IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 876 OF 2019

GRACE MWAKISYOMBE.....APPLICANT

VERSUS

NBC LIMITED.....RESPONDENT

(From the decision Commission for Mediation & Arbitration of DSM at Temeke)

(Mikidadi: Arbitrator)

dated 23rd October 2019

in

Labour Dispute Na. CMA/DSM/TEM/553/2018/197/2018

JUDGMENT

29th September & 13th October 2021

Rwizile J.

This application is for revision, where the applicant challenges the decision of the Commission for Mediation and Arbitration, to be referred herein as the Commission. It is preferred under section 91(1)(a), (2)(b)(c) and Section 94(1)(b)(i) of the Employment and Labour Relations Act, Rule 24(1), (2)(a), (b), (c), (d), (e) and (f) and

(3)(a), (b), (c) and (d) and Rule 28(1)(c)(d) and (e) of the Labour Court Rules, GN No. 106 of 2007.

It is supported by the applicant's affidavit, petitioning this court to mainly revise the decision of the Commission. The hearing of this application was by written submissions.

In brief, facts of the dispute are clear that the applicant was employed on the long-term contract by the respondent. Her employment, which was permanent and pensionable commenced 1987. It was terminated on 8th July 2018, on ground that she was found guilty of misappropriation of funds, gross dishonesty for concealing information relating to strong room cash shortage. Upon termination, the applicant referred her dispute to the Commission, claiming for payment of 63,378,302.51, for unfair termination; remuneration for 4 years, salary arears for 16 working days, severance payment of up to 10years. The commission found no merit in her application. It was dismissed. Not satisfied, she has advanced this application for revision on the following grounds;

a) The Hon. Commission erred in law and fact by failing to make a finding that the respondent cited non-

existing provisions of workplace policies that were the basis of terminating the applicant from her employment;

b) The Hon. Commission erred in law and fact by making its decision based on non-existing Whistleblower Policy that was never tendered during a hearing.

c) The Hon. Commission erred in law and fact by making its decision based on alleged disciplinary offence of dishonesty that was not the subject matter of the dispute before the Hon. Commission; and

d) The Hon. Commission erred in law and fact by failing to make a finding that Alphonce Msiba and Sweetbert Mapolu were heavily involved in the dispute prior to the disciplinary hearing that led to the termination of the applicant from her employment.

Mr. Leslie Mpanagala learned advocate submitted for the applicant that at the disciplinary hearing, the applicant was served with the charge sheet containing offences that are not in the policy alleged was infringed. The offences, according to the learned advocate, did not appear in the Disciplinary, Capability and Grievance standards or

in the NBC Cash Management Manual, exhibit D1 collectively. The learned counsel held the view that, the arbitrator did not analyse this point, which is contrary to section 37(1)(2)(a) and (b) of the ELRA and Rule 12(1)(a) and (b) (i) to (v) of the Code of Good Practice, GN No. 42 of 2007. This is to say, termination was not fair because the alleged misconducts committed are not regulated in the alleged documents.

On the second ground, the learned counsel argued that, the second charged misconduct, was not proved. He cited for instance, evidence by Dw1 and Dw2 at the trial. In his submission, it was stated that the NBC Disciplinary, Capability and Grievance Standards and rule 12(a) of the offences charged were stated in the notice of hearing. He went on submitting that the witnesses instead, referred to *Sera ya Bank ya Upashanaji Habari kwa njia ya simu na nyaraka"* non-trading loss report. This is what the arbitrator based its finding when in fact, it did not form the basis of the charge at the disciplinary hearing, Mr. Mpangala made it clear.

To him, the applicant did not have an opportunity to understand the rule she was alleged to have violated. Again, the learned counsel held the view that rule 12(1)(a) and (b)(i) to (v) of the Code of Good

practice was contravened. To support his finding, the learned counsel was of the view that the need to cite a proper law cannot be over emphasized, as held in the cases of **Mathias Shiza Luzabi vs Thobias M Mwanji**, Misc. Land Application No. 10 of 2017, HC Mwanza (unreported), where the court cited the decision of Court of Appeal in **Paul Mgana vs Managing Director Tanzania Coffee Board**, Civil Appeal No. 82 of 2001 (Unreported) and the case of **Robert Leskar vs Shibesh Abebe**, AR Civil Application No. 4 of 2006, CA (unreported). He asked this court to make the following conclusion; that at the disciplinary hearing a non- existing law was cited, and that the arbitrator invoked *Sera ya Bank ya Upashanaji Habari kwa njia ya simu na nyaraka"* non-trading loss report, which were not tendered at the hearing.

On the third point, the learned counsel argued that, the arbitrator defended Dw2 for proposing termination of the applicant while he was not a member of the disciplinary hearing committee. In his view, there is no law cited that allows a person not a member to the disciplinary hearing to propose a penalty. He said, this contravened Guideline 4(5) and (6) of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures. The learned counsel

submitted further that presence of Alphonce Msiba and Sweetbert Mapolu in the disciplinary hearing brought bias.

He argued so because among the 6 people who held the committee, it is only Sezaria Lusindin the chairperson who was not involved in the dispute before. The counsel concluded that, there were no proved valid and fair reasons for termination. The standard procedure for termination was not followed, and the arbitrator wrongly applied inapplicable provisions in exhibit D1 collectively (non-trading loss report). He asked this court to grant this application.

Mr. Innocent Mushi submitted for the respondent that the applicant has failed to distinguish between the Code of Good Practice, GN No. 42 of 2007, and the internal policy of the respondent. It was his submission, that the applicant was charged as per exhibit D1. The two internal policies namely NBC Disciplinary, Capability and Grievance Standards and Bank Cash Management Manual, according to him are in line with Rule 10 and 12(3)(a) of the code establishing misconduct, that constituted termination of the applicant. It was further submitted that the offences charged are stated in exhibit D1, the offence of dishonest while the Manual provides the procedure available when dealing with cheques.

The learned counsel was clear that Dw1 and Dw2 proved the offences were committed as per the manual. He said, the applicant admitted to have committed the offences at the trial as the award clearly pointed out. He further argued, the applicant admitted in exhibit D4 in respect of how she handled the cheque. Apart from exhibit D4, it was submitted, the applicant admitted at the disciplinary hearing as at exhibit D2.

As to the second misconduct charged, the learned counsel was of the view that the applicant also admitted as stated in the award. In his view, the fact that the applicant was not given the charge sheet before hearing is not backed by the record. He submitted, before the hearing, the applicant was given a notice which was accompanied by all the charges subject of the hearing.

Submitting on the second ground, the learned advocate was of the view that the applicant was to report the missing amount of money through the whistleblower policy. She became aware of the same on 27th March 2017 but concealed the information until 28th June 2017 when the same were discovered by auditors.

Submitting on the third ground, he said, the same lacks merit because those who attended the meeting were members with the capacity to do so.

When rejoining, the learned advocate more less repeated what was submitted in chief. He ultimately asked this court to grant the application.

From all grounds raised, that is (a), (b) and (d), (ground c was withdrawn) the award and submission of the parties, the application in my view, rests on whether the applicant was fairly terminated and what are the reliefs.

Dealing with the two issues, I have to start by clearly stating that, the applicant was terminated by a letter dated 10th August 2018. This was not a surprise to her because she had attended a disciplinary hearing on 31st July 2018. In reflection, exhibit D2 is good to that effect.

At page 12 of exhibit D2 which is a disciplinary hearing, the applicant was found guilty of having concealed information on the shortage of cash in the strong and having processed a cheque out of procedure.

The two were charged misconducts which upon hearing, the applicant admitted were committed.

Again, exhibit D2 a chargesheet has clearly stated the same as misconducts. In her mitigation at page 13 of the disciplinary hearing, exhibit D2, the applicant had this to say;

> *Nilifanya makosa haya bila kukusudia au kujua*
>
> *Nilipokea hundi kutoka kwa mwenzangu, sikujua kama hiyo hela italipwa au la*

From the above, it goes without saying therefore that the applicant was fully informed of the offence she committed. The fact that she did not know the rule she committed is misplaced. This is sufficient to show that the applicant was aware of the charge, she attended the hearing and did so with representation.

Upon going through exhibit D1, which is Disciplinary, Capability and Grievance standards. It is to my knowledge that it contains procedures and guidance for the employees and managers to operate their business. It is in the same document, at clause 2.3.2 that defines what amounts to misconduct and gross misconduct. It does not state types of misconducts, but lists a non-exhaustive list of incidences that would amount to gross misconduct and the

consequence thereof. As well, in Cash Management Manual- exhibit D2, clause 9.6 and 9.6.1 enumerates the procedure through which the cheque has be processed. Therefore, the two documents in my view are indeed informative and have sufficiently defined the offence committed.

In law, it is the duty of the employer to implement the disciplinary code at work place. This is important because unguided workers, will always do whatever they like at the expenses of their employers. Rule 11 of the Code of Good Practice, GN No. 42 of 2007, for ease reference has this to say;

> *11.(1) All employers shall implement disciplinary policies and its procedures that establish the standard of conduct required of the employees.*
>
> *(2) The form and content of policies and procedures shall obviously vary according to the size and nature of the employer's business.*
>
> *(3) An employer's rules in the application of discipline and standards of conduct shall be made available*

to the employees in a manner that is easily understood.

(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.

It goes without saying therefore, that the applicant being a long-term serving employee was aware of the rules. According to the record, she had served the respondent for 31 years. She was handling a sensitive area where cash is stored. She reported from leave and found shortage of cash but kept that at her heart for about three months until it was discovered by auditors. The loss, it was discovered had accumulated to at least 200,000,000/=.

She then handled the cheque with good intension but out of procure. Evidence of Dw1 and Dw2 is good that effect.

The issue is whether termination due to gross dishonesty was fair or not. The applicant submitted that the same did not comply with rule

12(1) of the Code of Good Practice and so was not fair. For ease reference the law states;

12-(1) Any employer, arbitrator or judge who is required to decide as to termination for misconduct is unfair shall consider-

(a) Whether or not the employee contravened a rule or standard regulating conduct relating to employment;

(b) If the rule or standard was contravened, whether or not

(i) It is reasonable;

(ii) It is clear and unambiguous;

(iii) The employee was aware of it, or could reasonably be expected to have been aware of it;

(iv) It has been consistently applied by the employer; and

(v) Termination is an appropriate sanction for contravening it.

From the foregoing I am of the firm view that the rule is category and does not need interpretation.

Applying it with the circumstances of this case, I have to say, exhibit D1 and D2 collectively have shown the how the policy and procedure at the respondent work premises were handled. The applicant did not raise an alarm that all what was done was foreign to her. She was, as well, a long-term serving employee. Above all, the same are reasonable and categorical to the belief that she knew she had failed to exercise properly the rules of procedure by failure to report cash shortage as it was testified by the respondent.

Lastly under subrule 2 of rule 12, it is apparent that the applicant was a first-time offender since nothing was said that suggests she had committed gross misconducts before. First offence under the law does not warrant termination. But under subrule 4, termination may be done, if the misconduct so serious. For avoidance of doubt the same states as hereunder;

> *(4) In determining whether or not termination is the appropriate sanction, the employer should consider-*
>
> *(a) the seriousness of the misconduct in the light of the nature of the job and the circumstances in which it occurred, health*

and safety, and the likelihood of repetition; or

(b) *the circumstances of the employee such as the employee's employment record, length of service, previous disciplinary record and personal circumstances.*

I would rather hold here that gross dishonesty will always merit termination in circumstances as stated in 4(a) above have been proved. But the applicant is at least saved with 4(b) above. She has been in long term service with the applicant with an unblemished record. She was away when the loss was occasioned. She is not accused of taking party in it. Her only offence here, was failure to report to the manager. But her evidence is clear and it has not been controverted. She said she reported to the accountant one Ngwitika Lufingo, who she said is her boss. The same was not called to refute this information. She testified that, from the time she discovered the shortage, she was following it up. She was informed, it was being worked upon by her boss. This time around, based on her evidence she was trying to find out the solution.

Still as to the cheque, she said on cross examination that what she did was normal, since they used to do so. Based on the nature of the misconducts and the manner they were committed; I think, it was not proper for her misconduct to merit termination.

In my considered opinion, these were misconducts which in terms of Rule 12(4) (b), of the Code, if the respondent would have considered personal circumstances of the applicant and other attenuating circumstances, such as length of time of 31 years she worked with the respondent with a relatively good record, the 4 years remaining for her to retire voluntarily, she could not have terminated her. For the reasons stated, I am to firmly hold that termination, though based on valid reason, it was not fair.

Having so decided, I think, I have to say though briefly, that ground 4(a) and (b) have no merit. I am saying so because exhibits D1 and D2 collectively enumerated all misconducts that the applicant had committed. Therefore, the decisions of the cases cited by the applicant in this aspect are not supporting her finding. It is so because, the subject under discussion in those cases were not labour matters.

For the last ground, which is 4(d), there is no merit in the same. composition of the team that conducted the disciplinary hearing was duly constituted and the fact that the named were dealing with that matter before the hearing has not been proved. But still, the whole process from the time the matter was discovered, investigation conducted and a hearing, did not prove, it was done with the aim of victimizing the applicant.

Having said so, I have now to venture into what are the remedies available for the applicant. On termination, which is exhibit D2, she was paid one month's salary in lieu of notice, outstanding leave for 14 days, certificate of good service, transport of personal effects and dependants. In terms of section 40(1) (c) of ELRA, the applicant is entitled to 12 months remuneration as compensation for unfair termination. For the foregoing reason, the application partly succeeds to the extent explained, with no order as to costs.

A.K.Rwizile

JUDGE

13.10.2021