IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 29 OF 2021

EDEN MASHASI..... ..... APPLICANT

VERSUS

BARCLAYS BANK TANZANIA LIMITED (ABSA)..... RESPONDENT

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

(Migire: Arbitrator)

dated 21st November 2020

in

REF: CMA/DSM/ILA/755/19

JUDGEMENT

24th April & 22nd July 2022

Rwizile J

In this application, the applicant has asked this Court to call for the records of the proceedings of the Commission for Mediation and Arbitration (CMA) and revise the award dated 21st November 2020.

Facts reading to this case were stated that, the applicant was employed by the respondent as a driver. He had a long-term service in a fixed contract. Sometimes in 2020, his employment was terminated for

misconduct to wit, involving himself in soliciting bribery from a fellow employee and failure to report the corruption and forgery incidences to the ant-money laundering officer of the Bank. Not satisfied by termination, he unsuccessfully filed a dispute with CMA. The Commission found termination was grounded on valid reason and the procedure was followed to terminate him. He was again not happy with the decision of the CMA and has now preferred this application.

The applicant, in his affidavit, has advanced a litany of legal issues to be determined by this court as follows;

I. *That the trial Honourable Arbitrator erred in Law and in fact by holding that the Applicant solicited the amount of TZS. 3,000,000.00 without any proof.*

II. *That the trial Honourable Arbitrator erred in Law and in fact by holding in favor of the Respondent who never proved that the Applicant's termination from employment was fair.*

III. *That the trial Honourable Arbitrator erred in Law and fact by making decision basing on the decision made by the disciplinary Committee instead of the Employer.*

IV. *That the trial Honourable Arbitrator erred in Law and fact by holding that the Applicant admitted to charges levelled against him in the reply to show cause letter.*

V. *That the trial Honourable Arbitrator erred in Law and fact by holding that the Applicant failed to report to his line Manager about the information he received from Fred Okoth.*

VI. *That the trial Honourable Arbitrator erred in Law and fact by holding that the Applicant failed to report to the Money Laundering Reporting officer concerning the payment arrangement between Fred Okoth and Ibrahim Lisso regardless of the Applicant's unawareness of such arrangement.*

The application has been heard by written submissions. Not represented, the applicant, in view of the first issue, stated that the Arbitrator in the eyes of the Law seemed to favor the Respondent. He said, there was no proof of any documentary evidence or oral evidence from the Respondent, to support the case.

With regard to the 2nd issue, it was submitted that the Arbitrator erred in Law and in fact by holding that termination from employment was fair. In his view, the requirement of the Law that the onus of proving that the Employment was fairly terminated is cast on the Employer, as stated under section 39 of the Employment and Labour Relations Act, [Cap 366 R.E 2019]. He was clear that the arbitrator overlooked this key legal doctrine.

On the 3rd ground, he argued that it is clearly known that the task of any disciplinary Committee is to make investigation concerning the offence alleged committed by the employee and not to make a decision. He added, that upon hearing the parties the committee finally makes a recommendation to the employer, who is a decision maker. In his view this requirement is well supported by the decision in the case of **Access Bank Tanzania Limited v Amos Lukuba, Revision Application No. 50 of 2018**, High Court of Tanzania (Labour Division) at Shinyanga, at page 12 where this Court held that;

> *"The procedure required to be taken are as follows: The employer must conduct investigation to ascertain whether a disciplinary hearing is to be conducted or not, draw and serve the employee with a charge with time to respond to the charges against him or*

her. Employee must be informed of the hearing date, and he is to be allowed to appear at the hearing by either himself or with a representative. Rules also allow an employee to bring witnesses and also to cross examine witnesses of the employer. At the end, the disciplinary committee is required to prepare a report and submit it to the employer for a decision which is to be communicated to the employee."

It was his submission that it is clear that the disciplinary committee's mandate is limited to investigation about the alleged offence, conducts hearing and finally submit a report to the employer who will thereupon deliver his decision basing on the disciplinary committee's report. The act of the disciplinary committee, he added, to make a decision instead of recommendation is, in the eyes of the law ultra vires and the same to be treated as a nullity.

On the 4th issue, the applicant submitted that the Arbitrator misdirected himself by declaring that the Applicant had admitted the charges levelled against him in the reply to show cause letter. The applicant was vehement that there is nowhere in the reply to show cause letter that the Applicant admitted the charge levelled against him.

It was the Applicant's submission that, what the Arbitrator did was the creation of his own facts and used them to decide the matter brought before the Commission, contrary to the Law.

With regard to the 5th issue, he said, it is not true that the Applicant failed to report to his line Manager about the information he received from Fred Okoth. The applicant said, he testified to have reported the incidence to the line manager, but the arbitrator ignored that evidence.

Lastly, the Applicant submitted that he was not aware of the payment arrangement between Fred Okoth and Ibrahim Lisso. The Applicant further submitted that, the said payment arrangement was made by Fred Okoth and Ibrahim Lisso without his knowledge. He therefore asked this court to grant this application as pleaded.

For the respondent, Godson Miage learned counsel appeared. In the submission for the respondent, he said that in respect of issues 1 and 4, the applicant never denied, the contents of the investigation report at the disciplinary hearing and at the trial before the CMA. He as well argued that the interview conducted to Fred Okoth was also not denied by the applicant. It was his view, that the applicant, when answering the show cause letter, admitted to have known the plan between Fred Okoth and

Ibrahim Lisso. He said, the applicant being quite aware of the corruption racket, he did not report to the line manager contrary to the policy. In his view this was a fair reason for termination.

Dealing with issues, second and third, it was submitted that the applicant did not show how, the respondent did not discharge her duty of proving fairness of termination.

It was his view that the arbitrator was satisfied that the case was made out against the applicant. The learned advocate was of the submission further that the committee did not terminate the applicant. He said, the evidence is clear that it made its recommendations for the employer to act, which she did. In his view, this is supported by the applicant's submission at page 4, where the applicant is alleged to have said as follows; *tarehe 06/08/2019, akaitwa kupokea matokeo ya kikao cha nidhamu ikipendekeza ajira yake isitishwe.* For the learned counsel, this issue is baseless and should be dismissed.

Submitting on the last two issues, Mr. Miage was of the submission that the applicant well knew the alleged corruption incidence, for the reasons best know to him, did not report it to the management or immediate supervisor. It was argued that the applicant came to open up on the

incidence when the police came to interview him at the end of almost everything. The learned counsel therefore asked this court to dismiss this application.

When re-joining, the applicant just reiterated his submission in chief. And asked this court to grant the application as prayed.

Having gone through the application and submissions, as it is usually the case, in incidences of unfair termination allegations, the court is to determine two key issues. Fairness of termination in terms of substance and procedure. The arbitrator was of the view that both substantively and procedurally the respondent was justified to terminate the applicant.

Now, the law provides, 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]-ELRA which states: -

> *"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 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 procedure 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."*

Back to the instant case, the record is clear that the applicant was employed by the respondent since July 10th 2010 under a contract of unspecified time as per BA1. The applicant also does not dispute that prior termination on 6th August 2019, as per exhibit BA7, for misconduct mentioned in the termination letter, he was first suspended. His suspension was done on 27th May 2019. But two days later, he was put on cause by a letter dated 29th May 2019, where he was served with the chargesheet and asked to show cause on the allegations stated therein, (exhibit BA4). His response to the letter to show cause, was done on 3rd June 2019, via letter exhibit BA5.

It is therefore clear that he was suspended pending investigation of allegations levelled against him. The investigation was conducted and as per exhibit BA3 and it was after submission of the report dated 22nd May 2019, the process stated above started. All that was followed by the

disciplinary hearing which was notified to him on 11th June 2019, as per exhibit BA6 and conducted on 14th June 2019 as per exhibit BA7.

The applicant does not dispute all these incidences. All he submitted, is that the procedure was not followed and that the respondent did not prove the case.

Based on the investigation report (BA3), the applicant was interviewed and at page 5, he admitted to the investigation that he was coordinating a bribery of 3million which he claimed that Ibrahim had asked him to facilitate to provide to the freelancer, Mr. Okoth so that he conceals bringing the Keko forgery allegation to the attention of the management as well as not to proceed to report the matter on his newspaper. At the same page, there is an admission by Fred Okoth-the freelancer that started at page 5. It also shows the applicant as a friend of Okoth was informed of the deal which he took to his hands. Further, at page 6 of the same, Ibrahim Lisso confirmed that the two as workers of the bank were in contact in respect of that bribery.

Based on this information, there was no doubt that the applicant was well aware of bribery, and concealed information to that effect. Having admitted to the investigation team, it goes without saying that the

respondent had reason to interdict him. The reasons for interdiction are therefore apparent. There is no reason to suppose that the applicant did not know that he was committing a serious offence which if not governed by the employer's policy at the work place, by any standard it is against the laws of the land. Like the CMA, I hold there were valid reasons for termination.

As to whether termination procedure was followed, this as well, is clear. I have shown before how the process started. Upon hearing and getting informed of the allegation against the applicant. The respondent mounted an investigation. The finding of the same brought suspension, disciplinary hearing and termination as the ultimate end. During the investigation the applicant admitted the offence.

It was, as far as I am concerned, enough to terminate him. But the respondent did not stop there. He initiated a hearing. The same, is not disputed, he was well informed of it, he was then tried and hence terminated. In my view, the procedure for termination stated under rule 13 of the Code of Good Practice, GN. 42 of 2007, was fully complied with. It follows therefore that termination was a reasonable step. The applicant was terminated not only with valid reasons, but also the procedure was properly followed.

For the foregoing reasons, this application has no merit. It is dismissed, with no order as to costs.

A. K. Rwizile

JUDGE

22.07.2022