

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

**REVISION NO. 91 OF 2020**

**BETWEEN**

**ELIZABETH SWAI ..... APPLICANT**

**VERSUS**

**BOLLORE TRANSPORT & LOGISTICS TZ LIMITED ..... RESPONDENT**

**JUDGEMENT**

**S. M. MAGHIMBI, J**

The dissatisfied applicant filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration ("CMA") dated on 23/01/2019 in Labour Dispute No. CMA/DSM/KIN/131/17/281 ("the Dispute"). The application, lodged by way of Chamber Summons and Notice of Application, is supported by the applicant's affidavit dated 09<sup>th</sup> March, 2020. The respondent vehemently challenged the application by the counter affidavit of Angeline Kavishe, the respondent's Legal Manager dated 18<sup>th</sup> day of May, 2020.

A brief recapture of the matter is that the applicant was employed by the respondent since 1987 as a filing clerk. On 26/01/2017 the

applicant was terminated from employment on the grounds of misconduct namely an act amounting to fraud, forgery or dishonesty in the performance of her duty. Aggrieved by the termination, the applicant referred the matter to the CMA claiming unfair termination. On her findings, the Arbitrator found that the applicant was fairly terminated both substantively and procedurally thus the applicant's claims were dismissed.

Dissatisfied by the Arbitrator's award, the applicant filed the present application challenging whether it was proper for an arbitrator to rule out the termination of employment was fair without testing the reasons for termination. She is also questioning the propriety of the arbitrator to rule out that the termination was fair without properly analyzing the evidence adduced before the Commission. She hence prayed for this court to revise, quash and set aside the award of the CMA.

The application was argued by way of written submission. The applicant was represented by Mr. Lucas Nyagawa, learned Counsels and the respondent was represented by Mr. Daniel Kalasha, learned Counsel.

Arguing in support of the application, Mr. Nyagawa submitted that the Arbitrator erred in law and facts by failing to properly analyze the evidence before her, where it was not proved that the applicant committed the offences charged. That the applicant on her capacity as Data Entry clerk was responsible to input data in the computer system known as Iris and that it is after payment has been effected to the bank by the client that the applicant issued payment receipt.

Mr. Nyagawa went on to submit that it at the CMA, it was testified that the applicant used to cancel credit notes and invoice receipt in iris system, however samples of the credit note purported to be cancelled were not tendered. He argued that in business transaction, it is impossible that at the same, a single document be invoice and receipt. That according to the investigation report (exhibit D13), the invoice clerks are the ones who used to cancel all credit notes by pretending mistakes. The cancellation was not done by the data entry clerk, the position held by the applicant until her termination.

Mr. Nyagawa submitted further that if the applicant issued receipts which do not matche with the payment made by the client, the client would have definitely not accepted. That the fraudulent allegations were made by Credit controller and the Deputy Chief accountant and

therefore it was wrong for the arbitrator to rule out that it was the applicant who committed the alleged offence contrary to the investigation report.

He went on submitting that in the investigation report there is no fact establishing that Data Entry clerks were involved in any fraud. That the respondent did not discharge his responsibility to prove the fairness of the termination pursuant to Section 39 of the Employment and Labor Relations Act, Cap. 360 R.E 2019 (ELRA). That the arbitrator should have considered whether or not the employee contravened a rule of standard regulating conduct relating to employment as per rule 12 (1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN 42 of 2007 ("The Code"). On the basis of the above submission, he prayed for the CMA's award to be revised and set aside.

In response to the application, Mr. Kalasha submitted that the applicant is confusing herself on how credit note and invoices were manipulated. That DW2 testified that receipts issued by the applicant did not match with the credit note issued. The receipt of 04/01/2017 showed that Neighbor Trading Company Limited was supposed to pay USD 24,843/= but the applicant printed invoices of different clients. That she

printed invoices No. 0153800546, 0153608206 and 001510099 where only USD 12 was paid as reflected in exhibit D10.

He submitted further that credit note No. 153800546 was for Bollore but receipt was issued for another client known as Transroad in which the credit note had amount of Tshs 9,476,266.07 but the amount which was paid by Transroad was Tshs. 26,900/=. He added that it was testified that credit note No. 153800546 of Best Ocean Air Limited were supposed to pay USD 7,540.70 but the applicant manipulated the receipt and they only paid USD 12 as evidenced by exhibit D10 and D11 collectively.

Mr. Kalasha then argued that the evidence tendered proved the applicant's misconduct. He contended that the allegation that credit controller and deputy Chief Accountant were making the alleged fraudulently invoices and credit notes is completely new fact not determined by the arbitrator. He argued that the court is barred to determine new facts on revision stage, citing the case of **Kisanga Tumainiel v. Frank Pieper and Traveller Lodge Limited, Civ. Appl. No. 139 of 200** where the said position was held. Mr. Kalasha then submitted that the respondent tendered documentary evidence to

prove the misconduct committed by the applicant. He therefore prayed for the application to be dismissed.

In rejoinder Mr. Nyagawa reiterated his submission in chief.

After considering the rival submissions from both Counsels, I find the Court is called upon to determine the following issues; whether the applicant was fairly terminated from employment and the reliefs that the parties are entitled to.

On the first issue of the fairness of the application, in accordance with section 37 of ELRA, employers are required to terminate employees on fair and valid reason by following the proper procedures. In the application at hand, the applicant was terminated for misconducts namely, an act amounting to fraud, forgery or dishonesty in the performance of duty. The applicant strongly denies the allegation levelled against her. The issue is whether the allegations were proved by the respondent.

The respondent tendered invoices (exhibit D10 collectively) which did not match with credit notes (exhibit D11). It was alleged that the applicant and other employees in the finance management manipulated the invoices to enable the client to pay lower amount than what he/she

is owed. The applicant did not dispute the content of the invoices and receipt tendered by the respondent. To the contrary the applicant demanded original document of the invoices of which the records of the CMA show that she was shown from the computer. In the event I do not agree with the applicant that she only had the duty to enter data presented to her by clients. In my view she was duty bound to examine the authenticity of the data entered in the computer system of which she did not, any loss would bring back the blame to her unless she proved that she took all precautions.

I also do not agree with the applicant's allegation that she was forced to give her password while she was on leave because there is no proof of such fact as correctly found by the Arbitrator. As the investigation report shows all members of the finance department were involved in the alleged forgery and the applicant being one of them, she was also involved.

The respondent's witness who testified at the CMA also established that the other members of the finance department were also terminated from employment from the same transaction. It therefore my observation that the respondent had a valid reason to terminate the applicant and all the finance members who were involved in the alleged



forgery. Had the other people in the chain be left at large, then the situation would have been different and consideration would have tilted to the unfairness of the applicant's termination.

Going to the second aspect of the fairness of the termination, the procedures that were followed, the applicant is alleging that she was not afforded the right to representation during the disciplinary hearing. I have carefully examined the record of the proceedings and found that in the notice to attend disciplinary hearing (exhibit D5) the applicant was dully informed of the right to representation but she did not brought any of her choice. In the disciplinary hearing, despite the fact that COTWU representatives were present in the meeting, the applicant clearly stated that she did not wish to have a representative as it is reflected at paragraph 5 of the hearing form (exhibit D6). Under such circumstances it is my view that the applicant was afforded the right to representation but she failed to bring her representative. I have also observed that the other termination procedures were dully followed by the respondent as rightly found by the Arbitrator.

I have also considered the applicant's claim from voluntary agreement. I had a glance on the voluntary agreement in question it is true that upon termination the employee is entitled to two months basic



terminal benefit will not be awarded to an employee terminated on the ground of gross misconduct. In the application at hand the applicant was terminated on the ground of gross misconduct thus, it is my view that she is not entitled to the relief in question.

On the last issue as to parties' relief, as it is found that the applicant was fairly terminated from employment both substantively and procedurally, I find she is not entitled to the reliefs claimed. In the end, the Revision before me lacks merits and it is hereby dismissed in its entirety.

Dated at Dar-es-salaam this 24<sup>th</sup> September, 2021



  
S.M. MAGHIMBI  
JUDGE