IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 74 OF 2022

WAMBU WAMBU ..... APPLICANT

VERSUS

STANBIC BANK TANZANIA LIMITED ..... RESPONDENT

(From the decision of the Commission for Mediation and Arbitration of DSM at Ilala)

(Lomayan: Arbitrator)

dated 12th February, 2021

in

REF: CMA/DSM/ILA/R.778/18/505

JUDGEMENT

19th September & 28 October, 2022

Rwizile J

This application emanates from the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/ILA/R.778/18/505. This Court is called upon by the applicant to revise and set aside the CMA award for being wrong, illogical and irrational.

The brief history behind this case can be stated thus; the applicant started to work with the respondent in 2010 as a mobile sales officer. Sometimes on 21st February, 2011 he was offered to work as customer consultant. In

2015, he was promoted to a post of an executive banker. He was paid the salary of TZS. 2,218,274.00 per month. He maintained this position until his termination date.

On 07th May, 2018, he was suspended from duty pending investigation regarding payment made to Tanzania Institute of Bankers (TIOB) account. On 01st June, 2018 he was served with a letter to attend a disciplinary hearing on 07th June, 2018.

After the hearing, he was found guilty of misconduct and was terminated on 12th July, 2018. His appeal against termination did not succeed. He was not happy with termination. He then filed a labour dispute at the CMA claiming for statutory terminal benefits. The CMA found termination to be fair in all fours and dismissed his claims. The applicant was again not satisfied, hence this application.

The application is supported by the applicant's affidavit advancing grounds for revisions as hereunder: -

a. *That the decision of the CMA dated 12th February, 2021 is unlawful, illogical and irrational because it offends the cardinal principles of fair hearing on account of a failure to afford the applicant a right to*

be heard before the said order dated 12th February, 2021 was issued.

b. *That the award of Hon. Lomayan Stephano, arbitrator in labour dispute No. CMA/DSM/ILA/R.778/18/505 dated 12TH February, 2021 contain errors material to the merits of the said award which has resulted injustice on the part of the applicant herein.*

c. *The Hon. Arbitrator erred in law and fact for failure to properly analyse the evidence on the records and therefore arriving at an unjust decision.*

d. *That the honourable arbitrator erred in law and fact to dismiss the claim while did not make a finding to the merit of the matters at issue.*

e. *That the honourable arbitrator erred in law and fact in adjudicating on non-issues of the parties.*

The application was heard by written submissions. The applicant was represented by Mr. Salmin Suleiman Mwiry learned advocate whereas the respondent enjoyed services of Mr. Antony Mseke learned advocate.

Mr. Mwiry abandoned grounds (d) and (e). He started to submit on ground (b). He stated that exhibit S1, a notice to attend disciplinary hearing, contained charges against the applicant alleging to open account

number 9120001473329, while exhibit S2, has particulars of the said account in the name of Lilian Daniel Rweyemamu. The account, it was stated showed a different account number stated as 9120001473326. It was the view of the applicant, that since there was variation of figures in the alleged account numbers, the entire proceeding, together with the decision of the disciplinary committee is invalid and void ab initio.

He stated that as exhibit S4, a hearing form and minutes showed, rule 13(1) of the Employment and Labour Relations [Code of Good Practice] Rules, G.N. No. 42 of 2007 was not complied with, since investigation was not conducted. To support his point, he cited cases of **Adela Damian Msanya v Tanzania Electricity Supply Co. Ltd (Tanesco)**, Civil Appeal No. 305 of 2019 (unreported) on 22nd February, 2022, **Sharifa Ahmed v Tanzania Road Haulage (1980) (t) Ltd**, Revision No. 299 of 2014, High Court Labour Division at Dar es Salaam (unreported), **Huruma H. Kimambo v Security Group (T) Ltd**, Labour Division, MRGR Revision No. 412 of 2016 (unreported) and **Knight Support (T) Ltd v Ramadhan Magina Igai**, Labour Division, DSM, Revision No. 317 of 2013 dated 05th August, 2014.

He submitted further that exhibit S4 was in respect of account number 9120001473329, not 9120001473326. According to him, the applicant

was not given the right to be heard as the hearing was in respect of account number 9120001473329. He argued further that based on the same exhibit, the applicant was not given a chance to mitigate contrary to rule 13(7) of G.N. No. 42 of 2007. In support, he cited the case of **Huruma H. Kimambo v Security Group (T) Ltd (supra).**

On ground (a) of revision, Mr. Mwiry submitted that the applicant was charged in relation to account number 9120001473329 instead of 9120001473326, which is a typographical error. In the view of the learned counsel, the typographical error stated goes to the root of the entire disciplinary proceeding. He argued, it was supposed to be rectified by the respondent as under exhibit S12 collectively, which is an appeal form, notice to attend appeal and appeal minutes. He supported his point by the finding in the case of **Alliance One Tobacco Ltd v George Msungi**, Labour Division, MRGR Revision No. 285 of 2009 (reported in LCD of 2011-2012). It was his argument as well that, there was a clear contravention of article 13(6)(a) of the Constitution of the United Republic of Tanzania [CAP. 2 R.E. 2002]. To accentuate this point, the case of **Magesa Joseph M. Nyamaisa v Chacha Muhongo**, Court of Appeal of Tanzania, Civil Appeal No. 161 of 2016 at Mwanza was referred.

On ground (c), he submitted that, improper analysis of evidence leads to miscarriage of justice.

He then cited cases of **Leonard Mwanashoka v The Republic**, Criminal Appeal No. 226 of 2014 (unreported) and **Jackson Stephano @ Magesa and Another v The Republic**, Criminal Appeal No. 130 of 2020.

He stated further that, it was not in the job description of the applicant to open an account. He said, account number 9120001473326 was opened by the Sales Support Officer with user ID, A173366 and that was approved by the respondent's branch manager. He submitted that the applicant was not involved in forging the cheque or in cashing it, as evidenced by exhibits S5 and S6. He then stated that as seen in exhibit S7, it is clear that the respondent was refunded the amount allegedly lost by the insurance.

On reliefs, Mr. Mwiry submitted that the court has discretion to decide on the appropriate award as in the case of **Vernanda Maro and Another v Arusha International Conference Centre**, Civil Appeal No. 322 of 2020, Court of Appeal. He prayed, the applicant to be reinstated or be paid compensation from the date he was unfairly terminated (10th July, 2018) to the date of judgement which is equal to 60 months salaries at

the salary of TZS. 2,218,274.17 per month as exhibit S14 shows. He also cited section 40(1)(a) of Employment and Labour Relations Act, and the case of **Vernanda Maro and Another v Arusha International Conference Centre (supra).**

It was his prayer that he should be paid damages due to mental torture and anguish, loss of income amounting to TZS. 30,000,000.00 as the award of excellence, which is shown by exhibit P1. The trip abroad, the amount that was not given, due to the applicant's termination and any other reliefs this court deems just and fit to grant. He lastly prayed; the award be dismissed.

In reply Mr. Mseke submitted on ground (a) that all arguments at the disciplinary hearing were in respect of Lilian Rweyemamu's account. He stated that, writing 9 instead of 6 was a typographical error that did not occasion injustice to the applicant. It was his argument further that there was only one customer in the name of Lilian Rweyemamu. According to him, the applicant appealed to the CEO alleging that the account number subject of the disciplinary hearing was different. In his view, the account issue is an afterthought.

He further argued that the applicant was afforded a right to be heard on the process of opening of the account of one Lilian Rweyemamu. It was

his view that the slip rule principle enables minor corrections without affecting the substance. He supported his point by citing the case of **Sebastian Stephen Minja v Tanzania Harbours Authority**, Civil Application No. 107 (unreported).

It was submitted that the applicant was charged with five different charges which were determined separately. It was said, the applicant did not dispute the findings that he was found guilty of other four allegations before the disciplinary hearing. He stated further that the applicant admitted, as shown at pages 11 to 13 of the award. Mr. Mseke submitted that the applicant is disputing account figures but did not dispute the substantive contents of the charge.

On mitigation, he submitted that the applicant was given a chance to mitigate but did not utilize it.

It was argued, he refused to mitigate on ground that he was in total disagreement with the hearing outcome as shown in exhibit 12 at page 15.

In his opinion, the committee could have re-considered mitigation even after they making the recommendation. It was added, that the requirement provided under section 37(2)(c) of the Employment and

Labour Relations Act and Rule 13(2)-(13) of G.N No. 42 of 2007 cannot be executed seriatim as held in the cases of **Mantrac Tanzania Limited v Daniel Kisoka**, Revision Application No. 267 of 2019 (unreported), **Justa Kyaruzi v NBC Ltd**, Revision No. 79 of 2009 at Mwanza, **Metal Products Ltd v Mohamed Mwerangi & 7 Others**, Revision No. 148 of 2008 (unreported).

Advancing his argument further, the learned advocate was of the view that the procedure such as investigation, framing of charges, preparation to attend the hearing, which are procedural rights were observed. To cement this point, he cited rule 13(4) and rule 4(2) and (6) of G.N. No. 42 of 2007. In his view, other procedures, if any, that was not complied is minor and so cannot affect the merits of the case. As well, it was stated that the case of **Huruma H. Kimambo v Security Group (T) Ltd (supra)** is distinguishable to the present case and that it is merely persuasive.

On ground (b) Mr. Mseke submitted that investigation is a new issue that was never raised before the CMA for determination. He said, it cannot be brought at any time. He supported his point by citing cases of **Simon Godson Macha v Marry Kimambo**, Civil Appeal No. 393 of 2019 (unreported) and **Rosemary Stella Chambejairo v David Kitundu**

Jairo, Civil Reference No. 6 of 2018, Court of Appeal of Tanzania. It was his view that the procedural requirement was correctly complied with by the respondent at the hearing. Mr. Mseke added, the arbitrator analysed the evidence properly as the applicant was the only one who met the customer including authorising the account and that others officers never met customers.

It was his argument as well that, prayers stated in this application were not raised before CMA F1. This argument he said, is against the law. He supported his point by citing cases of **Dr. Abraham Israel Shuma Muro v National Institute for Medical Research & Another**, Civil Appeal No. 68 of 2020, Court of Appeal of Tanzania (unreported), **Melchiades John Mwenda v Gizelle Mbaga (Administratrix of the estate of John Japhet Mbaga- deceased) & 2 Others**, Civil Appeal No. 57 of 2018, Court of Appeal of Tanzania (unreported).

In a rejoinder, the applicant reiterated what was submitted in chief. But raised two new issues which hinged on the contested account number with different figures. The applicant resubmitted at length on the issue. I do not think, I have to reproduce the length rejoinder by the applicant since doing so makes it a repetition

After going through the grounds for revision and submission of the parties, I find it important to determine *whether the respondent had valid reasons to terminate the applicant and if there was observance of procedural fairness in terminating the applicant.*

It is not disputed that the applicant was an employee of the respondent in accordance with exhibit S8. It is also clear that the applicant was terminated by the respondent- exhibit S14.

The reasons for termination being deceiving the bank, alteration of the customer introduction letter and failure to take due diligence during verification of account opening as per exhibits S11 and S14.

The law on fairness of termination is section 37(2) of the Employment and Labour Relations Act. It provides that a termination of employment by an employer is unfair if the employer fails to prove, that the reason for termination is valid and fair. It further states that the same has to relate to the employee's conduct, capacity or compatibility or on operational requirements. The above as well, must be supported by evidence of a fair procedure. In doing so, the duty is cast on the employer as per section 39 of the same Act.

According to Rule 9(1) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007 the employer is enjoined to follow a fair procedure in terminating an employee which may depend to some extent on the kind of reasons given for such termination

Having studied the whole issue, the point is that there is an account in the name of Lilian Daniel Rweyemamu which is number 9120001473326. Dw1 testified that the applicant opened the account by using forged documents. In his part, the applicant admitted to open account number 9120001473326. It was his evidence that the procedure was followed as per exhibit S2 collectively. What is in dispute is not account number 9120001473329 stated in the charge sheet, but the account name.

He stated that the obligation to open accounts was not solely his duty but many other workers were to be involved. In my observation, the account number stated is just with an error, but what provides the answer is the account name by the name of Lilian Daniel Rweyemamu which is 9120001473326.

It is gathered in the proceedings that the applicant agreed to sign exhibit S2 which is a form for opening accounts. The form shows items which were ticked to prove that they were correct. One of the items is the letter from the employer, but in the exhibits tendered it was not registered. This

alone shows negligence on party of the applicant. Rule 12(3) [G.N. No. 42 of 2007] provides, one among reasons for termination is gross negligence

From the foregoing, I found that the respondent had reasons for terminating the applicant as she acted negligently. I find no need to deal with other reasons for termination stated as the first one was proved to be the reason for termination.

In dealing with the second ground whether there was procedural fairness in terminating the applicant. The advocate for the respondent stated that the issue of investigation report was a new thing, it was not submitted before the CMA. The Procedure for terminating an employee's contract is provided for under rule 13(1) to (13) of G.N. No. 42 of 2007. The rule listed down the procedure, if followed amounts to fair termination.

On failure to supply investigation report, it has been held, to the employee must be supplied with the report. If not then, it is counted to be a procedural irregularity. This was also held in the case of **Kiboberry Limited v John Van Der Voort**, Civil Appeal No. 248 of 2021, Court of Appeal of Tanzania at page 9 : -

"... the failure to involve the appellant in the investigation that led to the formulation of the report coupled with the omission to share a copy thereof with the respondent was a serious irregularity. Inevitably, we uphold the concurrent finding by the courts below that the appellant failed to demonstrate that the impugned termination was for a valid fair reason..."

In this case, there is a procedural irregularity because the applicant was not provided with an investigation report. On the point about mitigation, rule 13(7) of G.N. No. 42 of 2007 provides that: -

"Where the hearing results in the employee being found guilty the allegations under consideration, the employee shall be given opportunity to put forward any mitigating factors before a decision is made on the sanction to be imposed."

As the law provides, I find, it was important to give the employee time to mitigate before the sentence is passed. As for this reason also, it is evident that the procedure to termination was not adhered to.

On reliefs, the applicant prayed for reinstatement. The case of **Charles Mwita Siaga v National Microfinance Bank PLC**, Civil Appeal No. 112 of 2017 Court of Appeal of Tanzania at Dar es Salaam, held: -

"... the appellant was employed in the banking industry in which trust and confidence were of paramount importance... It would be unrealistic to reinstate the appellant who was found by the respondent to be marred with dishonesty after having been convicted of gross misconduct and failure to perform duties to the standard required and whom the respondent had lost confidence..."

Since termination of the employment contract was reasonably fair but procedurally unfair. The employment contract (exhibit S8) does not show the duration of the contract and so it is impliedly termed to be permanent. In the case of **Felician Rutwaza v World Vision Tanzania**, Civil Appeal No. 213 of 2019, Court of Appeal of Tanzania at Bukoba, at pages 15-16 it was held that: -

"In the context of the case in which the unfairness of the termination was on procedure only, guided by some decisions of that court, the learned Judge reduced compensation from 12 to 3 months. With respect we agree with her entirely... under the circumstances, since the learned Judge found the reasons for the appellant's termination were valid and fair, she was right in exercising her discretion ordering lesser compensation than that awarded by the CMA. We sustain that award."

The applicant in his testimony stated that he was paid the salary of TZS. 2,218,274.17, the amount which was not disputed by the respondent. That being the case, the applicant is entitled to the following reliefs: -

1. A compensated of only six months remuneration.

   2,218,274.17 * 6 = 13,309,645.02 and a certificate of service

From the foregoing therefore the application is partly allowed to the extent explained. The award is revised to such extent. No order as to costs.

X _____

Signed by: A.K.RWIZILE

A. K. Rwizile

JUDGE

13.10.2022