

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM**

REVISION APPLICATION NO. 48 OF 2022

BETWEEN

JEROME LEONARD MRAMBA APPLICANT

AND

NATIONAL MICROFINANCE BANK PLC RESPONDENT

JUDGMENT

Date of last Order: 20/07/2022
Date of Judgment: 15/8/2022

B. E. K. Mganga, J.

On 1st April 2011, applicant secured employment with the respondent. His duty station was Mbulu branch where he was working as bank officer. His duties were customer service *inter-alia* issuing bank card, pins, bank statements etc. He was terminated due to allegations of withdrawing money from bank account No. 41202401000 operated in the name of Yustina Matle Holay. It happened that the said Yustina Matle Holay died, as result, on 15th January 2014, Leonce Xufo Lohay, the husband of the said Yustina Matle Holay reported that death to the

applicant. Having received that information, on the same date, applicant without authorization, requested the reissue of new ATM card for account No. 41202401000 operated in the name of the said Yustina Matle Holay, the deceased. On 28th January 2014, the applicant received a new ATM card Number o412025919 for the said account No. 41202401000 operated in the name of Yustina Matle Holay. Having received the said new ATM card, applicant and others activated it. On 1st February 2014, applicant sent an email with attachment to NMB mobile-Help Desk requesting mobile Number 0786341001 owned by Yustina Matled Holay, the deceased, to be deleted and delinked from account No. 41202401000 operated in the name of Yustina Matle Holay. On the same date, a new mobile Number 0787056764 was registered to NMB Mobile service to the said bank account No. 41202401000 operated in the name of Yustina Matle Holay. Thereafter, from 3rd February 2024, money from the said bank account No. 41202401000 operated in the name of the said Yustina Matle Holay, the deceased, started to be fraudulently transferred from the said account No. 41202401000 operated in the name of Yustina Matle Holay to several mobile numbers and the said new ATM card was used to withdraw money from the said account. Following Forensic report and CCTV cameras, it was

discovered that applicant was part to that fraudulent scheme that led to withdrawal of TZs 50,000,000/= from the bank account of the late Yustina Matle Holay. On **22nd August 2014** respondent was suspended and on 28th August 2014 he was served with a termination letter. On 1st September 2014, after termination, applicant was charged with criminal case No. 313 of 2014 in the resident magistrate's court of Manyara Region for the offences of stealing by public servant and Money laundering. The court found him guilty, convicted him and sentenced him to serve three years imprisonment for the offence of stealing by servant and for the offence of money laundering, to pay a fine of TZS 50,000,000/= in default to serve three years imprisonment. Applicant unsuccessfully filed criminal appeal No. 36 of 2017 before the High Court of Tanzania at Arusha and thereafter file a Notice of Appeal to the Court of Appeal, but later, he withdrew the said notice of appeal. Having served his custodial sentence, respondent was released from prison.

After release from prison, on 8th January 2021, applicant filed Labour dispute No. CMA/ARS/ARS/15/21 at Arusha claiming to be paid TZS 74,126,923/= being payment for severance pay, transportation costs, payment in lieu of notice and compensation, alleging that termination of

his employment was unfair both for want of reason and procedure. Since he was out of time, he filed an application for condonation as a result, condonation was granted. At CMA, respondent prayed the dispute to be transferred from Arusha to Dar es salaam, as a result, his prayer was granted.

On 30th June 2021, at the time of drafting issues, Mr. Constantine, counsel for the applicant informed the arbitrator that applicant was challenging fairness of procedure only and was claiming reliefs based on procedural unfair termination. Following that submission, two issues were drafted namely, (i) whether or not, the respondent complied with procedures before terminating the complainant and (ii) to what reliefs are the parties entitled to.

On 18th January 2022, Hon. U.N. Mpulla, arbitrator, having heard evidence of both sides, issued an award in favour of the respondent that termination of employment of the applicant was procedurally fair and dismissed the dispute.

Applicant was aggrieved by the said award, as a result, he filed this application for revision seeking the court to revise, quash, and set aside

the said award and grant the reliefs he sought in the CMA F1. In the affidavit in support of the application, applicant raised three issues namely:-

- i) Whether respondent complied with the procedure.*
- ii) Whether criminal misconduct of the applicant was finally determined and*
- iii) What reliefs are the parties entitled to?*

Respondent filed the counter affidavit of Lilian Komwihangiro, her principal officer, to oppose the application.

When the application was called on for hearing, Mr. August Constantine, learned Advocate appeared and argued for the applicant, while Paschal Kamala, learned Advocate appeared and argued for the respondent.

Submitting in favour of the application in the 1st issue, Mr. Constantine learned advocate for the applicant argued that, in termination cases, employer had a duty to prove that termination was fair on procedure and reasons as provided for under section 37(2) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] read together with Rule 9(1) of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007. He submitted further that, Rule 13 of GN. No. 42 of 2007(supra)

provides procedures for termination. He argued that Applicant was not served with notice of hearing contrary to Rule 13(2) of GN. No. 42 of 2007(supra). Counsel went on that; the respondent's Human Resources Policy (Exhibit D2) Clause 16(6) requires employer to notify the employee. It was submission of Mr. Constantine learned Advocate for the applicant that, applicant (PW1) testified that he was not afforded time to prepare himself for the disciplinary hearing, because he was informed of the disciplinary hearing while he was in the same meeting. Counsel argued that there was no proof that applicant was notified prior to the hearing. It was further argued by Mr. Constantine that, on the date of the disciplinary hearing, applicant went to Mbulu Police station to sign his attendance to comply with his bail conditions and that, it was at that time, he was taken to the employer's office by Police Officers for disciplinary hearing.

Mr. Constantine submitted further that, during the disciplinary hearing, applicant was neither allowed to enter defence nor to bring witnesses. He argued that denial to enter a defence was contravening the provisions of Rule 13(7) of GN. No. 42 of 2007(supra). But during submissions, Mr. Constantine conceded that he was not sure whether, applicant prayed to call witnesses and whether the prayer rejected. Counsel submitted further

that, applicant was not afforded right for mitigation after being found guilty. He concluded that, there was breach of Rule 13(5) of GN. No. 42 of 2007(supra) and Clause 16(7) and 8 of the Human Resource Policy of the respondent. He was however quick to submit that his submission is based on what applicant testified at CMA and that applicant was not cross examined on this aspect during hearing at CMA. He cited the case of ***Nelson Onyango v. Republic***, Criminal Appeal No. 49 of 2017, CAT (unreported) and ***Hatari Masharubu @ Babu Ayubu v. The Republic***, Criminal Appeal No. 590 of 2017, CAT (unreported) to support his submissions that matters not cross examined are deemed to have been admitted being correct. He concluded that evidence of the applicant on that aspect stands unquestionable and that, respondent agrees to it.

Counsel for the applicant submitted that it was alleged that applicant, who was a Bank Officer responsible with ATM Cards, stole TZS 50,000,000/= property of the respondent. Counsel went on that, applicant was served with termination letter while disciplinary hearing was going on.

Counsel for the applicant did not stop there as he hammered further that, the disciplinary committee was not properly constituted. He submitted

that according to Clause 16(12) of Exhibit D2, there is established Zonal Disciplinary Committee to hear complaints and that there are only six (6) members specified therein. He went on that, according to applicant's evidence, the disciplinary committee comprised of nine (9) members because, apart from the 6 members provided for under clause 16(12) of exhibit D2, other members who attended are Bethuel Kisaka, the Branch Manager, CPL Walii and CPL Alexander. Counsel for the applicant submitted further that, this fact was admitted by Suzan Mkenda (DW1) during cross examination. Counsel argued further that, the said improper composition of the disciplinary hearing was in violation of Rule 11(1) of GN. No. 42 of 2007(supra) and Clause 16(12) of the Human Resource Policy (Exhibit D2). Counsel submitted further that improper composition of the disciplinary committee vitiated the disciplinary hearing. He cited the case of **NMB Bank PLC v. Hadija Adam Mwinyimatano**, Labour Revision No. 19 of 2019, HC (unreported) to support his submissions that an employer can fairly terminate employment of the employee after adhering to fair procedures. He therefore concluded by praying nullification of the proceedings.

Mr. Constantine argued further that, respondent did not communicate the decision of the disciplinary committee to the applicant in accordance with Rule 13(8) of GN. No. 42 of 2007. Counsel argued that applicant (PW1) testified that, when he entered in the disciplinary hearing room, he found the Chairperson having two papers already printed and he was forced to sign those two papers in the presence of the two Policemen. When asked by the court as to whether the two policemen were called as witness for the applicant at CMA, Mr. Constantine readily conceded that applicant did not call them.

Mr. Constantine learned advocate for the applicant went on to submit that it was evidence of PW1 that the criminal allegations were reported at Police on 22nd August 2014 and that applicant was suspended on the same date. He submitted further that respondent handled the applicant to Police on the same date and that applicant was taken to Mbulu Police station. He submitted further that on 23rd August 2014, applicant was charged for the offence of theft. Counsel submitted that applicant was found guilty at Babati RM's Court, but he unsuccessfully appealed to the High Court at Arusha. Counsel submitted that applicant filed a notice of appeal to the

Court of Appeal and that during hearing at CMA, applicant tendered a notice of appeal to the Court of Appeal as Exhibit P3.

Counsel submitted that applicant was terminated on 28th August 2014 after he was charged on 23rd August 2014 and that the disciplinary hearing committee was conducted on 22nd August 2014. That, applicant signed the document showing that he was guilty while proceedings were going on hence violation of Section 37(5) of Cap. 366 RE. 2019 read together with Rule 27(5) of GN. No. 42 of 2007.

With regards to relief, Mr. Constantine learned advocate prayed that respondent be ordered to compensate applicant not less than 12 months remuneration in accordance to section 40(1)(c) of Cap. 366 R.E. 2019(supra).

On the issue relating to pending of the matter before the Court of Appeal, counsel for the applicant submitted that, during hearing of the matter at CMA, an appeal was pending before the Court of Appeal. After hearing at CMA, applicant withdrew the appeal that was before the Court of Appeal. He submitted further that, in CMA F1, applicant indicated that he was challenging fairness of termination on both fairness of reason and

procedure but at the time of framing issues the issue relating to fairness of reason was abandoned.

Responding to the submissions made by counsel for the applicant, Mr. Kamala, learned Advocate for the respondent, submitted that the disciplinary hearing form (Exhibit D6) shows that applicant was notified of the date of the disciplinary hearing on 26th August 2014 and the disciplinary hearing was conducted on 28th August 2014. He went on that, exhibit D6 was duly signed by the applicant to signify that contents therein were correct. Counsel for the respondent submitted further that, there was compliance of the provisions of GN. No. 42 of 2007(supra). On the allegation that applicant was forced to sign the minutes of the disciplinary hearing and termination letter, Mr. Kamala submitted that applicant neither raised this issue in the CMA F1 nor in the opening statement. Counsel submitted further that, it is not true that applicant was notified of the disciplinary hearing while in the same disciplinary hearing meeting as submitted by Counsel for the applicant.

Counsel for the respondent submitted that applicant was served with the charge (Exhibit D4) on 23rd August 2014 and that he was given time to

respondent to the charge. That, as a stage to the disciplinary hearing, on 26th August 2014 applicant responded to the charge (exh. D5) and served response to the respondent on the same date.

On the allegation that applicant was not allowed to enter his defence, counsel for the respondent submitted that the Disciplinary Hearing Form (Exhibit D6) at Clause 6 shows summary response of the applicant's defence to the allegation. He concluded that it is not true that applicant was not afforded time to enter his defence. Counsel went on that, it is also not true that applicant was not allowed to call witnesses because exhibit D6 shows that applicant was given time to be assisted by any employee or Trade Union, but he did not request to have witnesses. It was submissions of the learned counsel for the respondent that there is no evidence showing that the request to call witnesses was refused. On failure to cross examine the applicant, Mr. Kamala submitted that cross examination is the discretion of the Prosecutor.

Responding to submissions relating to improper composition of the disciplinary hearing committee, Mr. Kamala argued that in CMA F1 and opening statement, applicant did not complain that in the disciplinary

hearing committee there were 9 members. He submitted further argument relating to improper composition of the disciplinary hearing came after closure of respondent's case hence respondent had no opportunity to call more witnesses. Mr. Kamala submitted further that, exhibit D6 shows that the composition of the disciplinary hearing committee had only six (6) members and not nine (9). He went on that, the name of the Branch Manager, CPL Walii and CPL Alexander are not reflected in the form. It was submission of Mr. Kamala that the disciplinary hearing committee was properly composed as per exhibit D2. It was further submitted by Mr. Kamala that Rule 13(4) of GN. No. 42 of 2007(supra) only gives criteria of the Chairperson who is supposed to be impartial and that qualifications of other members of the disciplinary committee are not regulated. He therefore submitted that since there is no complaint against the Chairperson of the disciplinary hearing, other complaints are irrelevant.

Responding to the allegation that the decision was not communicated to the applicant, Mr. Kamala, learned counsel for the respondent submitted that exhibit D6 at Clause 10 that was duly signed by the applicant shows that applicant was found guilty. He went on that, termination letter (exhibit D7), was communicated to the applicant who signed to acknowledge to

have received it. It was submission of Mr. Kamala that, the allegations that there were two papers are naked lies. It was further submissions of Mr. Kamala that the allegation that applicant was terminated after commencement of criminal proceedings are not supported by evidence and went on that, it is not disclosed in the evidence as to when a criminal charge against the applicant was filed in Court. He argued further that, there is no record showing that applicant attended at Police on 22nd August 2014 and further that, that issue was not raised at CMA.

Counsel for the respondent submitted that since counsel for the applicant has submitted that there is no pending appeal before the Court of Appeal, all grounds relating to pendency of an appeal before the Court of Appeal collapses. He went on that, applicant was found guilty by the RM's Court and the High Court and since there is no pending appeal before the Court of Appeal, there was valid reason for termination. Mr. Kamala submitted further that, if at all there was any irregularity in the procedure, that cannot entitle the applicant to benefit from the loss he caused to the respondent. To bolster his submission, he cited the case of ***Deus Wambura v. Mtibwa Sugar Estates Ltd***, Revision No. 03 of 2014 that in the circumstances of this application, applicant deserved to be paid

nothing. He wound up his submissions by praying that the application be dismissed.

In rejoinder, Mr. Constantine, learned counsel for the applicant submitted that applicant signed Exhibit D6 together with the decision during hearing. He reiterated his submissions in chief that applicant was taken to the disciplinary hearing by two policemen. He submitted further that, the charge sheet is different from notification and maintained that applicant was informed of the hearing on 22nd August 2022. On composition of the committee, Mr. Constantine submitted that, PW1 testified that the committee was not properly composed, and he was not cross examined. He maintained that the decision to terminate the applicant was made prior the hearing was conducted and further that there was a pending appeal during hearing of the dispute at CMA.

I have carefully examined the CMA record and considered submissions of both sides in this application, and I am of the view that, termination of the applicant was both substantively and procedurally fair. I am of that view because evidence of **Susan Vandelin Mkenda(DW1)** is clear that on **22nd August 2014** applicant was served with a suspension

letter(exh. D3) and that after investigation, he was served with a disciplinary charge (**exh. D4**) on **23rd August 2014**. It was evidence of DW1 further that, applicant was required to respond to the charge within two days and responded within time as evidenced by his response (**exh. D5**). It was further testified by DW1 that the disciplinary hearing was conducted at Mbulu branch as evidenced by the disciplinary hearing Form (**exh. D6**). In the 1st page of exh. D6 complainant admitted having deleted the customer's information by using his computer. He admitted further that he used his domain and access which shows what he did. In fact in his evidence, DW1 is recorded stating *inter alia* that:-

"...He was terminated due to allegations of withdrawing money from the customer account namely Yuster Holay. The allegation was discovered after the customer's husband reported that his wife is dead. The report was made to the complainant who, disabled the card and issued a new one and thereafter was withdrawing money from the account. Forensic report shows that the money complaint was withdrawing money and sometimes transferring them through the phone. Cameras proves this..."

DW1 testified further that, applicant was given right to be heard and to call witness or fellow employee or trade union leader, but he didn't. DW1 concluded that applicant signed the disciplinary hearing minutes.

In his defence, Jerome Leonard Mramba (PW1) testified that the committee was improperly constituted on ground that it violated the HR manual of the respondent and that he was shocked to find unauthorized persons in the committee. He testified further that, the charge was not read, no witness was called, was not served with notice for the disciplinary hearing and that he was not given a chance to defend. He testified further that the chairman of the disciplinary hearing had two pieces of paper namely the disciplinary hearing form and disciplinary penalty (exh. D6 and D7 respectively) already printed and asked him to sign. He also testified that there was no evidence to support the allegation and that he was neither given a chance to mitigate nor a copy of the decision. With due respect to the applicant, the disciplinary hearing form (exh D6) that was signed by the applicant does not reflect inclusion of unauthorized persons namely the two aforementioned police officers and Mr. Batwel Kisaka the branch manager. The record shows that applicant signed the said disciplinary hearing form (exh D6) on 28th August 2014. While under cross examination by Mr. Kamala learned counsel for the respondent, applicant testified that being a graduate of bachelor's degree on environment planning, he cannot sign without reading and further there is nowhere it

was indicated in the said disciplinary hearing form (exh. D6) that he was forced to sign the hearing form. I therefore dismiss that claim. In my careful examination of the CMA F1, I found that respondent complied with procedures for termination of employment of the applicant. I have further found that exhibit D6 shows that the composition of the disciplinary hearing committee had only six (6) members and not nine (9) as it was alleged by the applicant. More so, the names of the Branch Manager, CPL Walii and CPL Alexander are not reflected in the said form.

It was further argued by counsel for the applicant that the said improper composition of the disciplinary hearing was in violation of Rule 11(1) of GN. No. 42 of 2007(supra) and Clause 16(12) of the Human Resource Policy (Exhibit D2) and prayed nullification of the proceedings. This submission, in my view, is unfounded. I see no reason as to why and how can CMA proceedings be nullified for improper procedure in the disciplinary hearing. In my opinion, the complaint that disciplinary hearing was not properly conducted is a ground of challenging termination based on procedural fairness and that cannot vitiate CMA proceedings. CMA heard the parties on procedural fairness of termination and found that it was fair and I have no reason to fault that findings.

I have also found that there was no complaint against biasness of the chairperson or members of the disciplinary committee. It was not enough for the applicant only to mention that there were nine (9) including police officers without explaining how that prejudiced him. Be as it may, the record does not show that the complained of persons participated in the disciplinary hearing. I agree with counsel for the respondent that applicant raised that issue in his defence after respondent has closed her evidence and with no opportunity to call more witnesses to clarify it. In my view, all issues raised by the applicant was raised as an afterthought. Had it that it was true, applicant could have raised it during cross examination of respondent's witnesses, but it was not. I therefore uphold CMA award that termination was procedurally fair and dismiss this application. Even if I could have found that it was unfair which is not the case at hand, applicant was fairly compensated as he was paid one month salary in lieu of notice, annual leave and repatriation to the place of recruitment all paid through his account as reflected in evidence of DW1, applicant's bank statement (exh. D8) and not disputed by the applicant (PW1) in his evidence. I am of that considered view because it is not mandatory when for the employee whose termination is only procedural unfair to be compensated not less

than 12 months' salary as it was held by the Court of Appeal in the case of *Felician Rutwaza v. World Vision Tanzania*, Civil Appeal No. 213 of 2019, (unreported). In *Rutwaza's case*(supra) it was held: -

"...it is not mandatory that in all cases of unfair termination, the arbitrator should order compensation of not less than 12 months' remuneration. In the context of the case in which the unfairness of the termination was on procedure only... we agree with her entirely...a reading of other sections of the Act gives a distinct impression that the law abhors substantive unfairness more than procedural unfairness, the remedy for the former attracts a heavier penalty than the latter... Be it as it may, ... a person in breach of the employment manual could not benefit from his wrong doing".

Guided by *Rutwaza's case*, even one month salary may suffice for procedural unfair termination, of which, as pointed hereinabove, termination was both substantively and procedural fair.

It was submitted by counsel for the applicant that was terminated after commencement of criminal proceedings but counsel for the respondent submitted that, that submission is not supported by evidence as it was not disclosed as to when a criminal charge against the applicant was filed in Court. I have examined evidence of applicant's (PW1) while in chief and find that he testified that on 1st September 2014, he was charged

in Mbulu District court for the offence of by agent. This was after termination of his employment on 28th August 2014.

All said and done, I hereby dismiss this application for want of merit.

Dated at Dar es Salaam this 15th August 2022.



B. E. K. Mganga
JUDGE

Judgment delivered on this 15th August 2022 in chambers in the absence of the parties.



B. E. K. Mganga
JUDGE