IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 46 OF 2021

(From the decision of the Commission for Mediation and Arbitration of DSM at Kinondoni) (Mbena: Arbitrator) dated 23rd day of December 2020 in Labour Dispute No. CMA/DSM/KIN/440/19/219

BETWEEN

BELINDA CHAULA...APPLICANT

VERSUS

DCB COMMERCIAL BANK..RESPONDENT

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JUDGEMENT

09th May 2022 & 27th May 2022

K. T. R. MTEULE, J.

This Revision application emanates from the award of the Commission for Mediation and Arbitration in Labour Dispute No. CMA/DSM/KIN/440/19/219 dated 23rd December 2020, which was determined by Kinondoni Commission for Mediation and Arbitration, Dar es Salaam zone (CMA). This court has been asked to call for the record of the CMA and to revise and set aside the award issued therein. **Ms. BELINDA CHAULA**, the Applicant herein is praying for the following orders:-

1. That this Honorable Court be pleased to call for, examine and revise the proceedings and subsequent award of the

Commission for Mediation and Arbitration in Dispute No.CMA/DSM/KIN/440/19/219 delivered by Honourable Mbena, M.S (Arbitrator) to be satisfied with equality, correctness of the award made herein.

2. That the Honourable Court be pleased to make any other orders it deem fit and just to grant.

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I find it appropriate at this point, to give a brief sequence of facts leading to this application which are grasped from CMA record, affidavit and counter affidavit filed by the parties. On 8th April 2014 the applicant was employed by the respondent as Operation Officer. Their dispute began on 2nd May 2019 when the applicant was terminated from her employment. It is not disputed that the applicant's termination was based on an alleged lack of skills and competence, basing on alleged applicant's failure to adhere to **Section 2.4 of the Respondent's Human Resource Policy** and for failure to observe the Respondent's code of conduct as per **Sections 18.16.7** of the same policy. (See Exhibit 12 - termination of employment contract). Section 2.4 of the said policy describes employee's entry qualification while **Sections 18.16.7** provides for

lack of skills and competence to be among the offences falling under the code of conduct which shall be penalised by termination.

Aggrieved by the termination, the Applicant filed in the CMA the Labour Dispute No. CMA/DSM/KIN/440/2019 on 07th June 2019 claiming to have been unfairly terminated and for payment of terminal benefits. After the determination of the matter, the arbitrator found that the termination was substantively and procedurally fair and entirely dismissed the application.

The applicant advanced one legal issue of revision as stated at paragraph 4 of her affidavit. The said issue is that the award was delivered contrary to **Rule 13 (3) The Employment and Labour Relations (Code of Good Practice) Rules, 2007 [Government Notice No. 42 of 16th February 2007)**, made under the **Employment and Labour Relations Act, CAP 366 R.E 2019**.

In disposing the application, parties argued by a way of written submissions. The applicant was represented by Mr. Simba Kipengele while the Respondent was represented, by Mr. Mohamed Muya, Advocate.

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In her written submissions, the applicant framed two legal issues in which her submission was based. The issues are:-

a. Whether it was proper for the arbitrator to rule/find that there was fair reason for termination?

b. Whether it was proper for the arbitrator to rule/find that the termination was procedurally fair?

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Arguing in support for the first issue as to whether it was proper for the arbitrator to find that there was a fair reason for termination, the Applicant challenged the allegation of applicant's lack of skills and competence which was the reason for her termination. Referring to page 6 and 7 of the awards, the applicant explained that the Applicant submitted to the Respondent all her original certificates of Diploma, transcript of bachelor's degree and the result slip for form IV and VI examination scores. She added that the respondent in terminating applicant's employment ought to have considered the employment entry qualification by complying with Section 39 of the **Employment and Labour Relation Act, Cap 366 R.E 2019, Rule 9 (3) of Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007** and Section 2.4 of the respondent's Policy.

The Applicant argued further that the requirement of Section 2.4 of the policy ought to be imposed by the respondent prior to the employment. The fact that the same are imposed after almost two years of employment refute the respondent allegation and CMA finding, that applicant failure to submit the required certificate for vetting amounted to incompetence.

It was further submitted by the Applicant since the respondent failed to identify and prove which entry qualification for the applicant was missing and how did the applicant failed to submit original A- level certificate, it should be construed as the failure to prove that the termination was based on valid reason contrary to Section 37 (2) of the Employment and Labour Relations Act, Cap 366 R.E 2019.

Regarding the **second** issue on propriety of the termination procedure, the Applicant submitted that the notice to attend the disciplinary hearing contravened **Rule 13 (3) of GN. No. 42 of 2007** as the applicant was not given reasonable time to prepare for his defence. She referred to Exhibit P2 which shows that the applicant was served on 29th April 2019 while the meeting was conducted on 30th April 2019. For that reason, she is of the view that

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the procedure was violated for not affording the applicant sufficient time for preparation.

Arguing against the application, Mr. Muya disputed the Applicant's assertion that page 6 and 7 of the awards did not show that the applicant submitted original certificate. Citing page 3, paragraph 3 and page 4 of the award, he submitted that it is shown in the award that on 10th April 2019 the Applicant was charged for failure to submit original certificate.

Mr. Muya averred that the respondent misconstrued **section 39 of the Employment and Labour Relation Act and Rule 9 (3) of GN. No. 42 of 2007** by not explaining how the respondent infringed the said provisions. According to him, Section 2.4 of the HR policy (Exhibit D1) explain about entry qualification of an employee whereby academic qualification is one of the factors to be considered. In his view, the Applicant's termination resulted from the failure of the Applicant to submit the original certificate of A-level despite of the different efforts the Respondent made to remind the Applicant to submit the said certificates. He is of the view that there was a valid reason for termination.

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With regards to the procedure of termination, Mr. Muya submitted that the applicant was afforded with enough time for preparing her defence since she was charged on 10th April 2019 and responded to the charge on 15th April 2019 while the disciplinary hearing was held on 30th April 2019, which means she had 21 days more than 48 hours stated under **Rule 13 (3) of GN. No. 42 of 2007**. To support her submission, Mr. Muya cited the case of **Adela Damian Msanya v. Tanzania Electricity Supply Co. Ltd.,** Civil Appeal No. 305 of 2019. Therefore, 48 hours stated under Rule 13 (3) is calculated from the moment when the employee was charged up to when the disciplinary hearing commenced. They thus prayed for the application to be dismissed.

Having cautiously gone through the CMA records and submissions of the parties the following are the issues for determination.

(1) Whether applicant adduced justifiable grounds/reasons for this Court to exercise its revision power to set aside the decision of the CMA?

(2) To what reliefs parties entitled to?

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In addressing the first issue, I will focus on the fairness of the reason for termination and propriety of the termination procedure as discussed by the parties.

Starting with the fairness of the reasons for termination, the arbitrator found that, the respondent had a valid reason for termination, since the applicant refused to submit original certificate. What follows is a determination as to whether the arbitrator was correct in this holding.

Validity and fairness of reasons for termination is well stipulated both nationally and internationally. To begin with the domestic legal setting, the relevant provision is **Section 37 (2) of the Employment and Labour Relation Act, No. 6 of 2004 (Cap 366 of 2019 R.E)** which state:-

> *"37 (2) A termination of employment by an employer is unfair if the employer fails to prove:-*
>
> *(a) That the **reason for termination is valid;***
>
> *(b) That the **reason is a fair reason:-***
>
> *(i) Related to the **employee's conduct, capacity or compatibility; or***

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(ii)Based on the operational requirements of the employer, and

(c) That ***the employment was terminated in accordance with a fair procedure."***

Internationally, Article 4 of the ILO Convention No. 158 provides:-

> *"The* ***employment of a worker shall not be terminated unless there is a valid reason*** *for such termination* ***connected with the capacity or conduct of the worker or*** *based on operational requirements of the undertaking establishment or service."*

The duty to proof is on the employer as per Section 39 of Employment and Labour Relations Act and is on a balance of probability.

In this matter it is undisputed that there was a vetting exercise relating to employees' certificates which found the applicant's certificate not presented. It is further undisputed that the Respondent wrote to the applicant to demand submission of original certificates, but the applicant could not respond timely due to what she claimed to be bail restrictions which prevented her to travel to Uganda to pick her A level certificate. She was charged under Section 2.4 of the HR

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Policy of the Respondent for having refused to tender her original certificate when she commenced her service. It is apparent that Section 2.4 of the HR policy (Exhibit D1) sets out entry qualification of an employee whereby academic qualification is one of the factors to be considered.

In her submissions, the Applicant challenged the applicability of the policy to her employment which came in place two years after her employment. In her view, the certificates were not determinant qualification of entry when the applicant was being employed. In her view, the applicant's employment was enabled by the proof of special pass in English and Mathematics via the result slips which the award confirmed to have been submitted to the Respondent during the recruitment.

From the facts of the matter, I asked myself, who was wrong between the applicant who convinced employment without the original certificate or the employer who agreed to employ the applicant without the said certificates. I have gone through the policy. It is dated 2017 while the applicant was employed in 2014. This means, the provisions used to terminate the employment of the applicant was not in place when the applicant was employed. This

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being the case, and due to its retrospectively, I could not comprehend how could the policy applied with regards to the Applicant's employment who was recruited 2 years before the policy. There was no policy dated prior to 2014 which indicated to have existed and breached by the applicant on the date of her entry into the Respondent Bank.

According to the letter of termination (Exhibit D13) which I had opportunity to read, the applicant was charged with the following offences:-

> *"1. Failure to adhere to section 2.4 of the DCB Human Resources Policy.*
>
> *2. Failure to observe DCB codes of conduct as per Sections 18.16.7 (p71) of the Human Resource Policy".*

Section 2.4 provides as hereunder quoted:-

> ***"2.4 Entry Qualifications***
>
> *DCB is an equal opportunity employer. Entry qualifications into DCB employment shall be determined by academic qualifications and working experiences as specified in the scheme of service. However for Operation Officers special considerations will be given to fresh graduates of Accounts,*

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Economics, Banking and Finance and or related fields depending on the position. The special consideration will also be given to applicants with special pass in English and/or Mathematics for A- level and O-level qualifications."

Sections 18.16.7 falls under the code of conduct which contains offences and penalties. For purposes of clarification, I hereunder reproduce the offence stipulated under Sections 18.16.7 of the policy. It provides:-

"Lack of skills and competence commensurate to qualifications which the employee expressly or implicitly claimed to possess".

Coming to the contents of the letter of termination, it appears that the applicant was terminated due to inadequate entry qualification which was punished by lack of skills and competence commensurate to the qualification. In my view, if the policy came to establish some offences and conditions, when it comes to reasons, the Respondent has a right to maintain the rightful staff in her organization, and this right can be exercised under **section 38 of Cap 366 of R.E 2019**. In her submission, the Respondent has claimed to have demanded A-level certificate without a success although the applicant's explanation was to the effect that she could not travel to Uganda to

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take the certificate due to bail restrictions of that time. It is obvious that qualification needs to be proved by a certificate. If the form 6 certificate could not be produced when needed for whatever reason, then the Respondent had right to terminate the applicant. This sufficiently conclude that the applicant had a fair reason to terminate the applicant due to new operational requirements which were brought by the policy after the recruitment of the applicant.

What next is the issue as to whether the applicant applied the proper procedure of termination. As submitted by the Applicant, there was no offence committed by the applicant to warrant disciplinary proceedings against the applicant since the entry qualification of the applicant were demonstrated on the date of recruitment and convinced the Respondent to offer the employment to the Applicant. May be the Respondent was no longer interested with the applicant's presence in her office due to the new requirements brought by the policy. Termination under these circumstances is guided by the procedure for termination basing on operational requirements which is allowable under the provision of **Section 38 (2) A (iv) of Cap 366 of the R.E 2019** which provides that an employee may be terminated basing on operational requirements of an employer. This

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means, if there was a change in operational requirements which arose in the work environment which is not commensurate to some qualification of an employee, termination is allowed. The nature of the applicant's termination seems to fall under this kind of a situation. It is not stated in the CMA what were the qualification used to recruit the applicant in 2014 before the promulgation of the policy. May be the applicant met the qualification by that time resulting to her employment, but circumstances changed after the policy. It appears that the policy came to introduce some new requirements for qualification unless the respondent proves that the applicant's qualifications were below the requirement from the time of recruitment. The Respondent may have desired to terminate the applicant to allow proper qualification in accordance with the policy. This is allowable but the Respondent ought to have adopted section 38 of Cap 366 of R.E 2019 in terminating the applicant. The section provides:-

> *"38.-(1) In any termination for operational requirements (retrenchment), the employer shall comply with the following principles, that is to say, he shall:-*
>
> > *(a) give notice of any intention to retrench as soon as it is contemplated;*

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(b) disclose all relevant information on the intended retrenchment for the purpose of proper consultation;

(c) consult prior to retrenchment or redundancy on:-

(i) the reasons for the intended retrenchment;

(ii) any measures to avoid or minimize the intended retrenchment;

(iii) the method of selection of the employees to be retrenched'

(iv) the timing of the retrenchments; and

(v) severance pay in respect of the retrenchments,

(d) give the notice, make the disclosure and consult, in terms of this subsection, with:-

(i) any trade union recognized in terms of section 67;

(ii) any registered trade union which members in the workplace not represented by a recognised trade union;

(iii) any employees not represented by a recognized or registered trade union.

(2) Where in the consultations held in terms of sub-section (1) no agreement is reached between the parties, the matter shall be referred to mediation under Part VIII of this Act.

(3) Where the mediation has failed, the dispute shall be referred for arbitration which shall be concluded within thirty days during which period no retrenchment shall take effect and, where the employees are dissatisfied with the award and are desirous to proceed with revision to

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the Labour Court under section 91 (2), the employer may proceed with their retrenchment.

Instead of complying with the above provision, the Respondent charged the applicant under the policy which is dated 2017 which is two years from the date when the applicant was employed. It is not on evidence that the policy existed before the recruitment of the applicant, and it is not shown if lack of skills and competence was one of offences when the applicant was employed. In my view, the provisions of the policy applied retrospectively against the applicant which is not a fair standard. This means there was a lack of fair procedure in the termination.

Apart from the application of the policy retrospectively, the applicant blamed the Respondent for having not provided sufficient notice for the disciplinary committee meeting. According to the Applicant, the notice of hearing was issued on 29th April 2019 at 11.27 am while the meeting was scheduled and held on 30th April 2019 at 15.00 pm which is about 30 hours duration of notice. Citing **Rule 13 (3) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007**, the Applicant submitted that the Respondent ought to give the applicant a notice of 2 clear days

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before holding the meeting. On the other hand, the Respondent argued that time should count from the time when the applicant was issued with the charge sheet which is 11th April 2019. The Respondent supported this contention by **Rule 13 (2) of GN. 42 of 2007**. For ease of reference, I hereunder reproduce **Rules 13 (2) and 13 (3) of GN. 42 of 2007**. They provide:-

> *(2) Where a hearing is to be held the employer shall notify the employee of the allegations using a form and language that the employee can reasonably understand.*
>
> *3. The employee shall be entitled to a reasonable time to prepare for a hearing and to be assisted in the hearing by a trade union representative or fellow employee. What constitute a reasonable time shall depend on the circumstances and the complexity of the case but shall not normally be less than 48 hours."*

From the above provisions, a notice is prescribed under sub rule 2 which constitute allegation against that employee. In this matter the allegations according to the Respondent, were notified to the Applicant by a way of a charge sheet since 11 April 2019.

I agree with respondent's Counsel regarding the relevance of the case of **Adela Damian Msanya v. Tanzania Electricity Supply Co. Ltd.,** *(supra).*

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There are more several court decisions regarding the procedure for termination, that they should not be followed in a checklist form. In the case of **Justa Kyaruzi V. NBC Ltd.,** Revision No. 79 of 2009, Lab. Division at Mwanza, it was held that:-

> *"What is important is not application of the code in the checklist fashion, rather to ensure the process used adhere to the basics of fair hearing in the labour context depending on the circumstances of the parties, so as to ensure the act to terminate is not reached arbitrarily. Admittedly, the procedure may be dispensed with as per Rule 13 (12) of the Code."*

Therefore, since the applicant was issued with the document containing the charges well in advance, the principles of natural justice were adhered to, as the applicant was charged, replied to the charge and given right to defend her case.

In my view, there was a sufficient notice to the applicant where preparations for the hearing could have been made well in advance before the hearing date. The applicant's argument that there was no sufficient time to prepare for the disciplinary meeting holds no water.

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Nevertheless, the issue of fairness of the procedure of disciplinary committee is expounded herein just for academic purposes. It is already found that there should not have been any disciplinary issues in this matter as no offence seems to have been breached by the applicant.

From the foregoing circumstances, it is my holding that there was a fair reason for termination of the applicant's employment. However, the procedure invoked to effect the termination was not fair since the applicant was charged under the provision of offences in the policy which was brought after her recruitment and she was terminated through a wrong procedure.

On that basis I am of the view that there was a valid reason for termination coupled with unfair procedure. From the foregoing, the first issue as to whether applicant adduced justifiable grounds for this Court to exercise its revision power against the decision of the CMA is answered affirmatively.

Regarding relief of the parties, from CMA FI, the applicant prayed for the terminal benefits and the compensation for unfair termination. Since the applicant was fairly terminated in terms of reason but with

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unfair procedure, she deserves compensation and other terminal benefits.

Therefore, I hereby revise the decision of the Commission for Mediation and Arbitration by setting aside the award and replace it by granting the applicant a compensation of 12 months salaries and other terminal benefits namely one month notice, leave payment and severance allowance. Each party to bear its own cost.

It is so ordered.

Dated at Dar es Salaam this 27th day of May, 2022.

KATARINA REVOCATI MTEULE
JUDGE
27/05/2022

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