IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT DAR ES SALAAM

CONSOLIDATED REVISION NO. 724 & 761 OF 2019

BETWEEN

I & M BANK (T) LIMITED ..... APPLICANT/RESPONDENT

VERSUS

GREGORY OGWEYO ..... RESPONDENT/APPLICANT

JUDGEMENT

S. M. MAGHIMBI, J:

This is the consolidated judgement of revision No. 724 & 761 of 2019. The present applications emanate from the common decision of the Commission for Mediation and Arbitration ("CMA") award delivered by Hon. Johnson Faraja on 09/08/2019 in Trade Dispute No. CMA/DSM/R.339/17/612 ("The Dispute"). Both partied were, on their distinct grounds, aggrieved by the CMA award. On her part, the employer, I & M Bank (T) Limited lodged Revision No. 724 of 2019 on the following grounds:-

i. That, the decision/ruling of the Arbitrator is problematic as it is in conflict with the findings and also contrary to the law.

ii. That, the Arbitrator erred in law in holding that the respondent was not properly terminated.

iii. That, the Arbitrator erred in law and fact ruling that the respondent was entitled to compensation for breach of contract in view of the circumstances of this case.

iv. That, the Arbitrator acted in the exercise of its jurisdiction illegally and with material irregularity.

v. That, there has been an error material to the merits of the subject matter in the arbitration proceedings involving and resulting in injustice to the applicant.

vi. That, the Arbitrator used his discretionary powers injudiciously.

vii. That, the Learned Arbitrator had deliberately manipulated the arbitration proceedings to arrive at the decision he wanted.

viii. That, the Learned Arbitrator had taken into account extraneous matters which had not been mentioned in the pleadings, proceedings or adduced in evidence.

On the other hand, the employee, Gregory Ogweyo (to be referred as the employee) filed revision No. 761/2019 on the following grounds: -

i. That, the Arbitrator erred in law and facts in holding that the termination of the applicant was substantively fair even though there was no direct evidence proving that.

ii. That, the Arbitrator erred in law and facts by holding that the termination was substantively fair basing on the electronic evidence which did not comply with the requirement of the law.

Having found the common decision that Revision is sought for, the two applications were consolidated by a court order dated.....

Before venturing into the merits or otherwise of the consolidated applications, brief background of the dispute that has led to the Revision is hereby narrated. The employee was employed by the employer as an Assistant Manager of IT Department from 30th July, 2012 to 18th May, 2017 when he was terminated from employment. His termination came after he was found guilty of gross misconduct namely, leaking of confidential document on salary increments and bonus in a WhatsApp group. The findings came from a disciplinary procedure conducted by the employer. Aggrieved by the termination, the employee referred the matter to the CMA on the ground of unfair termination and the CMA found that the employee's termination was substantively fair but procedurally unfair. Consequently, the CMA awarded the employee a total of Tshs. 47,322,375/= being 12 months remuneration as compensation for the alleged unfair termination, as well as severance pay. Both parties were aggrieved by the CMA's award hence they filed their applications which led to this consolidated judgment.

By an order of this court dated 17/05/2021, the matter was argued by way of written submissions. Both parties enjoyed the services of Learned Counsels, on his part, the employee submissions were drawn and filed by Mr. Evans Festo Ondigo, learned Counsel while the employer's submissions were drawn and filed by Ms. H. H. Sheikh from Sheikh's Chambers of Advocates.

Arguing in support of the application, Mr. Ondigo submitted that, the substantive reason which resulted to the termination of the employee was not adequately proved. He stated that, the copy of the investigation report which was used to terminate the employee was not

availed to him before the disciplinary hearing so as to enable him to prepare for his defence and that the employee was not shown the purported phone which was used to disseminate the confidential document nor shown the confidential document which was transferred to the staff WhatsApp group as alleged.

He submitted further that the necessity to supply the employee with proper evidence to be relied upon in the disciplinary hearing is provided under Rule 13 (5) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N 42 of 2007 ("Code of Good Practise"). To support his submissions, he cited the of **George Samwel Kibwana Vs. Kassim Mohamed Kassim [1074] HCD 55**. It was argued that in this matter, the fact that the investigation report was not availed to the employee makes the whole process a nullity.

Mr. Ondigo further submitted that the procedure for tendering electronic evidence which was relied to terminate the employment of the employee did not complied with Section 18 (3) of the Electronic Transaction Act No. 13 of 2015 which requires the certificate of the authenticity of the electronic evidence. He added that the authenticity of the electronic evidence was supposed to be declared and sworn in an affidavit before its admissibility at the CMA. He supported this argument by citing the same position in the case of **Reference Point Limited v. Overseas Infrastructure Alliance (I) P. Ltd, Civ. Case No. 71 of 2018** and also emphasized in the case of **Serengeti Breweries Limited Vs. Break Point Outdoor Caterers Limited, Commercial Case No. 132 of 2014**.

Mr. Ondigo went on submitting that in the matter at hand, the Arbitrator admitted exhibit D1 and other electronic evidence in contravention of the above cited law. That the employer did not file certificate of the authenticity of the electronic evidence while the CMA relied on those evidence to rule that the employee's termination was substantively fair.

As to termination procedures, Mr. Ondigo submitted that the disciplinary Committee used to terminate the employee was not properly constituted because there was biasness in the whole process. That, Mariam K. Amir, the HR support officer who was part of the accuser was also part of the disciplinary Committee as HR representative and she remained in the hearing from the beginning to the end of the process. It was also submitted that the chairperson of the disciplinary committee was Mr. Lalit Tewari who also signed the respondent's suspension letter as well as termination letter on behalf of the employer. That the termination letter was given to the employee few minutes after the hearing which shows that there was malice in the side of the committee which prejudiced the employee's right to appeal against the committee's findings.

It was further submitted that DW1, the investigation officer also attended the disciplinary hearing and participated in the decision making which shows there was no impartiality and fairness in the whole process. To support his submission, he referred the court to the case of **Jimmy Mngonya v. NIC Limited [1994] TLR 28** and added that, the employee was not afforded an opportunity to mitigate under per Rule 13 (7) of GN 42 of 2007.

As to the reliefs entitled, Mr. Ondigo submitted that the employee was unfairly terminated hence he was entitled to compensation. In conclusion, he submitted that the Arbitrator acted illegally in the exercise of his jurisdiction because he relied on insufficient evidence. In the upshot, he urged the court to confirm the CMA's decision on procedural aspect of termination, to quash the CMA's decision on substantive part of the termination and to reinstate the employee to his employment without loss of his remuneration.

On her part, Ms. Sheikh that the employee's termination was fair substantively basing on the evidence on record and testimonies of the witnesses. That the investigation report revealed that the employee committed the misconduct in question hence he was fairly terminated from his employment.

As to termination procedures, she submitted that the employer followed all required procedures in terminating the employee, he was served with a notice of charges (exhibit D5) and a notice to attend a disciplinary hearing (exhibit D4). Further that the employee was accorded with the right of representation where he brought his fellow employee, Miss Elizabeth Lugushi and also had a right to bring his witness. He was also accorded an opportunity to examine the evidence presented by the employer.

Regarding the composition of the disciplinary committee Ms. Sheikh contended that the Committee was well constituted, arguing that Mr. Lalit Tewari, who was the chairperson of the meeting, had no interest in the matter as manipulated by the Arbitrator. She added that, the authorities quoted by the Arbitrator to challenge the composition of

the disciplinary committee are inapplicable to the case at hand and that the employer proved on balance of probabilities that the employee's termination was fair both substantively and procedurally. To support her submission, she referred the Court to the case of **Wellington Shakifu v. TAKUKURU, Rev. No. 301 of 2013, HC, Lab. Div. DSM.**

On the award of compensation, she submitted that the employee is not entitled to any compensation because his termination was fair both substantively and procedurally. In addition to t at the Arbitrator acted illegally in the exercise of his jurisdiction and with material irregularities because on several occasions while the Arbitration was still pending, he verbally asked the employer's Human Resources person to get him a job to the employer's bank and he was displeased when he did not get any response. Thereafter, in the conduct of the arbitration proceedings, he had shown apparent bias in favour of the employee. Further that she had also requested for a change of Arbitrator (change of venue) in vain.

On the reliefs sought, Ms. Sheikh submitted that the employee's claim has no merit because he was found guilty of the misconduct in question and the termination procedures were properly followed. She therefore prayed for the CMA's award to be quashed and set aside.

Having considered the rival submissions from both counsels in both applications, I find that there are three issues to be determined by the Court. The first issue is whether the employer proved the misconduct leveled against the employee to have justified the substantive dismissal. Second issue is whether the employer followed laid down procedures in terminating the employee to prove procedural

fairness in the termination and lastly is the reliefs that the parties are entitled.

On the first issue, whether the employer proved the misconduct leveled against the employee to have justified the substantive dismissal, the issue will be determined in line with the provisions of Section 39 of the Employment and Labour Relations Act, [Cap 366 RE 2019] ("the Act"). The Section imposes a duty to the employer to prove fairness of termination in any proceeding concerning unfair termination. In the application at hand, the employee was terminated on a misconduct namely, sharing a confidential HR Board paper on Staff Increment and Bonus on WhatsApp social media for the Employers Staff. Now the question to be determined is whether the employer tendered sufficient evidence to prove that the alleged misconduct was actually committed by the employee and it amounted to grave misconduct .

In the impugned decision, the Arbitrator was of the view that the employer tendered sufficient evidence to prove the misconduct in question. On his part, the employee argued that there was no sufficient evidence tendered to prove the misconduct in question because the alleged document sent to the group was not tendered at the CMA. Further that the phone which was used to send the contested documents was not tendered. Looking at the tendered investigation report (D1), its page two stated the Log-ins log of the employee at hand. The report reveals that from 20th April, 2017 to 25th April, 2017 the employee accessed some of the documents from different staff including the Human Resources documents where the alleged file (increment and bonus 2017) was placed. It was submitted that the

employee had no permission to access the mentioned file. DW1 testified that, the employee accessed Human Resource files on salary increments and bonus. His evidence was also supported by the Login log (exhibit D2) which clearly shows the documents accessed by the employee with his password which he is aware. There is no evidence to dispute that as per ICT Policy & Password Policy (D3), he was not supposed to share the information with anyone else.

The employer also tendered copy of the WhatsApp group chat (exhibit D4) which shows that the folder of Increment for 2017 and bonus for 2017 was shared in the group by the person known as Gregory (the employee at hand). Under such circumstances it is my view that the employer proved on balance of probabilities that the employee committed the misconduct charged by sharing information which he was not authorised to.

I have noted the employee's submission on the admissibility of the electronic evidence. With due resbeing is a quasi-judicial body, it cannot be bound by much by the strict rules of evidence or the Court's technicalities. Section 88 (4)(b) of the Act requires the CMA to conduct arbitration proceedings with minimal legal technicalities. On the basis of the above provision, it is my view that the Arbitrator was right to admit and rely on the electronic evidence tendered by the employer so long as both parties were availed with an opportunity to examine the evidence presented. Under the circumstances I have no hesitation to say that the employer proved the misconduct levelled against the employee as rightly found by the Arbitrator.

On the second issue as to termination procedures, the procedures for terminating an employee on the ground of misconduct are provided under Rule 13 of GN No. 42 of 2007. In the application at hand, the termination procedure which is challenged is the constituency of the disciplinary Committee members particularly the chair person who is alleged to have had interest in the proceeding by signing the termination letter. The law requires a person who chairs a disciplinary meeting to be impartial. He/she must be or is expected to be completely neutral. This is pursuant to Guidelines 4 (2) of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedure of GN. 42 of 2007 (herein the Guidelines) which is to the effect that:-

> *'The chairperson of the hearing should be impartial and should not, if possible, have been involved in the issues giving rise to the hearing. In appropriate circumstances, a senior manager from a different office may serve as chairperson'.*

In this application, the disciplinary hearing was chaired by Mr. Lalit Tewari, Head of Business support as reflected in the hearing form (exhibit D6). The said chairperson also signed the employee's termination letter (exhibit D6). Further to that, as per the evidence of DW1, it was Mr. Laliti Tewari whom on the 25/04/2017, informed him of the leaked information. He also testified that it was the same Mr. Laliti Tewari who ordered him to proceed with the investigation and bring him a report of the said investigation. This testimony is sufficient to conclude that Mr. Lalit was the investigator of the matter having been the one who ordered the investigation to commence. All these facts leaves the

court with doubt of whether such person was a neutral and an impartial one to chair the disciplinary hearing.

In the circumstances of this case, if critically examined, one would come to the conclusion that the chairperson of the disciplinary hearing was not an impartial person. He would have been a proper person if he did not sign the termination letter nor ordered an investigation of the matter to commence. By having done so, it means he had interest in the outcome of the investigation and thus on the conclusion of the trial for he would not have wanted his investigation to be proven wrong. His involvement in the disciplinary proceedings was therefore uncalled for.

In my view, the fact that he initiated investigation, chaired the meeting and gave his recommendation and then proceeded to terminate the employee basing on his recommendation is sufficient to draw a conclusion that he had influence in the decision, the fact which proves that he was not an impartial person.

I have also noted the employee's dissatisfaction of the disciplinary hearing recommendations. With the circumstances of this case where the chairman of the disciplinary hearing was the same person who terminated the employee, issuing the employee with termination letter on the same date when disciplinary hearing was conducted is sufficient to presume that the chairperson had his decision to terminate the employee before such hearing was even conducted.

Furthermore, as rightly contested by the employee, DW1, the investigation officer was also part of the committee member as evidenced by the hearing form (exhibit D6). In my view the fact that the said person conducted an investigation disqualified him to be a member of the disciplinary committee because it is presumable that he had

influence to the committee's decision. He could only have been summoned as a witness in the relevant hearing.

The employee also alleged that he was not given investigation report prior to the disciplinary hearing. Under the provision of Rule 13 (1) of GN 42 of 2007, an employer is required to conduct investigation prior to the disciplinary hearing. The relevance of supplying an employee with investigation report has been elaborated by a range of cases which depends on a circumstance of the case. In the application at hand, there is no clear evidence proving that the employee was supplied with the investigation report prior to the disciplinary hearing and any other relevant documents which would have helped him to prepare for his defence.

I am not in disregard of the submission by the employer's Counsel that the termination procedures should not be adhered in a checklist fashion because that is also the purpose of the law. Neither does this mean that the principles of natural justice should not be adhered to. In this case, they were violated as substantiated above and as such, I join hands with the Arbitrator that the employer did not follow proper procedures in terminating the employee in question. The procedure for termination of the employee was therefore unfair.

The last issue is the relief that the parties are entitled to. To begin with, the employer urged the court to quash the CMA's award. On the other hand, the employee, in addition to the reliefs awarded by the Arbitrator, prays for an order of reinstatement. On the basis of the above discussion, because it is found that the employee's termination was fair substantively, it is my view that the award of reinstatement is not reasonable to the circumstances hence such prayer cannot be

granted. I fully agree with the Arbitrator's findings that, the award of compensation is suitable and correct in this case. However, since it was only some of the procedures which were not followed by the employer but there was substantive reason for termination, I find that the applicant is entitled to the compensation of six (6) months remuneration. This is pursuant to the recent position of the Court of Appeal of Tanzania 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 this position, I find the award of nine (9) months to be proper and suitable to the circumstances of this case. The Arbitrator also awarded the employee severance pay of five years. Section 42 (3) (a) of the Act provides that an employee who is terminated on a fair ground of misconduct is not entitled to severance pay. In the matter at hand, the employee was terminated on a proved ground of misconduct therefore it is my view that he is not entitled to the award of severance pay as awarded by the Arbitrator. This is set aside.

Lastly, I feel dutiful to comment on the employer's submission on the Arbitrator's misconduct. In this case the allegation is that the Arbitrator misconducted himself because he did not get a job in the employer's bank is a serious one which needs to be proved. On this aspect I wish to refer the wisdom of this Court in the case of **Danford Evans Omari v. Tazama Pipeline Limited**, Rev. No. 684 of 2019 where it was held that:-

> *'One cannot just throw anything he/she wish, simply because decision reached did not please him/her. It is my conviction that* ***parties to the dispute should not turn mediator/arbitrator as punching bag, simply because their decision was not in their favour.***'

In my view, such allegations are serious and should not be raised as words from the bar hence I should not consider them at this stage because the arbitrator would not have been afforded an opportunity to be heard. I have also wondered if the same allegations would have been raised if the matter was decided in favour of the employer. Anyway it is not my cup of tea for this day.

All the above said and done, it is my conclusive findings that the Revision Application No. 761 of 2019 has no merits, this court confirms that the Arbitrator's finding that the employee's termination was substantively fair but procedurally unfair. As for the Revision Aapplication No. 724 of 2019, it is partly allowed. The award of severance pay to the employee is quashed and set aside. Furthermore, the Arbitrator's award of twelve (12) months' salary compensation is reduced to nine (9) months' salary. Since the employee's salary was

Tshs. 3,571,500/- X 9 the employer shall pay the employee a total sum of Tshs. 32,143,500/-.

It is so ordered.

Dated at Dar es Salaam this 09th day of August, 2021

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) (Labour Division) DIVISHENI YA MAHAKAMA YA KAZI

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S.M MAGHIMBI

JUDGE