IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 316 OF 2021

PATRICIA MINJA ..... APPLICANT

VERSUS

BANK OF AFRICA (T) LIMITED ..... RESPONDENT

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

(Mbena: Arbitrator)

Dated 30th June 2021

in

REF: CMA/DSM/ILA/453/19/281

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JUDGEMENT

28th March & 17th June 2022

Rwizile J

This application emanates from the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/ILA/453/19/281. This Court has been asked to issue an order revising and setting aside the award. The reason for so doing is that the award is legally and factually wrong, it is irrational and illogical.

The brief facts of this case can be stated as follows; that the applicant was employed by the respondent on 07th June 2002 as a Corporate Officer for one year. In 2003, she worked in the loans department until 07th May 2019 when she was terminated. The reason for termination was stated as

misconduct. The applicant filed a labour dispute at the CMA claiming for reinstatement without loss of remuneration due to unfair termination. Unfortunately, her application was dismissed for want of merits. Dissatisfied, this application has been preferred. Grounds for the revision as per paragraph 6 of the affidavit supporting this application were thirteen, but during the hearing, the applicant's advocate dropped the rest and remained with only two stated as hereunder: -

i. That there was no reason for termination; and

ii. That the procedure for termination was not followed

The application was argued orally. The applicant was represented by Mr. Jovinson Kagirwa, learned Advocate whereas the respondent enjoyed the services of Mr. Godwin Nesphory Nyaisa learned Advocate.

Mr. Kagirwa on the first issue submitted that investigation report was a key document for determination of the alleged misconduct. He continued to argue that, there were no witnesses at the disciplinary hearing to support the allegations. To support his point, he cited Rule 13(5) of G.N. No. 42 of 2007 and the case of **Alex Eriyo & 4 others v Bank of Africa**, Revision No. 03 of 2020 at page 24-25 where it was held that evidence must be tabled at the disciplinary hearing.

He further submitted that at the CMA, investigation report was not tendered. It was his argument that only Dw1 under the directives of the managing director appeared to testify. The learned counsel argued that, even reasons for termination were not stated before the CMA. In his view, there was no legal basis to arrive at the decision. This court was therefore asked to hold that the CMA decision was wrong

On the second issue, Mr. Kagirwa submitted that the arbitrator did not rule out if the disciplinary hearing procedure, followed the law.

He stated that in the award, there is only the content of evidence of D5 (disciplinary hearing summary) as proof of admission of misconduct. In his view, based on the composition of the disciplinary hearing, it was contrary to guideline 4(2) of the G.N. No. 42 of 2007. To support his submission, he cited the case of **I & M Bank (T) Limited v Gregory Ogweno**, Consolidated Revision No. 724 & 761 of 2019. The learned counsel then asked this court to grant this application thereby quashing and setting aside the CMA award and order reinstatement.

To reply, Mr. Nyaisa learned counsel submitted that three charges were blessed by the disciplinary hearing committee and the CMA. The learned counsel added, the applicant admitted a misconduct as in exhibit D1, which shows the loan was approved in assumption that there was a mortgage. The learned advocate submitted further that the applicant

prepared an addendum without notifying the board, and so there was no approval of the board.

He stated further that there is evidence of the minutes and proceedings showing the applicant admitted to commit errors. To support his submission, he cited the case of **Bank of Africa v Karim A. Hassan**, Revision No. 123 of 2020 at page 15.

He submitted further that the hearing form has witnesses who testified during disciplinary hearing and even at the CMA as exhibits D5 shows. The learned counsel held the view that investigation can be done in any way. The learned counsel therefore cited the case of **Ramadhan Masoud v Bank of Africa**, Revision No. 391 of 2020 at page 12. He said, the case of **Alex Eriyo** (supra) is distinguishable as Dw1 testified and tendered documents to prove the wrong doing.

On the second point, he submitted that the arbitrator properly made reliefs, based on the admission as stated in the cases of **Ramadhan Masoud** (supra) and the case of **Nickson Alex v Plan International**, Revision No. 22 of 2014 at page 6-7.

He submitted further that the constitution of the disciplinary hearing committee and presence of the chairman is a new point, because, it was not stated before as provided for under Guideline 4(2) of G.N. No. 42 of

2007. As to the issues of mortgage, he submitted that, it was supposed to be tendered at CMA and not at this stage. He stated further, that the case of **I & M Bank** (supra) is distinguishable here as exhibit D9 shows what the applicant did was against the job description.

He then prayed for the application to be dismissed. But should not order reinstatement as the applicant was terminated in 2018. Reinstatement according to the learned counsel, is not a best option. The learned counsel then stated that the law has given an alternative as in CMAF.1 that the award can be reduced to less than 12 months as was stated in **Karim's case.** (supra).

In a rejoinder, Mr. Kagirwa submitted that reinstatement should be decided by the Court. Further, it was his argument that the procedure and the presence of the chairman is not new, as was stated at page 12-13 of the award where it was pointed out that he had interest in the matter. He submitted further that as seen in exhibit D5, the applicant disputed all allegations and did not admit anything. The respondent, he added, is duty bound by the law to prove the same.

He continued to stated that at page 3 of the award, it shows the investigator who testified was also the prosecutor and so could not be a witness. That, on the addendum issue, it was done but not by the applicant. He said as well, that admission was not in respect of the

allegations levelled against her. The mortgage documents, he said, were registered by the respondent in 2010 as a legal mortgage and so the applicant could have not asked for the documents which were already tendered. He then stated that the cases of **Ramadhan Masoud & Bank of Africa** and **Karim Hassan** (supra) are distinguishable. Mr. Kagirwa then prayed for the application to be granted.

After going through the submissions, CMA proceedings and exhibits, I find this court has been called to determine; *whether the respondent had valid reason to terminate the applicant and whether there was procedural fairness in terminating the applicant*

It is undisputed that the applicant was the employee of the respondent and that she was terminated. The reasons for termination as stated by the witness are found in exhibit D4. Those were deliberately uttering false information, giving the board credit committee wrong information, negligence in performance of her duties and signing of the addendum of the facility which replaced the security of the facility from a legal mortgage on leased property.

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

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

The extent to which this proof can be done is explained under section 37(2) of ELRA stating 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 fair, the employer has to demonstrate to have good reason for termination and to follow laid down procedure for termination. Rule 9(1) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007 as well has it that: -

"An employer shall follow a fair procedure before 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. In doing so, the employer has to prove at the balance of probabilities as under Rule 9(3) of G.N. No. 42 of 2007, thus;

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

On tuckering the issues at hand, I have observed that the arbitrator delt with only one reason of negligence out of the four reasons for termination listed in the exhibit D4. Thus, I will therefore start with the same.

At the hearing the applicant stated that she used the property of their client as security to a new loan application which was used in 2010, loan application and the said client had already finalized the payment. For clarity here is what she stated: -

"(shahidi anarejea D3) makosa manne kosa la kwanza ni employer claimed that I informed the board that we have a registered mortgage while it was not true kwenye hili kosa la kwanza huyu mteja Lesvos nilimfahamu tangu 2010 alipokuja kuomba mkopo

alitumia security hiyo na mkopo wa 2 million dollars na alimaliza kulipa; kosa ni kumtajia mteja security tofauti wakati hiyo security ilikuwepo tangu 2010 bank ilidai kuwa tuna registered lease hold property and not legal mortgage."

Going further, the applicant admitted signing the offer letter without the approval of the committee. She stated that: -

"Addendum iliandaliwa na watu wa credit administration na mamlaka ya kuandaa walipewa na local credit approval committee. Hivyo hapo kosa langu mimi lilikuwa kusaini hiyo offer letter baada ya kuona approval ya committee."

When cross-examined she stated that it was not her duty to sign the addendum. For easy reference she stated as shown below;

"S. Mkopo waliokuja kuomba 2017 ulikuwa ni muendelezo wa mkopo wa 2010, Local Credit Approval Committee waliapprove nini

J. Waliapprove apewe mkopo aliomba kwa Security ya Registered Lease hold property

S. Mikopo mikubwa kama wa Lesvos approval yake ipo stage ngapi

J. Tatu; kwanza; Local Credit Approval Committee (LCAC)

Pili; Group Credit Committee (GCC)

tatu; Board Credit Committee (BCC)

- *Mimi nilikuwa Local Credit Approval Committee*

S. Nani anatoa final approval kwenye hiyo stage 3

J. BCC anachosema au kuapprove BCC ndicho kinaandikwa kwenye facility letter

S. Kama kuna kitu unataka kupunguza au kuongeza baada ya kuwa approved na BCC nani anakuwa consulted

J. BCC ndio wanatoa go ahead baada ya kuwa consulted

...

S. Walikwambia uweke security ipi?

J. Legal mortgage Pamoja na facility letter ya kwanza walisema ni legal mortgage

- Nakubali nilipeleka niliandika legal mortgage ila kosa sikulikubali

S. Je ni kweli taarifa uliyoipeleka BCC ndio taarifa niliyopewa na Local Credit Approval Committee

J. Ndio taarifa niliyotoa mimi ilikuwa tofauti na attachments kutoka (LCAC)

S. Facility letter ilikuwa na masharti kama yaliyokuwa kwenye BCC na kama kuna marekebisho lazima yawe approved na BCC, wakati unaenda kuandaa addendum D7 kulikuwa na approval ya BCC?

J. LCAC walikubaliana yalifanyika marekebisho ya security

BCC hawakutoa approval ya kufanya marekebisho..."

From the above, the applicant signed the addendum when she was not supposed to do so and also, she changed the security of the said client without being authorised.

I have perused the CMA records and found that the applicant at different time had agreed to sign the addendum without authority. She stated that she registered the lease hold as the legal mortgage and later on changed it into registered lease. This was observed in exhibit D3 (*Re: Request for explanation on the charge against me*), she stated: -

"...The allegation that I intended to mislead the Directors is based on human error found in the email ...

The offer letter issued with reference to No. BCM/LO/jbb/0217/17 dated 07th December, wrongly mentioned securities held property on Plot No. 254 Toure Drive as legal mortgage while what was recommended by Group and approved by the Board, and kept in custody was leasehold on the property. As per Credit Policy section 1.4 (v) I acted to the best served long-term interests of the Bank and prudently meeting the reasonable needs of clients. There were no any security changes that required to involve the Board. Client

executed the documents without any issue since they had no ill intentions. Such addendum has occasioned no loss this far, then securing the Bank. I only was keeping records clear..."

Also, in exhibits D1 on facility given to Lesvos Enterprise Limited the applicant stated that: -

"... I did not intend to change Local Credit Committee decision, what I wrote in my email was purely an error of which I apologize for that."

To put the record clean, the applicant's defence was that what happened was a human error and that she wanted to make the records clear. I find this as lame excuse. Her position as the Assistant General Manager Credit Management and her experience of working in the industry since 07th June 2002, she ought to know what she was supposed to do or abstain from doing. Her job description as shown in exhibits D9, D6 (Human Resources Manual) and D1 (Facility Given to Lesvos Enterprise Limited) tells it all. From her experience she ought to have known the procedure and the dangers likely, when approving loans. It does not matter how good the customer may be. What is most important in the banking sector is to make sure the laid down procedures are followed and observed to the brim. Rule 12(3) (d) of G.N. No. 42 of 2007, provides that negligence merits termination.

It follows from the foregoing, that the respondent had valid reasons for terminating the applicant. I hold, she acted negligently on her party and so termination was inevitable.

In dealing with the second issue of whether there was procedural fairness in terminating the applicant.

The advocate for the applicant stated that the procedure was not valid. In support he cited Guideline 4(2) of G.N. No. 42 of 2007.

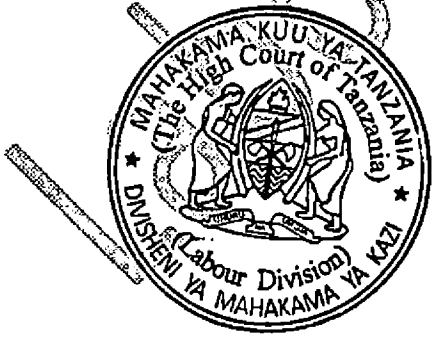
As the law provides, Rule 13 of G.N. No. 42 of 2007 provides for the procedures for termination. But in the circumstances of this case, the applicant admitted to have committed an offence as justified by exhibit D3 (Re: Request for explanations on the Charges Against You) a reply to show cause letter. I am of the view that any allegation regarding disciplinary hearing lacks merit. Since the employee admitted the offence, this court finds there was no dire need to proceed with the hearing. The essence of the hearing is to prove the allegations levelled against the employee.

On the issue of reliefs. The case of **Charles Mwita Siaga v National Microfinance Bank PLC**, Civil Appeal No. 112 of 2017, the Court of Appeal of Tanzania, provides the answer as shown below: -

"... 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..."

As I have stated before, there were valid reasons for terminating her employment and that the other procedure for hearing was not that necessary.

Based on the decision in the case of **Charles Mwita Siaga(supra)** reinstatement could not have been a viable option even if the applicant would have been unprocedural terminated. I find the application to have no merit, it is therefore dismissed. No order as to costs.



A.K. Rwizile

JUDGE

17.07.2022