IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 152 OF 2021

EQUITY BANK TANZANIA LIMITED ..... APPLICANT

VERSUS

MARTIN SHASHI ..... RESPONDENT

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

(Mbeyale: Arbitrator)

Dated 10th March, 2021

in

REF: CMA/DSM/ILA/474/19/228

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JUDGEMENT

12th April & 31st May 2022

Rwizile J

This application emanates from the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/ILA/474/19/228. This Court has been asked to call and examine the original CMA records and proceedings to satisfy itself as to the correctness, rationality and propriety of the CMA finding and the entire award.

The brief history to this case is; the respondent was employed by the applicant on 15th August 2016 as a loan manager on a permanent term contract at Quality Centre Branch.

On 28th May, 2019, the respondent was terminated on an allegation of authorising one client to spend loan money in buying other busses contrary to the loan agreement and viewing client's account balance contrary to Human Resource policies and procedure. Aggrieved by termination, he filed a dispute with the CMA. The award, after a hearing, was in favour of the respondent. The CMA ordered the applicant to pay TZS. 74,717,500.00. The applicant was not happy with the award, hence this application.

The application was supported by the affidavit of Prisila Clemence, Legal Service Manager of the applicant. Grounds for revision were raised as hereunder: -

i. *Whether it was proper for the trial arbitrator to declare unfair termination basing on the single count of soliciting and receiving bribery from the client in exclusion of the two other counts on which the respondent had admitted and convicted.*

ii. *Whether the trial arbitrator properly and thoroughly evaluated the evidence presented before her in deciding the matter in favour of respondent.*

iii. *Whether it was proper in law for the trial arbitrator to decide the matter in favour of the respondent even after admission by the respondent to have acted negligently on acts which violated applicant's HR policies and procedure.*

iv. *Whether it was fair and compliant to public and law for the trial arbitrator to award the respondent compensation of colossal sum of TZS. 74,717,500.00 which is equivalent to 24 months wages and severance payment.*

The application was heard by written submissions. The applicant was represented by Mr. Frank Kilian, learned Advocate whereas the respondent enjoyed services of Mr. Julius Manjeka, learned Advocate.

Mr. Frank submitted that circumstantial evidence tendered before CMA directly implicated the applicant to have committed the offence charged, but the arbitrator disregarded such evidence. He stated further that the respondent admitted to have unlawfully allowed the client to invest the loan money in the business of buying busses for transportation purposes. He said, the same ought to be invested in (Forty Forty Pub). He said, the

law was worth 1.8 billion. In his view, the respondent acted blindly authorised him to invest the money into business for transportation without checking, if the same were insured or were part of collateral of the Bank.

He continued to submit that, there is no doubt that the respondent solicited and received bribery. He further submitted that the respondent was found guilty of the offence of secretly operating the bank account under the name of his brother (Njile Isaac Shashi). It was further stated that the account was in occasions used to deposit large sums of money and then transferring the same to his mobile phone for his personal use.

He stated that there was a need to work with a person of good character, integrity, transparent and trustworthy. The learned advocate therefore held the view that the arbitrator misdirected her mind in holding that there were no reasons for termination of the respondent. He added that, such failure on party of the Arbitrator ended up awarding compensation of TZS. 74,717,500.00. He continued to state that the procedure for termination was also followed.

He claimed that on 04th February, 2019 the respondent was suspended, and the suspension was extended as per exhibit D3. According to him, investigation was conducted as proved by the investigation report -exhibit

D1. He went on arguing that a letter to show cause was issued as according to exhibit D4.

On 16th May, 2019, it was argued, the respondent was required to appear before disciplinary committee for hearing as shown by exhibit D5, a notice of the meeting. Mr. Frank submitted further that the reasons for termination were valid. He said therefore, there was no justification of ordering compensation of 24 months salary as there were no violation of procedure for termination of the applicant.

On another ground Mr. Frank submitted that the arbitrator did not consider the evidence which proved other charges but instead ended up issuing an award based on the single charge of soliciting and receiving bribery. He stated that the respondent was given the right to appeal within ten days but did not do so. For him, filing a dispute at CMA was premature because he ought to have appealed first. In his view the arbitrator did not properly exercise his powers when making an award. It was his prayer that this application be granted.

Mr. Julius submitted, in reply that exhibits D4, D5 and D7 are on the misconduct of soliciting and accepting bribes. It was his argument that, the applicant failed to prove bribery. He submitted, neither Eliud Jones Kijalo nor Abdallah Karim testified about the alleged bribe.

He stated that the applicant also failed to prove the allegation that the bank account was opened for the purpose of concealing the proceeds of bribery. He submitted that the arbitrator did not declare unfair termination based on only one count but to all three.

Mr. Julius submitted that termination was procedurally unfair since the applicant did not prove by doing investigation. He stated further that the respondent was not involved in the process of showing cause. He therefore asked this court to hold that the CMA was correct in its decision.

He stated that three reasons for termination of the employment mentioned in the termination letter never included the charge looking into the customers' accounts or allowing the client to invest money in transportation business. He stated further that the investigation report was challenged during cross examination. Dw1 was not the one who conducted investigation and so her testimony was a hearsay. He argued that Dw1 admitted that they did not report the alleged bribery to PCCB. He insisted that the proceedings and judgement reveal without doubt that the applicant failed to prove the charges against respondent.

Mr. Julius continued saying that the award is fair as it considered section 40(1) of Employment and Labour Relations Act, No. 6 of 2004. He stated that the respondent was unfairly terminated and has been out of

employment for more than 34 months. According to the learned counsel, investigation conducted was contrary to Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules of G.N. No. 42 of 2007. He added, investigation was conducted prematurely when there was no complaint against the respondent. He stated also that the respondent was not given a chance to make his defence, to cross examine witnesses or call his witnesses to support his at the disciplinary hearing. This, he said, is contrary to Rule 13(5) of G.N. No. 42 of 2007. He then prayed for the revision to be dismissed.

After going through parties' submissions, CMA proceedings and exhibits, the court has been called upon to determine the following common issues:

1. *Whether there were valid reasons for termination and if termination procedure was adhered to.*

As the testimonies of parties at CMA, it is not disputed that the respondent was the employee of the applicant. The respondent was terminated from the employment as well. The CMA record shows the reasons for termination as stated in exhibit D4 (a show cause letter) were demanding for the sum of money TZS. 60,000,000.00 from a customer (Mr. Eliud Jones Kijalo) so as to facilitate loan process amount of TZS. 1.8 billion. The other offence is fraud for accessing the account in the name of Njile

Isaac Shashi by his mobile number. Exhibit 5, is a notice to attend a disciplinary hearing, where three charges have been listed;

1. *Soliciting and accepting bribes or commissions which is a gross misconduct*
2. *Misappropriation of Bank's property or facilities for personal gain which is a gross misconduct*
3. *Exposing the Bank to risk of reputation loss/harming the Bank's reputation – which is a contravention of our code ethics*

It is legally provided that, it is the duty of the employer to prove if termination was fair. This is provided for under section 39 of the Employment and Labour Relations Act [CAP 366 R.E. 2019] which provides: -

> *"In any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination was fair."*

One will ask what constitute to fair termination. The law under section 37(2) of Employment and Labour Relations Act [CAP 366 R.E. 2019] provides the answer as hereunder: -

> *"A termination of employment by an employer is unfair if the employer fails to prove-*

a) that the reason for the termination is valid;

b) that the reason is a fair reason-

i. related to the employee's conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer, and

c) that the employment was terminated in accordance with a fair procedure."

This means for termination to be merited, there must be fair reason for termination and the procedures for termination has to be fully followed. Rule 9(1) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007 provides: -

"An employer shall follow a fair procedure of terminating an employee's employment which may depend to extent on the kind of reasons given for such termination."

Therefore, in this application the respondent is bound to prove whether she had good reasons and followed procedures to terminate the applicant as it is provided under Rule 9(3) of G.N. No. 42 of 2007, which states thus;

"The burden of proof lies with the employer but sufficient for the employer to prove the reason on a balance of probabilities."

In determination of the first issue, the record has it that, the respondent was terminated because of taking bribery when he worked in the loans section at Quality Centre Branch. This is in accordance with the evidence of Dw1, in the handwritten proceedings where he stated that: -

"Mlalamikaji alikuwa mfanyakazi wa Equity Bank, akifanya kazi ya mikopo, tawi la quality Centre. Kwasasa hafanyi kazi tena Bank aliondolewa kazini kwa makosa ya kupokea rushwa"

On the other hand, Dw1 during cross examination stated that the allegation of taking bribe was stated by the complainant and his accountant (exhibit D2). For easy reference the testimony reads: -

"S. Kuna Ushahidi wowote wa njia nyingine ya kushawishi

J. Hakuna Ushahidi mwingine zaidi ya barua/camera

S. Je, hiyo yako ilithibitisha vipi kwamba alipewa shilingi milioni 60

J. Kutokana na maelezo ya mteja na accountant wake"

Indeed, there was no direct evidence showing the respondent received corruption from the customer. The CMA when dismissing the allegations pf corruption was of the view that since the applicant and or the

complainant did not report the same to relevant government authorities, the allegation is baseless.

I do not think this reasoning is tenable. Corruption transactions in many respects are done secretly. Their evidence and investigation as well are complex. But the applicant as the bank is not prevented from taking its own internal measures. Taking bribery is a misconduct that is serious, that merits termination in all fours. Therefore, I think, the bank was right to hold investigation of its own for the purposes of protecting its customers, its reputation as well integrity of the business. I therefore hold that even a slightly allegation of corruption must be dealt with to the brim, due to the nature of banking business and the risks involved when issuing big sums of money in terms of loans.

As to whether it was proved that the respondent took bribery, it is a matter of evidence. The only evidence strongly submitted is the investigation report. It shows when did the allegation come up. It was months after the loan was issued and after the complaint's letter. It is unfortunate that the person who complained did not testify. What is clear is that there was suspicion raised by investigation. This is true of the evidence in D1 that the respondent had dubious transactions that suggested there was such a problem. According to the investigation report, the respondent opened

an account that belong to his younger brother. Despite receiving large sums of money different from its usual turn over, the respondent was regularly visiting it.

The respondent testified that it was due to the instructions of the owner. However, there is no evidence from him that it was so.

By any standard whether with or without instruction, one's account cannot be simply visited. The timing of the opening of the account, the manner the respondent was visiting it, including transferring some cash to and from it is not a normal banking practice.

In my view therefore, the applicant was justified to investigate the respondent in the manner she did. But still, there is evidence not controverted by the respondent that the loan was disbursed to the customer contrary to the terms for which the same was for. I think, since the issuing officer was duty bound to make a follow- up on use of the loan according to what was it applied for. Failure to do so, in my view shows the respondent was negligent and or grossly did so with purpose. I therefore do not agree with the CMA that there was no sufficient evidence to prove acts of gross misconduct on part of the respondent.

I have therefore to hold that evidence in labour matters should not be taken as that of a criminal case. Here the evidence is at the preponderance

of probability. That is to say, evidence to that effect has to be clear and convincing when measured in comparison with other evidences to the contrary. The applicant, in my view brought evidence that is to some extent convincing.

The evidence of Dw1 and Dw2 below shows how it was clear on the misconduct. For easy reference (untyped) they read:

DW1's testimony:

> *"Katika uchunguzi wetu tuliweza kubaini kwamba kuna akaunti ilifunguliwa 10/1/2018 na hiyo account ilifunguliwa kwa jina la Mr. Njile Shashi ambaye tuligundua ni ndugu yake Martini Shashi ilifunguliwa tawi la Morogoro na iliwekwa deposit ya Tsh. Elf. 10 baada ya hapo ikawewekwa laki moja- 2/10/2018. Hapa... tulibaini hii account ilifunguliwa miamala 2 ilifanyika na Martin Shahi ni laki 1 na laki 7 kwenye hii account Mlalamikaji hahusiki nayo lakini kwa miamala ilikuwa inafanyika naye which is contrary to bank policy"*

In **DW2's testimony:**

> *"Kwa taratibu za kazi hakupaswa ku view account ya mteja."*

I therefore hold that the first issue has merit. It is answered in the affirmative that termination was for valid reasons.

The second point to determine is if termination was procedurally fair. Here, the governing procedure is as per the law. Rule 13 of G.N. No. 42 of 2007 provides for the procedures for termination. It clearly provides for investigation and reasonable notice of disciplinary hearing among many others.

Based on the testimonies and exhibits tendered at CMA, it is evidenced that the complaints for bribe to the respondent came after he was suspended from employment. Dw1 and Dw2 stated, that the complaint of taking bribe from the customer was the reason for termination. The letters from those customers being their evidence produced as exhibits. They were collectively named as exhibits D2 which were the letters from Eliud Jones Kijalo dated 23rd February 2019 and the other of Abdallah S. Karim dated 05th March 2019.

But surprising enough the respondent was suspended on 04th February 2019 way back before the alleged letters. There is no evidence as to why was the applicant was suspended before the allegations were made

Rule 13(2) and (3) of G.N. No. 42 of 2007 provides for the employer to notify the employee of the allegations. This is done so as to give the employee a reasonable time to prepare for the defence. The respondent was called at the disciplinary hearing via exhibit D5. This was a notice to

the meeting which stated three charges. The fact that he was suspended before the allegation were brought raises a red mark on whether the procedure was followed. I therefore hold that failure to follow the termination procedure, which in my view commenced with suspension was unfair on party of the respondent. Fairness of procedure is prerequisite to fair termination. I therefore hold that the applicant failed to observe the procedure for termination. The second issue therefore is answered in the negative.

As to reliefs, the amount of 74,717,500.00 TZS, awarded is quashed. Instead, the following are the reliefs given;

Salary of 12 months which is equal to 36,300,000.00 TZS, severance pay and a certificate of service. The application is partly allowed to the extent explained. No order as to costs.

A.K. Rwizile

JUDGE

31.05.2022