IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM
REVISION NO. 538 OF 2020

(Originating from Labour Dispute No. CMA/DSM/ILA/R.647/17/742)

BETWEEN

ALI SALIM..... APPLICANT

VERSUS

NATIONAL BANK OF COMMERCE LTD (NBC).....RESPONDENT

JUDGMENT

Date of Last Order: 14/12/2021

Date of Judgment: 11/02/2022

I. Arufani, J.

The applicant was employed by the respondent on 2nd May, 1981 as a Clerk Grade III. He was promoted on various ranks until 23rd May, 2017 when he was terminated from his employment on ground of misconducts while holding a position of Branch Operations Manager. Being aggrieved by termination of his employment, the applicant referred his grievance to the Commission for Mediation and Arbitration (hereinafter referred as the CMA) where he partly succeeded as the CMA found termination of his employment was substantively fair but procedurally unfair. The applicant was awarded

six (6) months' salaries as a compensation for being procedurally terminated from his employment unfairly.

The applicant was dissatisfied by the decision of the CMA and come to this court to challenge it. The application filed in this court by the applicant is supported by the applicant's affidavit and is challenged by the counter affidavit sworn by Joyce Mbago, the respondent's Principal Officer. The grounds which the applicant is basing his application as listed at paragraph 11 of his affidavit are as follows:-

(a) *The Arbitrator erred in law and fact by failure to evaluate the evidence tendered before her which established that the termination of the applicant was substantially unfair.*

(b) *That the Arbitrator erred in law and fact by shifting the burden of proof on unfair termination dispute to the employee contrary to the requirement of the law.*

(c) *That the Arbitrator erred in law and fact by holding that the applicant failed to prove his claim on specific damages.*

(d) *That the Arbitrator erred in law and fact by awarding the applicant compensation for only six months having found that the procedure for termination was not adhered contrary to the law.*

When the application came for hearing the applicant appeared in the court unrepresented and the respondent was represented by Ms. Comfort Opuku, Learned Advocate. By consent of the parties the application was argued by way of written submission. I commend both sides for filing their submission in the court on the time given by the court.

The applicant submitted in relation to the first ground that, the arbitrator failed to evaluate the evidence tendered before her as a result, she arrived to a wrong conclusion that the respondent had valid reason for terminating his employment. He argued that, none of DW1, DW2 and DW3 who testified for the respondent before the CMA tendered a job description or a circular specifying the roles and responsibilities of a Branch Operations Manager held by the applicant.

He stated that, DW1 failed to specify in his testimony the loss caused by him as there were three employees who were charged with the similar offences levelled against the applicant. He argued that, the charged offences covered a period between January, 2014 to August, 2016 which includes the period when he was transferred from Zanzibar Branch to Masasi Branch in 2015. It was further submitted by the applicant that, DW1 was not sure which allegations

covered the year 2014, 2015 and 2016. The applicant insisted that from the CMA's evidence it is apparent that the respondent failed to prove the reason for termination. He submitted that, if the arbitrator could have properly analysed the evidence, then she could have found that the respondent had failed to justify the reasons for termination of his employment.

He stated in relation to the second ground that, the arbitrator erred in law and fact by shifting the burden of proof of unfair termination of employment dispute to the employee. He stated that, when the arbitrator was analysing the evidence at pages 21 and 22 of the award, he referred the FDR receipt which were never tendered by any witness before the CMA. He submitted that the arbitrator wrongly arrived to a finding that there were forged FDR receipts while it was not supported by any evidence on record.

He contended that, the respondent failed to comply with many procedures and not just a part as suggested in the award. He stated that, the respondent conducted investigation but failed to issue a copy of the investigation report to him. To support his contention, he referred the court to the case of **KCB (T) Limited V. Dickson Mwikuka**, Revision No. 45 of 2013, HCLD at Mwanza (unreported).

He submitted that it was proper for the arbitrator to decide that termination was procedurally unfair.

He argued the 3rd and 4th grounds together and submitted that, the arbitrator erred to decide that the applicant failed to prove his claims of specific damages and also to award the applicant with only six months as compensation after finding termination of his employment was procedurally unfair. He argued that, when he was testifying before the CMA, he stated after being terminated from his employment he suffered physically and emotionally. He thus prayed to be paid salaries and benefits including pension up to the date of retirement. He stated that, his outstanding salaries from the date of termination of his employment was Tshs. 76,562,707.65 and he prayed for specific damages of Tshs. 117,788,816,46.

It was the applicant's further submission that, the arbitrator did not address the relief of reinstatement or constructive reinstatement despite of being justified by the applicant. He stated the Arbitrator ought to have stated the reason why she did not grant the same. He stated that was a serious omission on the part of the arbitrator. As regards to the award of compensation of six (6) months, it is the

applicant's view that termination was both substantively and procedurally unfair.

He went on arguing that, the arbitrator was supposed to order reinstatement and if the same could have not been implemented then she could have awarded him constructive reinstatement. He submitted that, if the said order would have not been implemented, he would have been entitled to the salaries and benefits up to the date when the award was issued plus compensation of equal to twelve (12) months' salaries. At the end he prayed the court to award him the reliefs prayed in the CMA F1.

In her reply the counsel for the respondent prayed to adopt the counter affidavit filed in the court to oppose the application to form part of her submission. She argued in relation to the first ground of revision that, as stated in the termination letter, the applicant was terminated from his employment because of the offences of gross negligence and misappropriation of the customer's funds. She cited in his submission Rule 12 (3) of the GN. No. 42 of 2007 and the Case of **Saganga Mussa V. Institute of Social Work**, Revision No. 370 of 2013 to support her argument.

She argued that, when the respondent was making his mitigation, he admitted to have committed the offences as it can be seen at pages 6 and 13 of the Disciplinary Hearing Report. She stated that, the respondent had a valid reason for terminating employment of the applicant after finding him guilty of the mentioned misconducts. She submitted that, the arbitrator correctly evaluated the evidence adduced before the CMA which established the applicant's termination was substantively and procedurally fair. To strengthen her submission the counsel for the respondent cited the cases of **Twiga Bancorp (T) V. David Kanyika,** Revision No. 346 of 2013 and **Tanzania Revenue Authority V. Andrew Mapunda**, Revision No. 104 of 2014.

As for the procedures used by the respondent to terminate employment of the applicant, the counsel for the respondent argued that, the respondent complied with all the procedures required to be followed in termination of employment of an employee as provided under Rule 13 of the GN. No. 42 of 2007.

She argued in relation to the second ground that, the arbitrator did not shift the burden of proof to the applicant as argued by the counsel for the applicant but the respondent executed his duty of

proving fairness of termination of employment of the applicant. Thus, the applicant's allegation that the arbitrator shifted the burden of prove to the applicant is unfounded.

As regards to the third and fourth grounds, the counsel for the respondent submitted that, the Arbitrator was correct to decide that the applicant failed to prove his claim on specific damages. She stated it is an established principle of the law that, claim of specific damages must be proved and supported her argument with the case of **Zuberi Augustino V. Anicet Mugabe** [1992] TLR 137.

She went on arguing that, the Arbitrator decided the dispute in accordance with the law and awarded the applicant six (6) months' salary compensation after seeing the reason for terminating employment of the applicant was fair and some of the procedures were adhered. To bolster her argument the counsel for the respondent referred the court to the case of **Vedastus S. Ntulanyeka and Others V. Mohamed Trans Ltd.,** Revision No. 4 of 2014. At the end he prayed the application be dismissed for want of merit.

In his rejoinder, the applicant reiterated his submission in chief and added that, he did not admit any of the offences levelled against him. He submitted that it was misleading to make an inference on the mitigation factors. He distinguished the case of **Saganga Mussa** (supra) by stating it is inapplicable in the circumstances of the case at hand. He reiterated the prayer he made in his submission in chief that he be granted the reliefs sought at the CMA.

Having considered the rival submission from the parties and after going through the record of the matter and the applicable laws, the court has found proper to determine this revision by following the grounds of revision as raised and argued by the parties. Starting with the first ground of revision which states the Arbitrator failed to evaluate the evidence adduced before the CMA, the court has found the law as provided under section 37 (2) of the ELRA is very clear that, a valid termination of employment of an employee is supposed to be made on fair reason and fair procedure provided under the law must be adhered. That position of the law has been emphasized by this court in number of cases which one of them is **Sharifa Ahamed v. Tanzania Road Haulage (1980) Ltd.**, Revision Application No.

299 of 2014, [2015] LCCD II where it was stated that: -

> *"The well-established principle in law is that termination of employment which is not based on valid reason and fair procedure is unfair, Section 37 (2) of Employment and Labour Relation Act."*

That being the position of the law the issue to determine here is whether termination of employment of the applicant was made on fair reason and whether fair procedure provided under the law was adhered. The court has found the evidence adduced before the CMA and specifically the letter of terminating his employment admitted in the matter as exhibit 2 shows the applicant was terminated from his employment after being found he was guilty of the offences of gross negligence and misappropriation of the customers' funds.

I will start with the offence of gross negligence which the CMA found was established by the respondent and used to award the impugned award. The court has found the issue as to how the offence of gross negligence is required to be proved was stated by this court in the case of **Twiga Bancorp Limited V. Zuhura**

Zidadu and Another [2015] LCCD 18 where it was held that: -

> *"It is an established principle that the applicant to succeed in proving negligence he must prove that a duty of care was owed by the respondent, there was a breach of that duty, the breach caused damage and damage was foreseeable (see Lord Macmillan in Donoghue Steven (1932) A. C. 562)."*

While being guided by the above cited principle of the law the court has found that, as stated by DW1, DW2 and DW3 the offences levelled against the applicant were alleged to have occurred from January, 2014 to August, 2016 and the applicant did not dispute the said factual evidence. The court has also found it is not disputed that the applicant was working at the respondent's Zanzibar Branch as a Branch Operations Manager from January, 2014 to 18th June, 2015 when he was transferred to Masasi Mtwara Branch.

That shows that, as stated by the respondent's witnesses some of the misconducts alleged were committed by the applicant and caused the respondent to suffer the alleged loss occurred before the applicant being transferred to Masasi branch on the date mentioned hereinabove and another loss occurred at the period when the applicant had already been transferred to Masasi Branch.

The court has found that, the Arbitrator found the misconducts alleged were committed by the applicant at the period, he was at Zanzibar branch was gross negligence to supervise his subordinate staffs. The Arbitrator stated that, the evidence adduced before the CMA shows the applicant was negligent in discharging his duties of supervising his subordinate staffs to the extent of giving chance to them to forge his signature and withdrawn money from the accounts of the respondent's customers and caused the loss alleged was caused to the respondent.

The court has found that, although it is true as argued by the applicant that there is no job description or a circular showing his duties was tendered before the CMA by DW1 to establish the offence of gross negligence levelled against him but it was also not disputed that one of his duties as a Branch Operations Manager was to supervise his junior staffs. If that was one of his duties, he cannot be heard arguing he was not responsible for the misconducts of the subordinate staffs he was supervising which caused part of the loss alleged was caused to his employer.

It is also the view of this court that, it cannot be said the applicant who was at the rank of a Branch Operations Manager was

not aware of what was his duties and he continued with his work for the whole period without asking to be informed what was his duties. To the view of this court the applicant was aware of his duties of supervising his subordinates and he was aware that, any breach of that duty would have caused damage to his employer.

The question to determine here is whether the applicant was aware of the misconducts alleged was committed by the subordinate staffs he was supervising and he did not take any action against the alleged misconduct. The court has found that, as rightly stated by the counsel for the respondent the applicant stated at page 11 of exhibit NBC 6 that, there were some staffs who were not faithful and one of them was Omar J. Kumba who was withdrawn money from the accounts of the bank's customers.

Despite of the fact that, the applicant admitted that he was aware of the stated unfaithful staffs but he didn't say what measures he took against those unfaithful staffs as their supervisor. The court has found that, under that circumstance there is no way it can be said the applicant was not negligent in performing his duties as a Branch Operations Manager. The stated finding caused the court come to the view that the Arbitrator did not fail to evaluate the

evidence adduced before the CMA in finding the offence of gross negligence levelled against the applicant was proved to the standard required by the law.

The court has considered the argument by the applicant that DW1 failed to specify the loss caused by him to the respondent as there were other employees charged with the similar offences and DW1 was not sure about how much loss was caused in 2014, 2015 and 2015. The court has found that, although it is true that there is no evidence adduced before the CMA to show how much loss occurred at the period when the applicant was working at Zanzibar Branch but the applicant did not dispute there were some misconducts which were committed by some of his subordinate staffs of withdraw money from the accounts of their customers as he admitted himself in exhibit NBC 6.

If there is no dispute that there were some misconducts which were committed by the applicant's subordinates at the period of time, he was working at Zanzibar Branch as a Branch Operations Manager it cannot be said there is no loss occurred at the period of January, 2014 to June, 2015 when the applicant was working at Zanzibar. To the contrary the court has found what can be said was not proved as

rightly found by the Arbitrator is the commission of the offence of misappropriation of the customers' funds which was not substantiated and not the offence of gross negligence provided under Rule 12 (3) (d) of the GN. No. 42 of 2007 which the Arbitrator found it was established to the required standard which as provided under Rule 9 (3) of the GN. No. 42 of 2007 is on balance of probability.

Coming to the second ground where states the Arbitrator erred in shifting burden of proof of unfair termination of employment to the applicant the court has found that, as stated earlier in this judgment and as provided under section 39 of the ELRA the duty to prove termination of employment of an employee is fair is casted on the shoulder of the employer. The question to determine here is whether the respondent managed to discharge the stated duty and whether the Arbitrator shifted the said duty to the applicant.

The court has found that, in proving the offences levelled against the applicant the respondent had three witnesses who testified before the CMA as DW1, DW2 and DW3. The stated witnesses stated categorically in their evidence and without being disputed by the applicant that, the applicant was working at Zanzibar Branch of the respondent as a Branch Operations Manager in the period covering

January, 2014 to June, 2015 when he was transferred to Masasi Branch.

The court has also found the said witnesses stated in their evidence that the loss caused to the respondent covered the period from when the applicant was working at Zanzibar which is January, 2014 to June, 2015 and the loss continued until August, 2016. The court has found that apart from the oral evidence adduced by DW1, DW2 and DW3 but there is also documentary evidence adduced before the CMA which was admitted in the matter as exhibit NBC 6 and used to prove the offences levelled against the applicant. Although it is true that it was not stated how much loss occurred at the period when the applicant was working at Zanzibar but it was stated the loss included the period when the applicant was working at Zanzibar.

The court has gone through the award which the applicant argued is showing at pages 21 and 22 that the Arbitrator shifted the burden of proving fairness of termination of his employment to him but failed to see anywhere the burden of proving fairness of termination of his employment to him. To the contrary the court has found what was done by the Arbitrator on the said pages of the

award was just a comparison of the evidence adduced by the respondent's witnesses against the evidence adduced by the applicant and not to shift the burden of proof of unfairness of termination of the employment of the applicant.

The court has also found it is true that the Arbitrator referred to FDRs (Fixed Deposit Receipt) which were not tendered before the CMA to prove the loss caused by the applicant to the respondent. However, the court has found that the said FDRs were extensively referred by DW2, DW3 in their testimonies and even the applicant himself. The court has also found that, as the said FDRs were being referred by the witnesses in the course of proving and disproving the offence of misappropriation of the customers' fund which the CMA found was not proved there is no way it can be said the Arbitrator erred in referring to the same. The court has also found that, as it was found by the Arbitrator the offence of Misappropriation of the respondent's customers' fund which was being proved by the said FDRs was not substantiated there is no need of continuing to of dwell further in dealing with the arguments relating to the said FDRs.

Coming to the issue of the fairness of the procedures used to terminate employment of the applicant the court has found the

applicant challenged the procedures used to terminate his employment on two aspects. Firstly, he challenged the procedure by stating he was not issued with an investigation report of his case before the disciplinary hearing of his case being conducted and secondly, he stated his appeal was not heard and determined in accordance with the required procedure.

Starting with the first aspect the court has found it is true that the applicant was not issued with an investigation report before hearing of his charges at the disciplinary hearing committee. The court has found the requirement to supply an investigation report to an employee before disciplinary hearing of matter started has been emphasized by our courts in various cases and one of them is the case of **KCB (T) Limited** (supra) where it was stated that, where an employer is intending to relay on a certain document like an audit report, the same is expected to be supplied to the employee for the purpose of enabling him to get prepared for his defence.

To the view of this court the applicant was entitled to be supplied with investigation report of his case which was the foundation of the offences levelled against him because it was alleged the offences were discovered at a period when he was no longer in

the station the loss was found to have occurred. As the appellant was not supplied with either investigation report or audit report of his case before hearing of his matter at the disciplinary hearing committee the court is in agreement with the finding of the Arbitrator that some of the procedures for terminating employment of the applicant were not followed.

Besides, the court has considered the procedure of hearing of the appeal of the applicant he referred to the respondent's management which he said was not heard and the argument that decision to terminate his employment took more than the time provided under the respondent's policy. The court has found the applicant stated to have appealed to the respondent's management on 7th March, 2017 but the decision of his appeal was communicated to him on 12th June, 2017 which is a period of three months while the respondent's policy states the decision of the appeal is required to be communicated to an employee within ten days from the date of hearing of the appeal.

The court has also found that, the argument by the applicant that his appeal was not heard and he was just served with a letter of terminating his employment was not rebutted by the respondent. All

of what have been stated hereinabove caused the court to agree with the Arbitrator that, the procedure of dealing with termination of employment of the applicant was not properly complied with. In the premises the court is in agreement with the finding of the Arbitrator that termination of employment of the applicant was substantially fair but procedurally partly unfair.

As for the third and fourth grounds the court has found the applicant argued the Arbitrator erred in finding he failed to prove the specific damage he claimed against the respondent. The court has found it is true that the applicant prayed to be granted damages amounting to TZS 76,600,000/=. The court has found the position of the law as stated in different cases decided in our jurisdiction is very clear that specific damages must not only be pleaded but also strictly proved to move the court to grant the same.

That stated requirement of the law was stated in the case of **Zuberi Augustine** (supra) cited by the counsel for the respondent in his submission where the court stated that, it is a trite law that specific damage must specifically be pleaded and proved. The stated position of the law was also emphasized by the Court of Appeal in the cases of **Masolele General Agencies V. African Inland Church**

Tanzania, [1994] TLR 192 and **Future Century Limited V. TANESCO**, Civil Appeal No. 5 of 2009, CAT at DSM (unreported) where it was held that specific claim must be strictly proved.

The court has gone through the evidence of the applicant but failed to see any evidence adduced before the CMA to prove the stated claim of specific damage of TZS. 76, 600,000/=. The court has considered the argument by the applicant that he stated he suffered physically and mentally but find such assertion alone cannot be enough to say the claimed amount of damage was strictly proved. To the view of this court the applicant was required to adduce sufficient evidence to prove how he suffered physically and mentally to the extent of claiming the stated damage. As that was not done by the applicant the court has found the Arbitrator did not error in finding the claim of the applicant of specific damage was not strictly proved to move the CMA to grant it.

The applicant also complained the Arbitrator did not consider his relief of being reinstated in his employment and he didn't give reason as to why that relief was not granted. After going through the impugned award, the court has found it is true that the Arbitrator did not state why he awarded the applicant compensation of six months

salaries instead of reinstating him in his employment as he prayed in the CMA F1. Although it is true that the Arbitrator awarded the applicant the stated compensation instead of reinstating him in his employment but the court has found the Arbitrator did not error in granting the stated relief instead of reinstating the applicant in his employment.

The court has arrived to the stated finding after seeing that, as rightly argued by the counsel for the respondent there was a proof that termination of employment of the applicant was made on fair reason but the unfairness of termination of his employment was found on failure to follow some part of the procedure used to terminate his employment. Where there is a valid and fair reason for terminating employment of an employee and the problem is only the procedure of termination of employment which was not followed the court has discretion under section 40 (1) of the ELRA to award any of the reliefs provided under paragraphs (a) to (c) of the said provision of the law which it might see is appropriate according to the circumstances of a particular case.

As for the issue of the applicant to be granted compensation of only six months salaries and not more the court has found the

circumstances of his case where it was found the misconduct of gross negligence was proved and the problem is only that the procedure for termination of his employment was not partly followed it was justifiable for the Arbitrator to grant the award granted to the applicant. The stated view of this court is getting support from the case of **Felician Rutwaza V. World Vision Tanzania,** Civil Appeal No. 213 of 2019, CAT at Bukoba (unreported) and the case of **Saganga Mussa** (supra) where when the court was vacating the award of twelve months salaries as a compensation for procedural unfair termination of employment it was stated inter alia that:-

> *"This court has also vacated the grant of twelve months salaries where misconduct is proved but procedures not partly followed by the employer. I therefore reduce the grant of twelve months salaries to four months salaries for the reasons expounded above."*

By borrowing a leaf from the position of the law stated in the above cases the court has found that, as the misconduct of gross negligence was found it was proved to be valid and fair reason for termination of employment of the applicant and the only problem was that the employer failed to follow some part of the procedure of terminating his employment the court has found the Arbitrator did

not error in awarding the applicant compensation of six months salaries for unfair termination of his employment.

In the premises the court has found the applicant has not managed to convince the court there is any error committed by the Arbitrator in determining his case which deserve to be revised by the court. Consequently, the award of the CMA is hereby not revised and the application of the applicant is accordingly dismissed for being devoid of merit. It is so ordered.

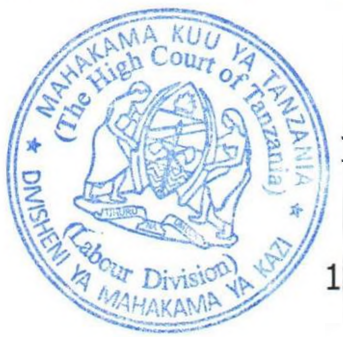
Dated at Dar es Salaam this 11th day of February, 2022.

I. Arufani

JUDGE

11/02/2022

Court: Judgment delivered today 11th day of February, 2022 in the presence of the applicant in person and in the absence of the respondent. Right of appeal to the Court of Appeal is fully explained.



I. Arufani

JUDGE

11/02/2022