Court be pleased to make any appropriate orders as it may deem fit, including quashing the arbitral award of the Labour Dispute No. CMA/MTW/DSM/ILA/R.1204/17/45 delivered on 19th June, 2020 by Hon. Nyagaya P of the Commission for Mediation and Arbitration of Dar es salaam.

The Chamber Summons was supported by the affidavit of the applicant dated 15th July, 2021. In the said affidavit, the applicant raised the following legal issues:

- a) Whether the commission directed itself properly to hold that the applicant acted negligently and occasioned loss of Tshs 5,000,000/= despite that there was no evidence to its satisfaction.

- b) Whether the commission directed itself properly to hold that the applicant was fairly terminated while in fact he was not supplied with investigation report in disciplinary hearing.
- c) Whether the trial arbitrator acted properly to hold in favour of the respondent while in fact the respondent for undisclosed reason did not call material witnesses.
- d) Whether the trial arbitrator held in favour of the respondent properly while in fact he was not given chance to cross examine the respondent's witnesses in the disciplinary hearing as there was no witness brought by the respondent.
- e) Whether the trial commission evaluated the evidence properly for failure to consider that CCTV camera did not show the applicant in the ATM machine room stealing Tshs 5,000,000/= as alleged.
- f) Whether the arbitrator directed herself properly to hold that I failed to follow procedures while in fact there was no any document tendered before the commission providing the procedures to be followed.

- g) Whether the trial commission acted properly to accept the act of the respondent to terminate me alone leaving Maureen Kiluwa while in fact the purported loss of Tshs 5, 000, 000/= and alleged negligence occurred while there were two co custodians me and Maureen Kiluwa.
- h) Whether the trial arbitrator acted properly for failure to consider that he was not given chance to put forward mitigation factors at the disciplinary hearing before termination.
- i) Whether the commission had properly evaluated the evidences tendered before it.

Having gone through the grounds of appeal, I find that there are only two main issues for determination, whether the termination of the respondent was substantively and procedurally fair. In challenging the fairness of the substance of termination, the applicant challenged the sufficiency of evidence that was adduced at the arbitration proceedings including what he called failure to call material witnesses to the case. The applicant also challenged the CCTV Camera evidence which he argued did not show the applicant in the ATM machine room stealing Tshs 5,000,000/= as alleged. The applicant further challenged the holding of the arbitrator that

the applicant failed to follow procedures while in fact there was no any document tendered before the commission providing the procedures to be followed. Further that there were two officers involved in the occasioned loss while only the applicant was terminated.

On the procedural unfairness, the applicant is challenging the procedures followed by the respondent where he alleges that he was not supplied with the investigation report. He also alleging that he was not given an opportunity to cross examine the witnesses during disciplinary hearing because none were called by the respondent and lastly that he was not given an opportunity to put forward his mitigating factors.

I will start with the substantive reason for termination. The reason for termination of the applicant was gross misconduct and breach of trust which as a result, occasioned the respondent a loss of Tshs. 5,000,000/-. During hearing, it was well established that the Applicant was employed as a CDC custodian by the Respondent and his duty was inter alia to put the money in ATM machines, earning a salary of Tshs 1,184,200/= per month. The alleged incident took place Sometimes in 2017 whereby the Applicant was with a fellow employee Maureen Kiluwa inside ATM room at Mabibo waiting to receive money from CIT crew. At around 01: 00 pm CIT team arrived and

the Applicant and Maureen Kiluwa received a cash box from CIT team in order to put them in Mabibo ATM machine, it was after opening the consignment the Applicant and Maureen Kiluwa found that there was deficit of Tshs 5, 000, 000/=.

Immediately upon discovery and while in the ATM room, the Applicant called the manager by mobile phone and confirmed that there was deficit of Tshs 5, 000, 000/=. During the whole time while waiting for the manager, the Applicant and Maureen Kiluwa were in ATM room which was surrounded by guardians. Up at until this point, following the applicant's submissions, it is not disputed that there was a loss of Tshs. 5,000,000/- that occurred while the respondent's cash to be filled in the ATM was in the custody of the applicant. The only issue is to prove whether the same was occasioned by the applicant.

I have gone through the records of the CMA and exhibit BB3 is a detailed report titled "*Structured Statement of Deo Mnyawami taken at BBT Head Office on 19/09/2017 from 13:35 hrs – 15:15 hrs*". In this report, the applicant clearly showed how negligent he was. He explained not to have read the blue book regarding how to replenish cash ATM, admitting that he

learnt the procedures from line managers. On this aspect, the applicant wrote:

*"When it comes to ATM replenishment, my understanding the procedure is as follows; First is dual process which involves two custodians, upon arrival at ATM, I receive the consignment box and the CIT form (contract). I/We cut the journal then after that we verify the padlocks and seal against the CIT form that are correct. Due to the fact that the seal are hard I normally use the padlock to cut the seal. **If the cash tallies with the consignment form which is inside the box then we replenish the ATM.** At the same time When we are verifying the seal my colleague will sign in the CIT form then after completion of replenishment that is when **I will also sign the handover the consignment box and the signed CIT form back to the CIT team.** We remain with one signed copy of the record keeping. But before we leave the ATM room i/we will check if CCTV camera is recording. I am also aware that there is a condition that inspection and verification of box, padlocks and seals should be done at the area with CCTV coverage".*

He also admitted that the inspection and verification of box, padlock and seals should be done at an area with CCTV coverage but him and Maureen had been doing verification in an area where there was no CCTV camera. The applicant wrote:

*"I have been shown the CCTV footages of Kigamboni ATM for the day of 06th September 2017; on the footages it shows me and Maureen receiving the consignment box at 14:08 and inspecting the seal and padlocks by both of us at 14:11hours. **The inspection of the box and seal we have done at an area where CCTV cannot openly see this verification.** I did not or was not aware that the CCTV camera was not covering that area but **I acknowledge that it is negligence on our part.***

By this statement, he further admitted negligence on his part, a negligence which as a result, it caused loss to the employer.

There was also the evidence of DW1 who took the footage and DW2 Jane Mbwilo who explained how the operation manual guide the handling of cash in an ATM. She is also explained that the procedures require them to receive cash while they are visible to the CCTV camera but on the incident day that

procedure was not followed. She tendered EXBB1 which showed that the procedure was not followed.

Therefore with this admission of the undisputed fact of the loss (EXBB3) and how he acted negligently and the supporting evidence by DW1 and DW2 is sufficient to prove that the substance of termination of the respondent was fair. I need not fault the decision of the CMA on this aspect.

Going to the procedural irregularities, the applicant is challenging the fact that during disciplinary hearing, the respondent did not bring any witnesses so as to give him an opportunity to cross examine those witnesses. The applicant submitted that the Disciplinary committee assumed the role of employer and raised some questions as if they were employer. Further that he was also not supplied with the investigation report and after completing hearing, the disciplinary committee did not invite the Applicant to put forward mitigation factors, instead the Committee proceeded to recommend termination of employment of the Applicant. That on 13th October, 2017, the employer proceeded to terminate the Applicant.

Starting with the issue of not being supplied with the investigation report, as correctly argued by the respondent, the investigation report does not in itself prove the offence because even in the presence of an

investigation report, the evidence brought during the hearing is the one which prove the offence. In this case, the whole evidence relied on the CCTV Camera footage which was shown to the Applicant even before the Disciplinary hearing. Thus he was full aware of what he was facing and that is why in EXBB3, he admitted to have seen the CCTV footage and what happened therein. Therefore under the circumstances like the one at hand, investigation report was not a crucial document to be supplied to the applicant for as long as he knew the substance of the offence and he was well aware of what the respondent was going to use to prove her case, the CCTV footage.

Going to the non-calling of witnesses which the applicant argued that it denied him the opportunity to cross examine those witnesses. As correctly argued by the respondent, Exhibit BBT-2 was very clear when it informed the applicant of the charges against him where it stated:

"It has come to the knowledge of the Bank that on 06th September, 2017 you failed to follow ATMA replenishment procedure, a lapse which led to a shortage of Tshs. 5,000,000/= (Five Million) from the consignment box that was delivered at Mabibo Offsite ATM.

Consequently, the charge of gross negligence and breach of procedures have been leveled against you.

It is clear that during hearing at the CMA, the witnesses paraded by the Respondent had to prove the offence of gross negligence because at no point of time had the Applicant been charged with an offence of theft hence the submission is off the context. As it was their purpose, the DW2 and DW3 testified on the charge of gross negligence which was, along with other evidence, proved by the bank.

As for the disciplinary hearing, I will not agree with the applicant that there was a need to call any witnesses for cross examination. If the applicant admitted the offence as EXBB3, and the disciplinary records shows only verification of what transpired because there was CCTV footage of the incident, I do see how the court can compel the respondent to have called witnesses to testify because that is not a court of law in criminal proceedings where strict proof of the offence is beyond reasonable doubt. **Rule 13(5) of the Employment and Labour Relations (Code of Good Practice) G.N. 42** provides;

"Evidence in support of the allegations against the employee shall be presented at the hearing. The employee shall be given a proper

*opportunity at the hearing to respond to the allegations, **question any witness called by the employer** and to call witnesses if necessary."*

As per the above cited Rule, it is clear that the employee shall be given an opportunity to question any witnesses **called** by the employer. The words "*any witness called*" means that should the employer bring witnesses, then the employee shall be given an opportunity to question those witnesses. The Code did not make it mandatory that in any disciplinary hearing a witnesses should be called.

It must be borne in mind that the disciplinary procedures are laid down to ensure that before a person is terminated from employment on grounds of misconduct or negligence, then he is given an opportunity to defend himself while the employer is discharged with a duty to prove the substance of termination. It should not be equated to a trial before a court of law where proof is beyond reasonable doubts and evidence is adduced through witness testimonies. Therefore the ground of not having witness called during disciplinary hearing should not form the basis of nullifying the disciplinary hearing or conclude that the procedure was not followed.

The applicant also questioned whether the trial commission acted properly in accepting the act of the respondent to terminate him alone leaving Maureen Kiluwa while in fact the purported loss of Tshs 5, 000, 000/= and alleged negligence occurred while there were two co-custodians, him and Maureen Kiluwa. DW2 said Maureen was not terminated because she wasn't in her usual line of business. Furthermore, she was given a final warning and the applicant was terminated because he had previously conducted such a misconduct and was even given a final warning and that is why termination was the only option. DW3 further explained that the investigation report was not given to the applicant because it contained confidential information about the bank customers and the applicant was only informed of the issues that concerned him in the investigation.

On the issue of not being given an opportunity to present his mitigating factors. The applicant submitted that the respondent did not also observe mandatory requirement of law that if the employee is found guilty of the allegations he must be given chances to put forward mitigate factors before a decision is made on the sanction to be imposed. He argued that it is the principle of law that if the employee is found guilty he must be given chance

to put forward mitigation factors, citing Rule 13(7) of the Employment and Labour Relations (Code of Good Practice) G.N. 42 which states:

*"where the hearing results in the employee being found guilty of the allegations under considerations, **the employee shall be given the opportunity to put forward any mitigating factors before a decision is made on the sanction to be imposed.**"*

The applicant then submitted that going through the whole proceedings of disciplinary hearing, there is nowhere in the disciplinary hearing proceedings where the Applicant was given chance to put mitigation factors. He hence prayed that this court finds the disciplinary proceedings to have anomalies which are not curable as such vitiate the whole disciplinary proceedings.

I find the argument to be lacking merits because the evidence established that the applicant was given two warnings before and according to the HR policy it was known that the next stage was termination hence the only available punishment for the offence given the two previous warnings was termination. Mitigating factors are meant to aid the decision maker to make a more lenient punishment but in the case at hand, the only available remedy was termination of the applicant. Hence under the circumstances,

the omission to give the applicant the chance to mitigate is not so fatal as to vitiate the disciplinary proceedings. The ground also lacks merits.

Having made the above findings, the revision before me lacks merits and it is hereby dismissed in its entirety.

Dated at Dar es Salaam this 03rd day of December, 2021.



A handwritten signature in blue ink, appearing to be 'S.M. Maghimbi', is written over a horizontal dotted line.

S.M. MAGHIMBI
JUDGE