IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 264 OF 2021

BETWEEN

EXIM BANK (T) LTD ..... APPLICANT

VERSUS

HAPPY KIBONA ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

In this application for revision, the applicant was partly aggrieved by the award of the Commission for Mediation and Arbitration for Ilala (CMA) in Labour Dispute Number CMA/DSM/ILA/450/19/229 by Hon. Muhanika, J. Arbitrator dated 2nd June, 2021 ("the Dispute"). In the said decision, the applicant was ordered to pay the respondent a compensation at the tune of Tshs. 11,348,916/= calculated at a monthly salary of Tshs. 945,743/=. The application was lodged under the provisions of Rule 24(1), Rule 24(2) (a),(b),(c),(d),(e) & (f), Rule 24(3) (a),(b),(c) & (d); 28(1)(c)(d) and (e) of the Labour Court Rules GN. No. 106 of 2007. Also under Section 91(1)(a), Section 91(4)(a) & (b); and Section 94(1)(b)(i) of the Employment and Labour Relations Act, No. 6 of 2004; and Section 91(2)(c) of the Employment and Labour Relations

Act, No. 6 of 2004 as Amended by Section 14 (b) of the Written Laws (Miscellaneous Amendment) Act No. 3 of 2010. She has moved the court for the following orders:

1. That the Honourable court be pleased to call for records of the proceedings and the award from the commission for mediation and arbitration in lobour dispute no. CMA/DSM/ILA/450/19/229, revise and set aside the award of the commission for mediation and arbitration dated 2nd June, 2021 delivered by Hon. Muhanika, J. Arbitrator.
2. That the Honourable Court be pleased to grant costs of this application.
3. That the Honourable Court be pleased to make such other orders as it may deem fit.

In this court, the applicant was represented by Ms. Rashida Jamaldin Hussein, learned advocate and the respondent was represented by Mr. Mrisho A. Mrisho, learned advocate. The application was disposed by way of written submissions, both the parties adhered to the schedule of submissions.

Brief background of the dispute is that the Respondent was employed by the Applicant since 02nd June, 2014 as Banking Officer II. She worked in in different departments and branches, and as at the time

of her termination, she was a holding a position of Banking Officer II at Kariakoo Branch in Dar es Salaam. Following allegations of gross negligence, the Respondent's employment was officially terminated on 07th May, 2019. Aggrieved by the termination, the Respondent referred the dispute to the CMA. It was the CMA's finding that the termination of the respondent was unfair and a subsequent order for payment of compensation was issue, it is the order that aggrieved the applicant hence this revision.

In the affidavit in support of the application, the applicant raised the following legal issues:

1. The Honourable Arbitrator erred in law and facts by adding new issue which initially was not agreed by the parties in reaching her decision which was whether the apology letter written by DW2 (Zingatia Maganga) (Exhibit D12) amount to Appeal or not.
2. The act of the Arbitrator to misdirect herself by using reason for termination as part of the procedure before the termination. DW2 (Zingatia Maganga) was reinstated with the reason that her apology letter was considered and accepted while the Respondent never attempted any sort of an apology to her employer.

3. The act of the Arbitrator of not considering and analyzing the reasons why the applicant decided to terminate the respondent alone and not together with DW2.
4. The act of the Arbitrator of ignoring the admission of the respondent that she never bothered to appeal nor apologizing to the applicant after the decision of the committee was delivered and the right of appeal explained to her.

Having gone through the legal issues raised, the award of the CMA and the evidence adduced thereat, I have noted that the substantive as well as the procedural fairness of the termination was proved and the CMA held that the reason for termination was valid and so was the procedure. I have also noted that the respondent has not at all challenge those findings of the CMA by way of revision. However, what is partly disputed by the applicant on the said award is the arbitrator's reasoning in reaching her decision by comparing the termination of the respondent with the reinstatement of the DW1 who was not at trial during arbitration; rather she was the applicant's witness. I will therefore determine all the grounds/legal issue together because they all attack that reasoning of the arbitrator.

It is pertinent to note that as per the evidence of the PW1, the respondent herein and the findings of the arbitrator, the termination of

the respondent was substantively and procedurally what the arbitrator termed "just". The arbitrator also made a finding, on the admission of the respondent, that the procedure for termination was fair. The only issue being the reinstatement of the DW1 who was charged with the same misconduct as the respondent. One of the issues that Ms. Hussein challenged was that the issue as whether the apology letter written by DW2 amount to Appeal or not was completely a new issue raised by the arbitrator suo motto in the course of composing the award.

Starting with the first issue, Ms. Jamal first prayed to adopt the contents of her affidavit in support of the Chamber Summons to form part of her submissions. She then submitted that the issue as whether the apology letter written by DW2 amount to Appeal or not was completely a new issue raised by the arbitrator suo motto in the course of composing the award. That this issue was not among the three issues agreed by the parties and recorded by the commission for parties to lead evidence to either prove or disprove them. She then cited the decision of this court in the case of ***Naiungishu Soikan Mollel Versus Energy & Water Utility Regulatory Authority (EWURA), Revision no. 712 of 2019 (Unreported) where*** **Hon. Z.G.Muruke, J.** ***cited a case of Court of Appeal in Civil Appeal No. 7 of 2002 between Juma Jaffer and Manager PB2 ltd and two others (Unreported)***

in which an appellant had included in his appeal a ground on payments of interest which was not one of the issue framed by the trial court and the court held that;

"Needless to say, the parties and the court are bound by the pleadings and issues framed and proceed to deliberate on such issues. This issue was not before the trial court and hence it was not dealt with. The first appellate judge therefore erred in deliberating and deciding upon an issue which was not pleaded in the first place."

Ms. Hussein then submitted that the arbitrator's decision to raise the issue and decide the dispute on basis of that new issue without hearing the parties by affording them with an opportunity to lead evidence to either prove or disprove them, did not only offend the above established precedent of the effects that parties and courts are bound by the pleadings and framed, but, it did also deprived the applicant its basic and natural right of being heard. Referring this court to the case of ***David Nzaligo Vs. National Microfinance Bank PLC (unreported)*** which was cited in a case of ***Naiungishu Soikan Mollel Versus Energy & Water Utility Regulatory Authority (EWURA), Revision no. 712 of 2019*** (Unreported), Ms. Hussein pointed out that the court held:

"The right to be heard in any proceedings is para mount and this cannot be overstated enough. The right of the party to be heard before adverse action or decision is taken against him/her has been stated and emphasized by the court in numerous decision"

On the above argument, she prayed that the court quash and set aside the award, and remit the record, back to CMA to hear the parties on the issue whether an apology letter written by DW2 amount to appeal or not and the arbitrator compose a fresh award based on the new issue along with other three issue previously framed.

In reply, Mr. Mrisho also prayed to adopt the contents of counter affidavit filed before this court on 16th August, 2021 to be the part to his reply submissions. He then submitted that, there is no new issue raised by Arbitrator, the record show that during the cross examination after tendering her letter for apology and confirm to the honourable Arbitrator as an appeal, the DW2 was asked if the letter amount to the appeal while there is special form prepared by Applicant office for the part intent to appeal after the decision of disciplinary committee. He urged the court to note that, this is not a new issue but one borne out of material before the commission at the hearing stage. That the honorable Arbitrator considered nothing else but supporting evidence of DW2 and

her Exhibit D12 only while deciding the issue of whether the procedure was followed?

He submitted further that the arbitrator also referred to the evidence tendered before the commission and exhibits and found that the gross negligence was committed by two employees whereby one was terminated and another reinstated without even an appeal. That even during the re-examination, the appellant didn't dare to challenge an apology letter is equal to the appeal. He concluded that this ground of revision lack merit and should not be regarded.

I have gone through the award of the CMA and as correctly pointed out by Mr. Mrisha, the arbitrator did not frame a new issue during award, rather she used that evidence to compare the treatment of the two employees as it is required under Rule 12(1)(b)(iv) of the Employment and Labour Relations (Code of Good Practice), G.N. No. 42 ("the Code".)

Going to the remaining grounds/legal issues, Ms. Hussein submitted that the evidence is clear that DW2 was reinstated because the apology letter to the Applicant was lodged before the expiration of appeal time offered to them. In the said letter she explained what happened on incidence date and shows that she realized it was a big mistake on her duty line and managed to apologize to the applicant

while promising that the same mistake will not happen again. Apart from that, on the same letter she showed that she is still in need of her work regardless of what happened. She argued that both the Complainant and DW2 had the rights to appeal against the decision of committee or asking for an apology based on their mistakes. That the Complainant never bothered to appeal nor writing an apology letter or getting back to the applicant after the committee decision. This shows that she was not in need of her work and never sorry for what happened regardless her admission that was gross negligence on line of duty.

Ms. Hussein submitted further that the Arbitrator erred in law and fact by considering the termination of the Complainant to be unfair labour practice which amounts to unfair termination without considering her arguments under page 14 of the award that all the procedures and reasons for termination was fair and just. That it shows that both Complainant and DW2 were supposed to be terminated but she never considered the efforts which was conducted by both of them that to what extent does the Complainant tried to get back her job and how regretfully she was after conducting the mistakes which made her lose her job. She argued that through the evidence of the applicant and all the exhibits tendered, the good intention of the applicant can be

justified that both the Complainant and DW2 had the same rights and not one among them was treated differently.

She submitted further that if the Complainant could have shown an extra effort like what DW2 did, then probably the applicant could have reinstated the Complainant as she admitted during her testimony that she had no negative issues nor complains against the applicant before and after the incidence which leads her to loose her work and that her only issue was why DW2 was reinstated without knowing that DW2 wrote an apology letter which helped her out. Apart from that, she argued, the Complainant admitted that all the rights explained to her but she never felt the need of neither appealing nor apologizing. She supported her submissions by citing the case of **Matilda Matigana Versus Peter Kiula & 3 Others, Land Appeal No. 197 of 2020, (Unreported)** where the court used the case ***of Leornard Mwanashoka Vs. Republic, Criminal Appeal No. 226 of 2014*** cited in the case of ***Shaban Adam Mwajulu & Baraka Msafiri Mwakapala Vs. Republic, Criminal Appeal No. 131 of 2019*** in which among other things it was held that; -

"it is one thing to summarize the evidence from both sides separately and another thing to subject the entire evidence to an

objective evaluation in order to separate the chaff from the grain."

She then submitted that the Hon. Arbitrator in the case at hand failed to put the evidence to a proper evaluation process and it is biased. That the omission to evaluate the applicant's evidence by the Arbitrator is fatal as it was so decided in the case of **Hussein Iddi & Another Vs. Republic [1986] TLR 166**. She then pointed out that the Complainant admitted that the applicant was right in the whole process and she admitted that the mistake conducted was under gross negligence in which, regardless of her admitting the mistakes and explaining that she was offered all her rights to appeal and a chance to discuss with the applicant on the issues pertaining her mistake, she never bothered to do the same but decided to lodge the complains at CMA after realizing that DW2 was reinstated without knowing what efforts she went through to get her job back. Ms. Hussein concluded that the Award of the Hon. Arbitrator is obvious that the evidence of both parties were not considered and apart from that parties especially the applicant was abstained from her right to be heard after the introduction of new issues which leads to the conclusion of the Award. That the applicant should have been given the chance defend and argue

on the said issue that "whether an apology letter amount to appeal or not" and not to be surprised on the issue on the date of award.

In reply, Mr. Mrisho submitted that the letter of apology written by DW2 was on time and that the procedures require any person aggrieved with the finding of committee to appeal and not to write a letter to apologise. That the evidence of a Human Resources officer Mr. Mikidadi Mahadi Ngoma, DW1 at second paragraph on page number 3 of typed award state that after hearing, the complainant was informed the right to appeal but she did not. That the evidence of DW2 was that she appealed at page number 6 of award and to back up her statement, she tender apology letter which is not an appeal as Exhibit D10 which included the Hearing form. He then argued that Guideline No. 4(12) of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures, G.N 42/2007 provide that an appeal should be by completing the appropriate part of the copy of disciplinary form and gives it the chairperson within five working days together with any written representation the employee wishes to make. That none of the requirement outlined on this guideline was met by DW2 and Complainant/respondent.

He submitted further that the applicant's submission that even after respondent was given an opportunity to appeal, she did not even

bother to appeal or to make an apology is totally incorrect. That it is undisputed during the hearing that the respondent had written an apology and he ask her HR the outcome of appeal, also this court is aware that an appeal after the finding of disciplinary Committee is an option not mandatory and a party should not be condemned by not appealing after opting to seek the relief from the CMA. He argued that the act to terminate the respondent and leaves behind the DW2 while they commit the same negligence and none of the two had appeal amount to double standard as correct held by Arbitrator, and the Rule 13(5) of Employment and Labour Relations (Code of Good Practice) GN No 42 of 2007 ("the Code").

On the applicant's contention that the complainant/respondent admit that the whole process was right by confessing the mistake she made was under gross negligent, does not oust the power of Arbitrator to exercise her power to go deep to see if the outlines requirement of the law had been met after considering that the gross negligence was committed by two employees; Mr. Mrisho submitted that the honorable Arbitrator evaluated the evidence which render her to find the reason was fair while the act of terminating one and reinstate another with no evidence of proper procedure amount to double standard.

On the allegation that even after respondent was given an opportunity to appeal she did not even bother to appeal or to make an apology, Mr. Mrisho denied the fact arguing that during the hearing the respondent had written an apology and she ask her HR the outcome of appeal. He also argued that an appeal after the finding of disciplinary Committee is an option not mandatory and a party should not be condemned by not appeal after opting to seek the relief from CMA.

On my part, I will start by quoting the holding of the arbitrator at page 14 of the award where she held that:

> *"It is evidence before the Commission that her collague Zingatia Maganga (DW1) wrote a letter of apology EXD12. However there is no any evidence tendered that shows that an apology letter amounts to appeal which can change the decision to terminate, that decision can only be made by appellate committee. Before this Commission there is no any appeal lodged after termination of DW1 and complainant herein. But it is on records that DW1 was reinstated thereafter. The act of terminating one and reinstating another is a practice that cannot be withheld of its unfair labor practice which amounts to unfair termination".*

What the arbitrator did in this case was to compare the treatment of the two employees who were charged with the same offence and not

to raise a new issue as Ms. Hussein would want the court to conclude. She was just using evidence to come to conclusions and not raising a new issue. That notwithstanding, I would still understand the applicant's concern on the holding of the CMA because by doing so, the arbitrator fell into a complete error. She treated the DW1 as a co-complaint in the dispute that she was making a determination of, while the circumstances of the two employees were different. The way she attacked the reinstatement of the DW1 by holding that there was no appeal put the DW1 in a very jeopardizing position without any justification. Her conclusion that there was no appeal at all would sound like there was favoritism on the part of the DW2 as opposed to the treatment of the respondent, a finding which was erroneous owing to the fact that the said DW2 tendered an apology letter to the applicant in consideration of which the applicant decided to reinstate her.

On the other hand, in her testimony, the respondent admitted not to have apologized nor appealed hence the two situations cannot be compared at arbitration stage to make a conclusion that the termination was discriminatory. For the reasons above, the holding of arbitrator was erroneous.

I have noted that the main basis for the applicant to have lodged the complaint was not that she did not commit the alleged misconduct,

it was just because her colleague whom they were both accused of the same misconduct was reinstated. So it was rather a why not me issue than I didn't do it case. The issue that was important before the arbitrator was to determine the fairness of the termination which was found to be fair both procedurally and substantively as the complainant/respondent had admitted to both. It is also in evidence that after the decision of the disciplinary committee, the respondent did not bother to apologize or appeal against the decision that means she waived her right for second consideration at the employer's level, instead she quickly jumped to the CMA alleging unfair termination because the DW2 was reinstated. However, the circumstances that led to the reinstatement of the DW2 were also revealed, she was reinstated after she apologized to the employer, something which the respondent herein never bothered to do. Had she lodged an apology like her colleague and yet still be terminated, then they would be on equal footing for analysis to see whether the treatment was fair to both parties. But this is a case to case basis considering the undisputed evidence that the DW2 tendered an apology that was considered by her employer. Owing to those facts, the arbitrator fell into error by dragging an issue which was not comparable to make a basis for her findings.

On those findings, I find merits in this application, since there was no dispute that the negligence was proved and procedure followed, the respondent remains fairly terminated both substantively and procedurally. The application is allowed, the award of the CMA is erroneous and it is hereby set aside.

Dated at Dar-es-salaam this 25th day of May, 2022

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S.M. MAGHIMBI
JUDGE