IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 205 OF 2022

LENIFRIDA MAGAWA .... APPLICANT

VERSUS

CRDB BANK PLC .... RESPONDENT

(Arising from the decision of the Commission for Mediation and Arbitration of Ilala in Labour Dispute No. CMA/DSM/ILA/60/21/73/21

JUDGEMENT

S. M. MAGHIMBI, J;

The application beforehand was lodged under the provision of Section 91(1) (a), (b), 91(2) (a), (b), 91(4) (a), (b) and 94((1) (b)(i) of the Employment and Labour relations Act, Cap. 366 R.E 2019 ("ELRA") and Rules 24(1), 24(2) (a), (b), (c), (d), (e) and (f) and 24(3) (a), (b), (c), (d) and 28(1) (c), (d), (e) of the Labour Court Rules, G.N 106 of 2007 ("the Rules"). In the chamber summons the applicant urged the Court to revise and set aside the Arbitral proceedings and award issued by Honourable Msina H.H. (Arbitrator) at the Commission for Mediation and Arbitration for Ilala ("CMA") on 25th May 2022 in Labour Dispute No. CMA/DSM/ILA/60/21/73/21 ("the Dispute"). She prayed that this court determine the dispute in the manner this Court considers appropriate.

The Chamber Summons was supported by an affidavit deponed by the applicant herself on the 04/07/2022.

On the other hand, the respondent vehemently challenged the application through the counter affidavit of Mr. Isaack Kandonga, the respondent's Senior Specialist, Labour and Trade Relations Officer deponed on 22/07/2022.

The application emanates from the following background; as per the letter of employment offer (exhibit D1) the applicant was employed by the respondent as a Bank Officer Trainee on unspecified period of contract commencing on 01/06/2013. On 15/01/2021, the applicant was terminated from employment after the respondent's disciplinary committee charged and found her guilty of gross misconduct. It was alleged that on diverse dates between 31/07/2014 and 02/08/2014, the applicant stole a sum of USD 3618.52 equivalent to TZS. 8,300,000/= alleged to be the property of the respondent's customer. Aggrieved by the termination, the applicant referred the matter to the CMA where his complaint was dismissed for lack of merits. Still aggrieved by the termination, the applicant filed the present application raising the following legal issues:-

i. Whether the Hon. Arbitrator was correct in holding that the respondent had a valid reason to terminate the applicant.

ii. Whether the Hon. Arbitrator was correct in holding that the applicant's termination caused by admission arising from promise to acquit the applicant was fair

iii. Whether the Hon. Arbitrator was correct in holding that the procedure was adhered to by the respondent pre and during the disciplinary hearing

iv. Whether the Hon. Arbitrator's admission of the notice to attend the internal disciplinary hearing on the trial that was not signed by the applicant due to failure of being served to her was correct bearing in mind that it denied the applicant the rights contained in such a notice such as preference as to a representative on defense, attending with evidence, witness and so on in the disciplinary hearing

v. Whether the Hon. Arbitrator was correct on her failure to realize that the audit report was the important document to have been tendered as documentary evidence during the disciplinary hearing and a copy to have been availed to the applicant prior to the disciplinary hearing.

vi. Whether the Hon. Arbitrator was correct on her failure to consider the applicant's testimony regarding the requirement for the respondent to use the content of the CCTV camera located at the area of the scene that could show exactly the participation of the applicant (if any) in connection to the alleged incident.

vii. Whether the Hon. Arbitrator was correct on her failure to require and consider the testimony of the alleged respondents' customer whose money was claimed to have been stolen by the applicant.

viii. Whether the Hon. Arbitrator was correct on holding that the respondent Bank could not remain with copies of document(s) pertaining to the alleged incident on handing some to the police force.

The application was argued by way of written submissions. Before this court, the applicant was represented by Mr. Philemon Mujumba, Learned Counsel whereas Mr. Innocent Mushi, Learned Counsel appeared for the respondent.

Starting with the first and second issues Mr. Mujumba submitted that the show cause letter (exhibit D5) alleged that the applicant on diverse dates between 31st July 2014 and 2nd August 2014 did steal the sum of USD 3618.52 which is equivalent to TZS. 8,300,000/= alleged to

be the property of respondent's customer. He submitted that prior to the said show cause letter, there was a plea bargain agreement entered between the applicant and the republic arising from the same allegation shown above causing arraign of the applicant on economic charges. He added that the applicant stayed under police custody for so long since the charge sheet included unbailable offences such as alleged money laundering. That in response to the show cause letter, the applicant put it very clear that the admission to the minor offence pointed out by the republic in the agreement leading to her conviction was nothing but a desperate quest for her liberty since the Plea bargain agreement created a number of promises for setting free the applicant as in paragraphs/items A 2 & 3, B 2 and E 2 as reflected in exhibit D4.

Mr. Mujumba continued to submit that given the illegal conviction as shown above, it was not prudent and reasonable for the respondent to base on such an outcome as a fair reason for the applicant's termination. He contended that the respondent had nothing than the decision arising in illegal conviction that was used entirely during the disciplinary hearing. It was further submitted that the respondent was supposed to use internal documentary evidence during the disciplinary hearing showing how the applicant participated in the alleged misconduct but to the contrary, the respondent Bank did not tender any

documentary evidence during the disciplinary hearing apart from the findings of Kisutu RM's Court.

Coming to the third and fourth issues, Mr. Mujumba jointly submitted that the termination procedures were not adhered to by the respondent. The applicant was not properly summoned to the disciplinary hearing. He submitted that though the notice to attend disciplinary hearing (exhibit D7) was prepared on 13th November, 2020 and the same was not served to the applicant on the particular date. He argued that the respondent's failure to serve with the notice which contained crucial information prior to attending the disciplinary hearing. He then argued that the act denied her proper guidance in the disciplinary hearing. It was submitted that the applicant attended the hearing after being informed through mobile phone on 18th of November 2020 by somebody who introduced to her as the Bank Officer of the respondent directing her to attend the disciplinary hearing on 19th November 2020 at 09.00 am at the CRDB House Mikocheni. The counsel alluded that the applicant came across the notice of attending the hearing the moment it was tendered as evidence before the commission by the respondent's witness without bearing the applicant's signature or any proof of service. Mr. Mujumba argued that this is contrary to the

provisions of Rule 13(3) of the Employment and Labour Relations (Code of Good Practice) Rules G.N. No. 42 of 2007 ("the Code").

On the fifth issue, Mr. Mujumba submitted that that there was no any audit report pertaining to the allegation which was tendered as evidence during the disciplinary hearing. He pointed out that the respondent being the financial institution and considering the allegation at hand, could not fail to tender any audit report during the disciplinary hearing or give a copy of it to the applicant for proof of the alleged misconduct which resulted to termination. To support his submission the counsel cited the case of **Melania Mosha Vs. Twiga Bancorp Limited, Consolidated Revisions No. 263/2015 and 279/2015** High Court of Tanzania Labour Division at Dar es Salaam (Unreported).

Coming to the sixth issue, it was submitted that the reputable bank like the respondents' CCTV cameras could not be ignored since it is the important working tool thereof. He argued that to the contrary, the Arbitrator made no comment on such aspect in the award. As to the seventh issue Mr. Mujumba submitted that The Arbitrator did not address anything on failure of the respondent to bring his alleged customer whose money was stolen, to testify at the disciplinary hearing.

Turning to the last issue, Mr. Mujumba challenged DW1's testimony that the respondent's Bank did not remain with any record about the incident since all documents were handed to the Police Officers. He concluded that since the applicant's termination was unfair substantially and procedurally as shown above, the applicant prays for orders as stated in the notice of application and chamber summons.

In reply, Mr. Mushi consolidated the applicant's grounds into two grounds, the validity of the reason to terminate and the procedures followed in terminating the applicant. Starting with the first issue as to validity of the reason, Mr. Mushi maintained that the Arbitrator was correct to hold that the respondent had valid reason to terminate the applicant. He stated that as per plea-bargaining agreement (exhibit D4) the applicant admitted the offence she was convicted with, which by itself is a concrete proof of the reason for termination. The counsel further challenged the applicant's allegation of promises in the plea-bargaining agreement that the same are an afterthought.

Turning to the second issue on the procedures for termination, Mr. Mushi submitted that the applicant only contested the fact that he was not served with the notice to attend disciplinary hearing. He argued that the allegation has no merit because the applicant admitted to have received the notice on 16/11/2020 and the disciplinary hearing was

conducted on 19/11/2020 which was within 48 hours required by the law. He then emphasized that the case of **Mwita Magani and Another Vs. Mganga Mkuu Hospitali Teule Buharamulo, Labour Revision No. 09 of 2013** (unreported), which was also cited by the CMA at page 15 and 16 of the award, is very relevant and justifiable for this court to follow and dismiss the application at hand and uphold the CMA's decision. As to the remaining issues submitted by the applicant Mr. Mushi generally responded that they are unfounded and have no merit. He added that the cases cited thereto are also irrelevant to the circumstance at hand and in the upshot, he urged the court to dismiss the application. In rejoinder Mr. Mujumba reiterated his submission in chief.

After considering the parties rival submissions and the court records, I find that the court is called upon to determine the following issues; whether the respondent had valid reason to terminate the applicant, whether the respondent followed procedures in terminating the applicant and what reliefs are the parties entitled to.

Starting with the first issue as to the validity of the reason, it is the requirement of the law, under Section 37 of the ELRA, that employers should terminate their employees only on valid and fair reason. Further to that, Section 39 of the same ELRA imposes a duty to the employer to

prove that there was a valid reason for termination done under fair procedures. In the application at hand, the applicant was terminated for an alleged gross misconduct. The details of the alleged misconduct was that on diverse dates between 31st July, 2014 and 02nd August, 2014, the applicant stole a sum of USD 3618.52 which is equivalent to TZS. 8,300,000.00, the property of the respondent's customer. The applicant strongly alleges that the respondent did not tender sufficient evidence to prove the alleged misconduct. The respondent's disciplinary committee found the applicant guilty of the charged misconduct due to her own admission in the plea-bargaining agreement (exhibit D4). The applicant challenges the said agreement on the ground that she stayed under police custody for so long since the charge sheet included unbailable offences. Indeed I agree with the arbitrator that conviction of a criminal can form a basis for termination, that is understandable because under normal circumstances, no one may wish to keep a person of bad character in the place of their business, more so, for the respondent, the business she is involved in requires a lot of trust. I will therefore not dwell much on the fairness of the reasons for termination since the applicant was convicted following her plea bargaining conviction (EXD4). However, despite the fact that applicant was convicted on her own plea during plea bargaining, the respondent was still under obligation to

follow the proper procedures before terminating the applicant for reasons I shall elaborate in determining the second issue, the fairness of the procedures for termination.

Coming to the second issue as to the procedures for termination, the procedures for terminating an employee on the ground of misconduct are provided under Rule 13 of the Code. As rightly submitted by Mr. Mushi the procedure alleged to have been violated by the respondent is the service of notice to attend disciplinary hearing. It is the requirement of the law to serve notice to attend disciplinary hearing to the employee in question 48 hours before the meeting is held. This is pursuant to the provision of Rule 13(3) of the Code which provides that:

> *"13(3): The employee shall be entitled to a reasonable time to prepare for the hearing and to be assisted in the hearing by a trade union representative or fellow employee. What constitutes a reasonable time shall depend on the circumstances and the complexity of the case, but it shall not normally be less than 48 hours".*

At the CMA and even before this court the applicant alleges that on 18/11/2020 she was called via telephone to attend a disciplinary hearing which was held on 19/11/2020. However, after thorough examination of the records of the disciplinary hearing minutes (exhibit

D8) it indicates that the applicant was informed of the hearing on 16/11/2020 as stated at paragraph 6 of the referred exhibit. However, there is no evidence of the notice showing that the applicant was actually notified of the hearing on the 16/11/2020 as alleged. Proof of notice of service should be, unless availability of the applicant is in issue, in writing. Thus, the allegation that the applicant was served with the notice to attend disciplinary hearing on 18/11/2020 contrary to Rule 13(3) of the Code is valid.

Further to that, I have thoroughly gone through the Exhibit D5, the notice to show cause dated 29th September, 2020. In the said notice, the applicant was alleged to have committed Gross Dishonesty contrary to Rule 12(3)(a) of the Code. In the EXD4 that was relied by the respondent, the details of the charge were not clearly stated but the applicant admitted to have stolen the money, from who that was not clear. So it is not clear from the way the EXD4 was crafted, to connect the applicant with the loss allegedly caused to her employer. At this point, I will go back to the cited case by Mr. Mushi, the case of **Mwita Magani and Another Vs. Mganga Mkuu Hospitali Teule Buharamulo. In that case, this court** (Hon Rweyemamu, J as she then was) held that:

"Considering ELRA as a whole, the essence of Disciplinary hearing is to afford an employee his basic right to be heard, before deciding whether the involved on the alleged misconduct/offence. Now where all that had been by the court and conviction obtained despite a higher standard of proof, ***it would be superfluous to conduct disciplinary hearing, unless the criminal offence was not on facts constituting a disciplinary offence.*** *To conclude, I find that where a criminal charge against an employee is connected or related to his employer's business, the employer can rely on the fact of conviction to terminate the employee without institution a disciplinary action"*

As for the case at hand, the EXD5 says that on the diverse dates of the applicant caused loss to the employer. However, although the respondent bunked much of her reliance to the EXD4 which going through the whole document, there is nowhere where it says that the loss was caused to the respondent. There is no connection between the essence of the EXD4 and any loss caused on the respondent therefore, the respondent terminated the applicant upon her being convicted of a criminal offence as per the provisions of Rule 13(11) of the Code. But as held in the cited case of **Mwita Magani,** the conviction must be related

to the employer otherwise, which is the case in this application, the employer was under obligation to follow a fair procedure before terminating the applicant.

Further to the above, in this case, much as the applicant entered a plea bargaining agreement, since she admitted to have done so to save herself from remand custody, the respondent was still obliged to conduct investigation in order to show how the applicant's conduct caused him loss as an employer. Since the employer alleged that the employee caused him loss, an investigation report, as a matter of procedure, should have been availed to the employee to show how the alleged offence she entered into plea bargaining agreement with caused loss to the employer. Therefore at this point, I find that the procedures for termination were not followed to he required standard hence the termination was procedurally unfair.

Turning to the last issue of the reliefs entitled to the parties, as it is proved that the termination was procedurally unfair in this case, the award of the CMA is hereby revised. The respondent is ordered to pay the applicant a compensation of 12 months remuneration for procedural unfairness of her termination. Since the salary of the applicant in the record is Tshs. 2,112,693.13 times 12 months, the employer shall pay the employee a sum of **Tshs. 25,352,317.60** as compensation. Since

the records show that she was paid salary in lieu of notice that shall not be paid. The applicant shall also be issued with a certificate of service in case it has not been issued.

Dated at Dar es Salaam this 16th November, 2022.

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S.M. MAGHIMBI

JUDGE