IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 391 OF 2020

BETWEEN

RAMADHAN MASOUD.....APPLICANT

AND

BANK OF AFRICA.....RESPONDENT

JUDGMENT

Date of Last Order: 22/06/2021

Date of Judgment: 01/07/2021

D. NGUNYALE, J.

The Applicants here in namely **RAMADHAN MASOUD** has filed the present application against the decision of the Commission for Mediation and Arbitration (CMA) in labour dispute no. CMA/DSM/ILA/440/19/211. The Applicant is praying for the orders of the Court in the following terms:

1. That, this Honourable Court may be pleased to call for the records, revise and set aside the award made by the Commission for Mediation and Arbitration (CMA) at Dar es salaam Zone in labour Dispute No. CMA/DSM/ILA/440/19/211. (Hon. Ng'washi Y, Arbitrator) delivered on 21st August 2020 and make an order quashing the said award.

2. That, this Honourable Court may be pleased to make any other order or orders as it may deem just and equitable to grant.

The background of the dispute in brief is that; applicant namely **Ramadhan Masoud** was employed by the respondent on 9th July 2007 being promoted in different position he was terminated on 07th May 2019 in a position of Recovering Executive Officer for the reason of misconduct. The applicant was not happy with the termination and he referred the dispute to the Commission which decided the dispute favor of the respondent. This time the Applicant was not satisfied with the Commission award and he filed the present application for revision.

Both parties to the application were represented. The Applicant was represented by Mr. Stephano Joshua, Advocate, whereas the Respondent was represented by Mr. Godwin Nyaisa and Mr. Philip Ilunga, advocates. The hearing of the matter proceeded by way of oral submissions.

Supporting the application, The Applicant's Counsel prayed for the applicant affidavit to be adopted and form part of their submissions, applicant's submission based on two aspect of termination which are reason and procedure for termination. But he had four grounds of revision.

Starting with ground No.2 the applicant's Counsel submitted that the respondent had two reasons for termination as grounded in the termination letter which is exhibit R8. He stated that the first reason was that the

applicant signed the security document cheque list while knowing that the security to be placed against the loan as written in the offer latter was not available in the bank custody and this is contrary to HR manual appendix X Section 5.6 which provides deliberate provision or misleading or wrong information or deny to give such information.

The counsel submitted that this ground is invalid because of the following reasons, the applicant never contravened the HR Manual Section 5.6 due to the fact that most important ingredient of appendix X.5.6 is deliberate provision of misleading information. Per evidence adduced before CMA the applicant had no intention to give misleading information this is due to the fact that the applicant signed a security document check list. He added that the security document checklist was taken as exhibit R5 as signed by the applicant on 12/12/2017. On 13 day of December 2013 the applicant raised a contrives concerning the security to the effect that the security to the facility letter was legal knowledge and that security was signed by Mr. Masoud. That security was not the required security. With those contrivers the bank prepared an addendum exhibit B8 which now changed the security on legal mortgage and registered as lease hold. With that art they of the view that the applicant never intended to mislead the bank rather he did all thing in his capacity to ensure the bank reached the beneficial of this loan. Therefore, the arbitrator erred in law and fact by holding that the first reason

for termination was valid while the rule or employer's policy was not contravened. This is contrary to rule 12(1) of Employment and Labour Relations (Code of Good Practice) G.N No.42 of 2007.

The second reason as to why the reason is invalid is that the respondent disbursed the loan to his client basing or depending on lease hold as security and not legal mortgage. After the addendum has been provided by respondent the security changed from legal mortgage to registered lease hold. The Counsel submitted that the respondent wanted to retrieve the legal mortgage from his client, unfortunately the client was not present he was on safari. Therefore, the process was to wait. He was to dispense with the provision of lease agreement and the dispensation was per credit facility dispensation i.e., exhibit R6. Under this document the respondent signed on, 15the December, 2017. The loan was disbursed depending on legal mortifies. The first reason of termination is invalid.

The applicant Counsel submitted that the signing of security document check list caused no loss to the respondent, during hearing respondent's witness failed to prove that failure to sign the same caused any damage to the respondent. He stated that negligence in performance for failure to register lease hold on property leased is invalid reason for termination because it was not the duty of the applicant to register the lease hold as the same was outsource by the respondent advocate legal link law firm.

Therefore, the respondent erred in law and fact to say that the reason for termination was proper.

The counsel argued that even if they assume the fact that the applicant, was to perform this duty still the termination was not the proper sanction as provided in Human Resources manual appendix 5 and admitted as exhibit B5. The rule provides that the right sanction for the offence of negligence is warning letter and not termination.

On the first ground of revision, the applicant Counsel submitted that the procedures were not followed as the investigation was not conducted contrary to rule 13(1) of the Employment and Labour Relations (Code of Good Practice) G.N No.42 of 2007. He stated that it was the duty of the respondent to prove that investigation was not conducted contrary to Rule 13(1) of the Employment and Labour Relations (Code of Good Practice) G.N No.42 of 2007. That including tendering of investigation report but the same was not done. To support his submission, he cited different case including the case of **HESLB v. Yusuph M. Kisale,** Consolidated Revision No. 755 & 888 of 2018, High Court of Tanzania, at Dar es salaam(unreported). Therefore, the arbitrator erred in law to hold that procedures for termination were adhered while investigation was not conducted as evidenced in hearing form Exhibit R7.

Further the Counsel submitted that the applicant was not given right to put forward mitigation factors. This is contrary to Rule 13(7) Employment and Labour Relation Rules of Good Practice GN No. 42 of 2007. Also, what is awarded by the arbitrator was contrary to applicant's renumeration.

Opposing the application, the respondent Counsel submitted that the arbitrator correctly ruled that there were valid reasons. This is because when you go through the charge of allegations both they are in regard to negligence in performance of work. The first allegation that the applicant deliberated provided wrong information that there was a security in bank custody in form of legal mortgage and he was assuring the respondent that they can continue granting loans, this assurance was done through exhibit checklist to ensure compliance Exhibit B3 collectively. The applicant committed himself that the security for the same is in existence and by that time the applicant was the Head of Legal Documentation Department.

The Counsel submitted that basing on applicant's job description Exhibit B10 collectively was purely in his mandate to ensure that there is security as approved by the board of credit committee. The credit documentation and execution secured loan policy with post perfection securities policy Exhibit P 9, he stated that if you look at these documents you see the role of the applicant as reflected in the offer letter.

It was further submitted that in terms of exhibit B11 which is credit approval manner the only security approved was legal mortgage, and when the applicant executed the banking loan and security checklist, he assured the board that there is legal mortgage as approved.

The counsel argued that sometimes customers started defaulting in paying, in such circumstance the bank was looking for security towards enforcement, the bank found that there was no security for enforcement. The loan which went unsecured is 1,860,000 USD. He stated that the respondent appointed DW3 for investigation, in her findings the results in Exhibit B6 revealed that there was no mortgage register. On such circumstance the Head of documentation was taken for questionnaire as the same was conducted by the Auditor, responding to questions as per Exhibit. B7 page 27 of the proceedings, the applicant just admits on the same.

In the second charge the applicant again admitted that there was misconduct the committee worked for the HR Manual which was admitted as per Exhibit B 5, Section 5(6) the penalty is termination on the ground that he failed to perform his duties as the legal mortgage was not registered. This forced the bank to restructure the loans. To strengthen his argument, he cited range of cases including the case of **NMB v. Andrew Aloyce**, Revision No. 1 of 2013, High Court of Tanzania, at Dar es salaam (unreported).

On the second ground of revision regarding mitigation factor and investigation. The Counsel submitted that investigation was conducted as per Exhibit. B7, search was done at Land Registry and report was found. He stated that there was genuine exhibit which show that investigation was conducted. The Counsel stated that the **MIC Tanzania case(supra)** is distinguishable to the scenario of investigation at hand. In regard to mitigation factor as the applicant admit for the offence then no need for mitigation. To back up his stand he referred this Court to the case of **The Board of Trustee NSSF vs Prosper Ogola,** Revision No. 639 of 2019, High Court of Tanzania, Labour Division, at Dar es salaam, (unreported).

Lastly it was submitted that the amount or salary which was awarded by CMA as per Exhibit B 13(letter of termination) was the applicant salary and not otherwise. Therefore, he of the view that application has no merit.

In rejoinder the applicant reiterated his submission in chief and emphasized on the reason for termination that was valid but the same does guaranteed termination and the best option was warning and not termination.

After reading the submission from both sides, there are two major issues for determination. The issues are as follows;

i) Whether applicant's termination was both procedurally and substantive fair.

ii) What are the reliefs entitled to parties?

The validity and fairness of termination in exercising retrenchment regarding the reason for termination is subjected to Section 37 of the Employment and Labour Relation Act, Cap 366 R.E 2019 which provides that:

"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."

Article 4 of ILO Convention also provides that: -

"Article 4: The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operation requirements of the undertaking, establishment or services."

In the case of **Tanzania Revenue Authority V. Andrew Mapunda,** Labour Rev. No. 104 of 2014 it was held that: -

"(i) It is the established principle that for the termination of employment to be considered fair it should be based on valid reasons and fair procedure. In other words, there must be

substantive fairness and procedural fairness of termination of employment, Section 37(2) of the Act.

(ii) 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."

The applicant was terminated for allegedly committing a misconduct, by signing a Security Checklist while knowing that the security to be placed against the loan as written in offer letter was not available in the Bank's custody and failing to register lease hold. In my view the question before this Court is whether the respondent committed those offences or not.

Having gone through the record the applicant was employed in a position of Branch Manager due to his performance he was promoted to be a Head of Legal Documentation, thus means among the duties of the respondent on that position was to ensure the Security are available in the Bank custody before signing checklist as testified by PW-1(applicant himself) at page 67 paragraph 11 of the CMA's proceedings and he was supposed not to act negligently.

However, things differ in this matter as the applicant admitted to sign Security Checklist while was not available in the Bank's custody as evidenced at page 67 paragraph 13 of the CMA's proceeding, contrary to Section 1.4

and Appendix 10-5.6 of HR Manual which admitted as Exhibit B-5(Human Resource Manual).

In such circumstance where by the applicant failed to explain why he signed checklist while the security was not in Bank's custody and failed to register leasehold on property leased for loan, while at page 67 paragraph 21 admit that one of his duties was to register and he failed to do so, to the client known as LEVOS ENTERPRISES which resulted loss of USD 1,860,000 to the respondent in my view this justify gross negligence. Therefore, the applicant's allegation that the transaction was also honored by other officer lacks merits as the same does not remove him from liability of acting negligently.

Now under Rule 12 (3) (a) and (f) of the Employment and Labour Relations (Code of Good Practice) GN 42/2007 a misconduct is a good ground for termination. It provides that: -

"Rule 12(3) The acts which may justify termination are-

(a) gross dishonesty;

(d) gross negligence.

This was so emphasized in the cases of **Saganga Mussa V. Institute of Social Work,** Lab. Div., DSM Consolidated Lab. Rev. No. 370 of 2013 and **Institute of Social Work V. Saganga Mussa,** Consolidated Labour Rev. No. 430 of 2013.

In the present application I have found that the allegations against the applicant amounted to a misconduct. Therefore, the respondent had a valid reason for terminating the applicant after finding him guilty of the misconduct.

Regarding procedure aspect, as the termination was for misconduct the applicable provision is Rule 13 of the Code which provides that: -

"Rule 13(1) The ***employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held."***

Apart from rival submissions regarding this aspect it is from the record that its undisputed that the respondent get the loss of USD 1860000 which resulted from the applicant negligence and the same was admitted as evidenced at page 67 paragraph 13 of the CMA's proceedings. Again, the applicant claim that he was not given the right to make his mitigation as required under Rule 13 (7) of the Code of Good Practice, GN. No. 42 of 2007.

Since I am aware of the general principles that code of good practice should not be applied as a check list style as it has been considered in different courts' decisions for instance **NBC CO. Ltd Mwanza v. Justa B. Kyaluzi,** Revision No. 79 of 2009, High Court of Tanzania, at Dar es salaam, (Unreported), it was held that; -

"What is important is not application or the code in a check list fashion rather to ensure that the process used adhered to basic of fair hearing in the labour context depending on the circumstances of the parties so as to ensure that the act of terminating is not reached arbitrarily".

In this matter at hand, basing on the circumstance of this labour dispute as the applicant admit on the same that he acted negligently, I find that the allegation of investigation report that was not conducted lacks legal stance.

In administering justice, it is true that a right to be heard is a very fundamental one as provided for under Rule 13 of GN 42/2007. In the case of **Abbas Sherally & Another Vs. Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 33 of 2002 (unreported) it was held that;

*"**The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the Court in numerous decisions. That right is so basic** that **a decision which is arrived at in violation of it will be nullified**, even if the same decision would have been reached had the party been heard, **because the violation is considered to be a breach of the principle of natural justice.**"*

From the above cited authority and wise of the legal stand, that each case has to be decided upon its own circumstances. In this matter at hand the applicant was afforded with right to be heard as per Exhibit R4(calling for hearing), Exhibit R4(response to the charge) and Exhibit R7(hearing form), regarding mitigation I concur with respondent by citing the case of **Board of Trustee NSSF vs Prosper Ogola,** Revision No. 639 of 2019, High Court of Tanzania, Labour Division, at Dar es salaam, (unreported), where it was held that there is no need for mitigation once there is admission for the same.

In the end result, as ruled by CMA I have found that the respondent had a valid reason to terminate the applicant and procedure was adhered. Then I find nothing to award CMA's award, upheld. I give no order as to the cost of the suit.

D. P. NGUNYALE

JUDGE

01/07/2021