IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 123 OF 2020

BETWEEN

BANK OF AFRICA (T) LIMITED..... APPLICANT

VERSUS

KARIM A. HASSAN..... RESPONDENT

JUDGEMENT

Date of Last Order: 24/06/2021

Date of Judgement: 30/07/2021

T. N. Mwenegoha, J

The applicant filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (CMA) delivered on 14/02/2020 by Hon. Mbeyale, Arbitrator in labour dispute No. CMA/DSM/KIN/R.769/18/459.

Briefly, on 01/04/2016 the respondent was employed by the applicant as an Officer SME in Business and Development Department on permanent and pensionable terms. On 03/07/2018 the respondent was terminated from the employment as a result of an act of negligence as stated in section 2.6 of the HR Manual for being involved in a frequently activity or business against the Bank, as it is reflected in the termination letter (exhibit B17). Aggrieved by the termination the

respondent referred the matter to the CMA claiming for unfair termination. On its findings the CMA was of the view that, the respondent was unfairly terminated both substantively and procedurally. Therefore, the CMA ordered the applicant to pay the respondent 24 months' salary amounting to Tshs. 53,280,000/= being compensation for unfair termination and severance pay of 2 years equal to Tshs. 1,314,923/=.

The applicant was dissatisfied by the CMA's award hence he filed the present application inviting the court to determine the following legal issues:-

i. That the Honourable Arbitrator erred in law and fact in holding that the applicant did not establish reasons for termination of the respondent's employment in disregard of the respondent's own admission.

ii. That the Honourable Arbitrator erred in law and fact by failing to analyze the evidence brought before her hence reaching an illogical and irrational award.

iii. That the Honourable Arbitrator erred in law and fact by holding that the applicant was not sure of the charges against the respondent.

iv. That the Honourable Arbitrator erred in law and fact in holding that the applicant failed to adhere with proper procedures as required by law and applied unfair legal practice.

v. That the Honourable Arbitrator erred in law and fact by awarding the respondent 24 months salary which is excessive and irrational

vi. That the Honourable Arbitrator erred in law and fact in computing respondent's 24 months' salary to Tshs. 53,280,000/= which computation is incorrect and excessive.

vii. That the Honourable Arbitrator erred in law and fact by awarding the respondent leave pay of Tshs 2,220,000/= an amount which is incorrectly computed and was not prayed for in CMA F1.

The matter was argued orally whereby both parties enjoyed the services of Learned Counsels. Mr. Philip Irungu was for the applicant while Mr. Stephano Joshua Mchome appeared for the respondent.

Arguing in support of the application Mr. Philip adopted the applicant's affidavit to form part of his submission. He submitted on the grounds appeared at paragraph 8 of the Affidavit.

As to the first ground he submitted that, the reasons for termination were established and the Hon. Arbitrator disregarded the respondents own admission to commit the offences charged. That, the

Respondent's admission is found in exhibit B4 which is non-loan performing questionnaire where in that exhibit at page 10, the respondent admitted to initiate a loan without following procedures. He added that, at paragraph 7 of credit memo (exhibit B7) the respondent agreed that he did initiate a loan without due diligence.

It was argued that, since the respondent admitted to have committed the offence while he was aware of the procedure of issuing a loan communicated to him in his job description (Exhibit B15). It was stated that, the job description required the respondent to assess individual seeking for loans and recommend, a suitable product however, he negligently initiated a loan of 1 billion while knowing the customer had no capacity to service the loan. It was also submitted that, as it is seen in the audit report (exhibit B10) at page 4, paragraph 5, the respondent initiated a loan of 70 million to the same customer and the bank scaled it down to 40 million because the customer couldn't service a 70 million loan.

It was strongly submitted that the respondent was negligent and that is why in the non performance Questionnaire (Exhibit B4 at page 2 paragraph 6) he wrote to the Applicant's bank that all he did was a mere human error. The Learned Counsel argued that, there is never an error

where a person knows that a certain customer was denied 70 million then he initiated a 1 billion loan. To buttress his submission, he referred the court to the case of **Oswald Chenyenge Vs Pangea Mineral**, Rev. No. 62/2015 said and the case of **George Peter & Another Vs Higher Education Students Loan Board**, Rev.No.509 of 2019.

On the second issue it was submitted that, the Arbitrator never gave any reasoning to state why she did not record or take into consideration the respondent's admission in committing an offence. And in so doing she gave unfair award. He cited the case of **Tanzania Breweries Ltd Vs Anthony Nyingi**, Civil Appeal No. 119/2014 where it was held that,

> *'if a Court of Law decided to accept or reject a party's argument it must set out reasons ... otherwise it becomes arbitrary one. It was stated that, since the Arbitrator did not give reasons, this court should find the award given is arbitrary award or unfair award.'*

Regarding the third ground it was submitted that, at page 28 of the contested award, the Arbitrator stated that the fact of dropping some allegations and raising them during evidence creates doubt and confusion is not true, because the respondent was charged with negligence as reflected in a charge letter (exhibit B11) as well as in the

termination letter (exhibit B17). He added that, dropping some of the charges doesn't prove that the employer is not sure in terminating the employee on the proved charges only as it was the position in the case of **Jackline Mathias Binukila Vs PCCB**, Rev. No. 784/2019.

As to the fourth ground it was submitted that, Exhibit B4, together with Exhibit B10, non performing questionnaire and Audit report respectively, proves that investigation was done before charging the employee. It was submitted that, after investigation the law requires the employer to issue charges to the employee which was done in the case at hand as per the charge (Exhibit B11) and the respondent replied thereto (Exhibit B12). It was further submitted that, the employee has to be notified of a hearing and when the disciplinary hearing has to take place, that this was done as reflected in the notice to attend disciplinary hearing (exhibit B13) and hearing minutes (exhibit B14). It was strongly submitted that, the procedures were dully followed by the applicant.

The fifth and sixth issues were argued jointly. It was submitted that, since the reasons were valid and the procedures were followed the Arbitrator should not have awarded any compensation. It was contended that, the award of 24 months compensation is excessive and incorrect. It was argued that, in the termination letter (exhibit B16),

shows that the respondent's net salary is 1.4 million, that in simple computation for 24 months the total is 33.6 million. The Learned Counsel went on to argue that, if we take respondent's gross salary as 2 million multiply by 24 months it is 48 million which is contrary to the Arbitrator's findings of 53 million. It was also argued that, compensation should not be issued as a leniency, that in awarding more reasons must be explained as it was held in the case of **Jordan University College Vs Flavian Joseph**, Rev. No. 23/2019 at page 5. He also referred the cases of **Kulwa Solomon Kulile Vs Salama Pharmaceuticals Ltd**, Rev. No. 1/2019, (unreported) and **Felicia Rutwaza Vs World Vision Tanzania**, Civil Appeal No. 2013/2019 CAT.

On the last ground it was submitted that, the Arbitrator awarded leave pay of Tshs. 2,220,000/= which were not prayed for in CMA Form No. 1 or even proved. To support his submission, he cited the case of **Judicate Rumishaeli Shoo & 64 Others Vs The Guardian Ltd**, Rev. No. 80/2010, where in the 4th paragraph it was stressed on the significance of referral form. That, the CMA has to make decision on what was pleaded in CMA Form no. 1. In the upshot, he prayed for the CMA's award to be set aside and the application be allowed.

Responding to the application Mr. Mchome strongly submitted that, there is no admission by respondent to any allegations. He averred that, what has been alleged by applicant's counsel under Exhibit B4 is not a confession but a reply that he used certificate of Birth provided to him. That, the respondent further stated that, he is not an expert on forged documents therefore there was no confession. It was stated that, the issue of forged birth certificate was dropped by the applicant as evidenced by Exhibit B14.

Mr. Mchome combined ground no. 1 to 3 and argued them jointly. He submitted that, at first the applicant had 8 charges against the respondent but 3 were dropped, 5 remained. That, the first charge was contrary to Rule 5.6.2 of Credit Policy which was against forged of 3 documents that were used by the Respondent, a Bank document, Birth Certificate and Bank Management Account. It was argued that, the accusation is invalid because the applicant never tenders at the CMA the contested documents other than a copy of NBC Bank Statement, which was tendered contrary to Section 66 of The Evidence Act, Cap. 6 RE 2019, which requires for primary evidence. That, the applicant failed to prove the first charge.

It was further submitted that, the credit policy was not tendered, as pointed out by the Arbitrator at page 25 of the impugned award which was contrary to R.12 (1) (b) of Employment Labour Relations (Code of Good Practice) Rules GN.42/2007 (herein GN 42/2007). It was argued that the applicant failed to prove the allegations as per Section 110 of the Evidence Act.

As to the 2nd allegation which was contrary to S.2, 3 (2) of Credit Policy it was submitted that, the same is invalid because credit policy was not tendered. It was added that, the CMA failed to assess whether the credit policy existed or not. Regarding the 3rd charge it was submitted that, it is also invalid because no rule was shown to be contravened. The Learned Counsel alleged that, it is a mere charge without a rule which was contravened contrary to Rule 12 (1) (a) of GN 42/2007. On allegation no. 4 it was argued that, it is invalid because no rule was contravened and also the Respondent was alleged to commit an offence of loan facility which passed various stages and department, involving a lot of people.

The Learned Counsel went on to submit that, the allegations against the respondent were not proved because the principles and

Rules especially Credit Policy and Human Rights Manual of the applicant were not tendered to prove the alleged allegations against respondent. It was cemented that, the CMA was right to find that the reason for termination were invalid because the allegations were not proved.

Resisting to ground No. 4 it was submitted that, the Arbitration was right because the procedures were not followed. It was submitted that, the first procedure is about mitigation factor, he said no evidence adduced at the CMA showing that the respondent was given his right to mitigate as in accordance with Rule 13 (7) of GN 42/2007. To support his submission, he cited the case of **Huruma Kimambo Vs. Security Group (TZ) Ltd**, Rev. No. 412/2016 Pg 20 & 21. It was also submitted that, the respondent was not given ample time to prepare for his defence contrary to Rule 13 (3) of GN 42/2007. It was stated that, as per notice of disciplinary, the respondent was given notice on 12/06/2018 and hearing was conducted on 13/06/2018. It was argued that, the respondent was not accorded enough time to prepare for his defence.

It was further submitted that, the disciplinary hearing outcome was not served on time. He said, the disciplinary hearing was conducted

on 13/6/2018 but the outcome was issued on 10/7/2018 which is against Rule 13 (8) of GN 42/2007. To cement his submission, he referred the case of **Ker & Downey (T) Ltd Vs Rajun Kiure**, Labour Rev. No.6/2017 where at page 5 it was held that, outcome of the hearing needs to be given to the employee within 5 days. To the contrary outcome of the disciplinary hearing was given to the respondent after a month. It was strongly submitted that, the procedures were not followed and the Arbitrator was right in her decision.

On the 5th 6th & 7th grounds it was submitted that, the Arbitrator was right to award 24 months as compensation because the law does not bar the him/her to award more than 12 months. It was argued that, it depends on the circumstances of the time it took to adjudicate the case. It was stated that, compensation is statutory damages and can be provided even if they are not in CMA Form No. 1. Conclusively, the Learned Counsel urged the Court to dismiss the application.

In rejoinder Mr. Philip replied to ground 1 to 3, he strongly submitted that, the reason for termination was negligence therefore, the allegations stated were to show whether the employee was negligent

and not otherwise. As to the documents alleged not to be tendered, he stated that, the same were tendered at the CMA and admitted as (Exhibit B10) compiled with the Audit Report and Management Account. He added that, the Bank Statement was admitted as Exhibit B2 as reflected at page 15 of the CMA proceedings. That, the respondent overlooked those documents. It was strongly submitted that, the respondent admitted to the offences charged as reflected in Exhibit B4, on paragraph 7.

On statement regarding Credit Policy or HR Manual, it was submitted that, since the respondent was charged with negligence which is also provided under Rule 12 (3) (d) of GN 42/2007 thus, absence of those rules does not invalidate the negligence.

As to the ground of mitigation it was responded that, the same was a new fact raised by the Arbitrator which was not part of the CMA proceedings. About the time of disciplinary hearing, it was submitted that, as per Exhibit B17 the respondent was given time but he chose to continue with hearing himself.

On lateness of decision of the decision of Disciplinary Committee it was stated that, looking at page 62 of the proceeding the respondent

was in his annual leave that is why he was not given the decision in time. Regarding the payment of leave allowance it was submitted that, the same was not part of the compensation, and since it was not pleaded, it was wrongly awarded. He therefore urged the application to be allowed.

Having gone through the CMA and Court's records as well as submissions by both parties, it is my considered view that the issues for determination before the Court are; whether the applicant proved the alleged respondent's misconduct, whether the applicant adhered to fair termination procedures in terminating the respondent and lastly is to what relief are the parties entitled.

On the first issue as to substantive part of the termination; it is the requirement of the law employers to terminate employees only on valid and fair reasons as it is pursuant to section 37 of the Employment and Labour Relations Act, [CAP 366 RE 2019] (herein referred as the Act). In the application at hand the record shows that the respondent was terminated as a result of an act of negligence as stated in section 2.6 of the HR Manual for being involved in a frequently activity or business against the Bank, as it is reflected in the termination letter (exhibit B17).

The case of **Donoghue vs. Stevenson** [1992] UHKL, 100 established three principles in a test for a tort of negligence as follows:-

'i. That there was a duty of care,

ii. That there was a breach of that duty,

iii. That the breach of the duty caused loss.'

The elements were also elaborated in the case of **Tanzania Revenue Authority Vs. Thabit Milimo and Another**, Lab. Div. DSM Rev. No. 246 of 2014 [2015] LCCD 1 (191) where Nyerere J. (Rtd) held that:-

> *'In the law of negligence liability arises where:-*
>
> *(i) There is a duty of care and a person breaches that duty as a result of which, the other person suffers loss or injury/damage.*
>
> *ii) a person acts negligently, when he fails to exercise that degree of care which a reasonable man/person of ordinary prudence, would exercise under the same circumstances.*
>
> *iii) Negligence is the opposite of diligence or being careful.'*

In applying the principles of negligence in the case at hand, the respondent alleged that his role in the whole process of loan was to insert financial statement and attaching some documents in the CQ

provided and given instruction from his line manager as stated in Non-performing loan info (exhibit B4). This court is not convinced with such role elaborated by the respondent. If at all his duty was to attach the documents in question as claimed such an act would undermine the very purpose of employing professionals like him, and his line manager could have attached the documents in question without his assistance. It is my observation that, the documents in question were given to the respondent for him to asses them and ascertain their truth of which he did not, an act which caused loss to the employer.

As rightly submitted by the applicant's Counsel, the respondent admitted to have made a human error on the management accounts of September 2016 where the turnover was TZS 11.6 billion instead of 15.4 billion. His admission proved that he was negligence in handling the customer in question.

It is also my view that, the record available at the bank which shows that the customer in question was granted 40 million which was scaled down from the request of 70 million four months ago before processing of the disputed loan, if keenly considered should have alerted the respondent on the capacity of the customer in question. However

the respondent did not consider such record and proceeded to process loan in favour of the contested customer.

Therefore, in this application the respondent had the duty to scrutinize the attached document but he did not discharge such duty an act which in my view amounts to negligence.

On the procedural aspect the applicant's Counsel strongly alleged that the applicant followed stipulated procedures in terminating the respondent. On his part the respondent's counsel insisted that some of the disciplinary procedures were violated by the applicant. He submitted that the respondent was not given enough time to prepare for his defence. As per exhibit B16, the respondent's response to the allegation on item (h) the employer wanted to postpone the meeting to allow him get prepared for his defence but he asked the employer to proceed with disciplinary hearing because he was travelling on the next day. Under such circumstance it is my view that, the respondent is barred to claim on such aspect because he willingly consented for the hearing to proceed. Thus, his allegation lacks merit.

The respondent further claims that he was not given the outcome of the disciplinary hearing on time as required under Rule 13 (8) of GN 42 of 2007 which provides as follows:-

'Rule 13 (8) After the hearing the employer shall communicate the decision taken, and preferably furnish the employee with written notification of the decision, together with brief reasons.'

The above provision reads together with guideline 4 (9) of the **Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures** which is to the following effect:-

'The chairperson should inform the employee of the outcome of the hearing as soon as possible, but not later than five working days after the hearing, giving brief reason for a decision. The chairperson should sign the disciplinary form and give a copy to the employee.'

From the provisions of the law above the respondent was supposed to be served with outcome of the disciplinary hearing five days after the hearing. In this application the disciplinary hearing was held on 13/06/2018 and the respondent was served on 10/07/2018 almost a month after the alleged hearing. The applicant's defence on the lateness is because the respondent was in his annual leave. In my view such reason is baseless, if the applicant considered that the respondent was on his annual leave then, he should have postponed the disciplinary hearing until when the respondent resumed work. The fact that the

hearing was conducted while he was on leave, he had a right to be provided with the same regardless the fact that he was on leave or not.

The respondent's counsel also alleged that, the respondent was not afforded an opportunity to mitigate. It is the requirement of the law that where hearing results in the employee being found guilty of the allegations, he should be given an opportunity to put forward his mitigation factors, this is pursuant to Rule 13 (7) of GN 42 of 2007. The disciplinary minutes tendered in this case does not reflect that the respondent was afforded with such opportunity to mitigate. Therefore, it is crystal clear that, such procedure was violated.

Thus, on the basis of the above discussion it is crystal clear that some of the procedures were violated by the employer in terminating the respondent.

On the last issue as to parties relief, the Arbitrator awarded the respondent 24 months remuneration as compensation for unfair termination. As it is found above that, the reason for termination was valid but some of the procedures applied to terminate the respondent were violated it is my view that, the award of six (6) months compensation is justifiable in the application at hand. As it is the position

in the recent Court of Appeal of Tanzania decision in **Felician Rutwaza Vs. World Vision Tanzania**, Civ. Appl No. 213 of 2019 where the Court subscribed to the decision in the case of **Sodetra (SPRL) Ltd. V. Njelu Mezza & Another**, Labour Revision No. 207 of 2008 (unreported) where it was held that: -

> *'...it is not mandatory in all cases of unfair termination the Arbitrator should order compensation of not less than 12 months remuneration...'*

In the latter case the Court went on to hold that: -

> *'...a reading of other sections of the Act gives a distinct impression that the law abhors substantive unfairness more than procedural unfairness, the remedy for the former attracts a heavier penalty than the latter...'*

On the basis of such position which under the principle of stare decisis binds this court, I find the award of six months remuneration is reasonable to the circumstances of this case. Thus, the Arbitrator's award of 24 months is hereby quashed and set aside.

In the result, as it is found that the applicant had valid reason to terminate the respondent but he violated some of the procedures, I find the application to have partly succeeded. In the event the Arbitrator's

award of 24 months remuneration to the respondent is hereby quashed and set aside. Thus, the applicant is ordered to pay the respondent six (6) months remuneration as compensation for the procedural unfair termination. I find no need to disturb the award of severance pay ordered by the Arbitrator.

It is so ordered.

T.N Mwenegoha.

JUDGE

30/07/2021