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

LABOUR REVISION NO. 438 Of 2022

BETWEEN

NCBA BANK TANZANIA LIMITED ..... APPLICANT

VERSUS

ANNAH LUPEMBA ..... RESPONDENT

JUDGEMENT

Date of last order: *07/03/2023*
Date of Judgement: *17/03/2023*

MLYAMBINA, J.

In this application, the Applicant is urging the Court to revise and set aside the award of the Commission for Mediation and Arbitration (CMA) in *Labour Dispute No. CMA/DSM/ILA/245/21/112/21* delivered by Hon. Kokusima, L Arbitrator on 08th December, 2022. The application was supported by the affidavit sworn by Ms. Frida Shirima, the Respondent's Head of Legal Governance and Company Secretary. On the other hand, the Respondent challenged the application by filing the notice of opposition and counter affidavit sworn by herself.

The application emanates from the following background; the Respondent was employed by the Applicant since 08th July, 2020 holding the position of Head of Branches. On 18th June, 2021, she was

terminated from employment after been charged and found guilty of the misconducts which will be apparent in due course.

Aggrieved by the termination, the Respondent referred the matter to the CMA claiming for unfair termination. After considering the evidence of the parties, the CMA found that the Respondent was unfairly terminated both substantively and procedurally. Following such finding, the Respondent was awarded a total of TZS 181,688,971.52/= being 12 month's salaries as compensation for unfair termination, one month salary in lieu of notice, one month salary as leave payment, repatriation allowance amounting to 1,716,000/= and subsistence allowance of 18 months equal to TZS. 101,198,233.98. Such decision aggrieved the Applicant. She therefore filed this application urging the Court to determine the following legal grounds:

i. Whether the Arbitrator erred in law and fact in holding that the termination was substantively unfair while the Applicant proved, and the Respondent clearly admitted she assisted and facilitated transactions that were suspicious and risk to the Bank.

ii. Whether the Arbitrator erred in law and fact in holding that there was no policy that prohibited the Respondent from assisting other persons while the Applicant proved, and the Respondent admitted she acted contrary to the Bank's procedures.

iii. Whether the Arbitrator erred in law and fact for failing to evaluate the evidence by the Applicant that proved the Respondent as Head of Branches acted dishonestly and negligently.

iv. Whether the Arbitrator erred in law and fact for holding that the termination was procedurally unfair despite the clear evidence that all the procedures were followed.

v. Whether the Arbitrator erred in law and fact in awarding subsistence allowance despite of the undisputed testimony and evidence that the Respondent refused to do clearance and exit procedures.

The application was argued by way of written submissions. Before the Court, the Applicant was represented by Mr. Luka Elingaya, Learned Counsel from a firm trading as Dentos EALC East Africa Law Chambers. On the other hand, Mr. Joseph Mirumbe, Learned Counsel from a law firm styled as Leo Attorneys appeared for the Respondent.

Arguing in support of the application, Mr. Elingaya jointly submitted on the first, second, third and fourth ground and separately on each of the remaining ground.

Starting with the first, second, third and fourth grounds, Mr. Elingaya submitted that; according to Exhibit A13, Charge Sheet and A16 Termination Letter, the Respondent was charged and found guilty of gross dishonesty for being involved and facilitating suspicious

transactions contrary to her job description and the Bank's policies. She was also charged for being grossly negligent, involved in suspicious transactions at the Kariakoo Branch contrary to her job description and the Bank's policies.

Mr. Elingaya submitted that; according to Exhibit A14, the Hearing Form and M5 Hearing Minutes, the Respondent clearly admitted to having been involved, assisted, and facilitated the transactions that she admits were suspicious and risk to the Bank.

He went on to submit that sufficient evidence was tendered to prove that the Respondent was involved and facilitated suspicious transactions. Mr. Elingaya referred to the testimony of DW1, John Mbezi, the Manager Security and Investigation of the Applicant, who testified that the Applicant received a whistle-blow report (Exhibit A2) from her contractual partner Deloitte, showing *'there was an account of a customer namely, Rajab Ramadhan Ismail, Account No. 144257100011 domiciled at Zanzibar Branch opened without a business licence but operating business accounts while the said Rajab Ramadhan Ismail was not doing any business that could send a huge amount of USD 50,000 to import goods from abroad. The report further indicated that the account was owned by Zanzibar Branch Manager one Majid and was used to*

send TT for some businesspersons from Kariakoo who were evading to pay tax.

Furthet, it was submitted by Mr. Elingaya that; DW1 testified, after the Applicant received the whistle-blow report, he conducted the investigation. The Investigation Report was admitted as Exhibit A3. He informed the CMA when the said Rajab Ramadhan Ismail was interviewed, admitted owning account No. 144257100011 for TZS as reported in the Whistle-blow report. In addition, he also owned account No. 144257100029 for USD, all domiciled in Zanzibar Branch used for his cash savings. The said Rajab Ramadhan Ismail denied being aware of the nature of transactions and businesspersons who transacted in his account. He informed the Applicant his accounts were being used by Majid Mohamed, Branch Manager Zanzibar and Anna Lupemba, the Respondent.

Mr. Elingaya went on to submit on the evidence of DW1 who testified that; when Majid Mohamed, Branch Manager Zanzibar was interviewed, he admitted that Rajab Ramadhan Ismail was not aware of most of the transactions that passed through his account, as most of them were known to him and Anna Lupemba, the Respondent herein. Also, Majid Mohamed admitted that Rajab Ramadhan Ismail's account

was used for business without a business licence and proper KYC and that the account was being used by him with the assistance of Anna Lupemba. The latter assisted different business people from Kariakoo to order goods from abroad. Mr. Elingaya referred the Court to page 6 paragraphs 3 and 4 of Exhibit A3, and page 2 question 12 and page 4 question 21 of Exhibit A5 as well as an Interview Statement of Majid Mohamed.

Mr. Elingaya submitted that; on pages 4 and 5 of Exhibit A3, the Applicant has shown in detail the business persons from Kariakoo who were transacting through Rajab Ramadhan Ismail's account with the assistance of Majid Mohamed and the Respondent. DW1 also tendered Exhibit A4 Rajab Ramadhan Ismail Bank Statement to prove the transactions done in the account.

Mr. Elingaya went on to submit that; the Applicant discovered another Bank account, Chukwani Investment Account No. 142784100017, domiciled in Zanzibar Branch being used by Majid Mohamed and the Respondent to assist businesspersons in sending TT's transfer to abroad to buy goods. He added that; Majid Mohamed admitted the accounts of Rajab Ramadhan Ismail and Chukwani Investment who were operating contrary to the Bank policies and

procedures and were suspicious and risky to the Bank and decided to take responsibility by resigning from employment. He referred the Court to page 6 paragraphs 4 and 7 of Exhibit A3 and pages 2, 3 and 5 of Exhibit A5. Also, he submitted that the Chukwani Investment Bank Statement was received as Exhibit A4 collectively.

Mr. Elingaya was of submission that; when the Respondent was interviewed, she tried to deny everything, as reflected at Exhibit A7 (Respondent's Interview Statement). He added that; the Applicant discovered email correspondences between the Respondent and Majid Mohamed on the transactions they carried out in the Chukwani Investment Account. He explained that; even the email correspondences, Exhibit A3 and A7 shows that the Respondent and Majid Mohamed were using jargon language which means they were hiding the truth.

It was further submitted by Mr. Elingaya that; the Applicant tendered Exhibit A6, email correspondences between Majid Mohamed and the Respondent with attachments of swift codes, TT transfers and invoices of transactions done in Rajab Ramadhan Ismail and Chukwani Investment accounts that were sent to the Respondent to give businesspersons at Kariakoo. He said, at the disciplinary hearing, the

Respondent admitted to have received the swift codes, TT Transfers and Invoices from Majid Mohamed as evidenced by the Disciplinary hearing minutes, Exhibit M5. He added that; at the disciplinary hearing, the Respondent admitted that in all transactions Majid Mohamed did not follow the procedures.

Mr. Elingaya submitted that; dishonest is a grievous offence in the banking industry that is intolerable. He referred the Court to the case of **Charles Mwita Siaga v. National Microfinance Bank PLC**, Civil Appeal No. 112 of 2017, Court of Appeal of Tanzania at Dar es Salaam (unreported), p. 13 the Court held that:

> The Applicant is in the banking industry, where honesty by its employees is its key stock in trade; without it, its business would collapse with dire consequences, not only to the employer and its other employees but also to the economy at large. It is true therefore, that the nature of the bank's demands a unique degree of honesty from its employees, such that, any show of dishonesty amounts to a grave misconduct and may be sanctioned more severely than if it is committed in any other less honesty sensitive industry.

Mr. Elingaya was of the view that; the Arbitrator did not comprehend the misconduct that the Respondent was charged with and

found guilty of. He said, the Respondent was charged for being involved and facilitating suspicious transactions, which the Applicant proved and the Respondent herself admitted. Mr. Elingaya challenged the Arbitrator's findings that there was no deposit slip or any TT transfers showing deposits of any kind to Ramadhan Ismail's account or Chukwani Investment to prove the Respondent's participation in assisting to make transactions so as to import goods from abroad.

Mr. Elingaya was of further the view that the fact that Majid Mohamed facilitated transactions in the accounts of Rajabu Ramadhan Ismail and Chukwani Investment, assisting business persons from Kariakoo to buy goods from abroad with the assistance of the Respondent was not disputed, then no more proof was needed.

It was further submitted that the Applicant tendered Exhibit A6 which are; invoices, swift code and TT transfers of the transactions done in the accounts of Rajabu Ramadhani and Chukwani Investment and the Respondent admitted in assisting the transactions. He added that the Applicant tendered, Exhibit A4, the bank Statements of the accounts of Chukwani and Rajabu Ramadhan Ismail.

Mr. Elingaya submitted that; the Applicant clearly indicated the Respondent violated Exhibit A18, her Job Description, on page 2 which

required her to *"review and manage operational risks to ensure no loss arises from operational lapses and ensure compliance with operational risk requirements and Compliance with Bank policies".* He again pointed Exhibit A17 collectively, the Human Resources Management Policy, at clause 4.4 that required the Respondent *"to take action and report actions of contravening Bank policies and procedures and report the suspicious transaction to the Respondent"* and Clause 5.2.11 (a) of the Ant-Money Laundering & Counter Terrorism Financing Policy of 2020 for *"Failure to monitor and report suspected suspicious transactions, verify customer identity and establish and maintain customer records".* He was of view that; it is absurd for the Arbitrator to hold that there was no law contravened by the Respondent.

As regards to the misconducts of gross negligence and dishonesty for being involved in suspicious transactions at the Kariakoo Branch, it was submitted by Mr. Elingaya that the same are contrary to Respondent's job description and the Bank's policies.

Mr. Elingaya went on to submit that; the Respondent on page 3 of Exhibit A14 admits on 30th October 2020, while on leave, visited the Applicant's Branch at Kariakoo. While at the Branch, someone called looking for her. Upon speaking with that person, she was informed that

there was a person sent at the Branch with an invoice for the Respondent to facilitate money transfer. The Respondent further admitted receiving the invoice from that person and directed a customer service officer one Jeska Bachwa to send it to Majid Mohamed, the Branch Manager of Zanzibar.

It was submitted by Mr. Elingaya that; the issue was not receiving the invoice or assisting the person who sent the invoice, but rather the manner in which the Respondent handled the matter which clearly shows negligence and dishonesty. *First*, it is the coincidence that the alleged person called when the Respondent arrived at Kariakoo Branch looking for the Respondent to facilitate a money transfer. *Second*, the Respondent directed the Invoice to be sent to Majid Mohamed Branch Manager Zanzibar, the same person who facilitated the money transfer abroad through the same account of Rajab Ramadhani Ismail. *Third*, the swift code of the transactions was sent back to the Respondent to give to the alleged client at Kariakoo. The Email dated 30th October, 2020, Invoice and swift code were also admitted as Exhibit A6.

Again, it was submitted by Mr. Elingaya that; as per Disciplinary Hearing Form - Exhibit A14, the Respondent upon being asked about the

client she spoke with over the phone who sent the invoice, "*she denied not know the person".*

On page 7 question 3 of Exhibit M5, the Respondent was asked and responded; Question "*As a Senior Manager, you received a paper from the guy whom you do not know, did you not see that it was important to check the details?"* Answer "*I was on leave and was in rush, just passed by to withdraw some cash. I did not have time to check."*

On the basis of the above evidence, Mr. Elingaya submitted that; it is absurd and reckless argument for a person holding a top position of Head of Branches in a Financial Institution, if she was on leave and in a hurry, why did she receive the Invoice, why didn't she direct the Invoice to be directed to the Branch Manager at Kariakoo Branch who was present? Or to any person who was acting in her position while on leave?

It was further submitted by Mr. Elingaya that; the Respondent was not working at Kariakoo Branch. She was on leave. She could not inform the Branch Manager who was present at the Branch but she took the invoice and instructed it to be sent to Majid Mohamed Branch Manager Zanzibar. Mr. Elingaya termed such an act as dishonest. He added that;

the Respondent wanted to hide what they were doing with Majid. At page 7 question 7 of Exhibit M5, the Respondent admitted the manner she instructed the invoice to be sent to Majid was not proper.

It was the submission of Mr. Elingaya that; the Arbitrator ignored all evidence and admission by the Respondent. He stated that; as Head of Branches as per Exhibit A1 employment contracts, the Respondent had duties, as per clause 6 of Exhibit A1, to comply with the Respondent's policies, to act faithfully and loyally and defend the Respondent's business interests. He stated that; as per Exhibit A18, her job descriptions, the Respondent was obliged to ensure prudent management of all business-related operational risks, to review and manage operational risks to ensure no loss arises from operational lapses and ensure compliance with operational risk requirements, and to ensure full compliance with the Bank policies and procedures. With all these dishonest and negligent acts, the Applicant had nothing else to do but to take disciplinary action against the Respondent.

Mr. Elingaya further challenged the Arbitrator's finding that there was no Policy or Bank Code of Conduct tendered by the Applicant that prohibits a staff from assisting clients or fellow staffs. He cemented that; the finding was serious misconception brought in her own observations.

He submitted that the issue was not to assist client or fellow staff but the manner the Respondent acted.

Mr. Elingaya submitted that; the misconducts committed by the Respondent fall within *Rule 12 (3) (a) and (d) of the Employment and Labour Relations Act (Code of Good Practice), Rules, 2007 [GN. No. 42 of 2007]*. He said, the Respondent acted grossly negligent and dishonest for intentionally violating the Bank's policies, the Ant-Money Laundering & Counter Terrorism Financing Policy and Human Resources Management Policy of 2020 Exhibit A17. Such acts were very well known to her and her job description Exhibit A18.

Mr. Elingaya added that; the Respondent's misconduct falls under *Rule 13 of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures;* Offences which may Constitute Serious Misconduct and Leading to Termination of Employee under *GN. No 42 of 2007*. It is serious breach of organizational rules or policy which have the effect of causing irreparable break down of the employment relations.

Turning to the last ground, Mr. Elingaya challenged the Arbitrators' findings that she faulted the whole procedure on mare allegation that, the Respondent was not supplied with evidence. That, even Exhibit A14

and M5 do not show anywhere the Investigation report or any other document was produced at the disciplinary hearing. That, there was no dispute the Respondent was supplied with all documents during the disciplinary hearing.

Mr. Elingaya went on to submit that; the Arbitrator raised her own issue as to what time the Respondent was given the documents. She alleged DW1 testified; he did not give the Complainant the Investigation Report before the hearing but was given during the hearing which is illogical. He stated that DW2 testified that the Respondent was given all the evidence including the investigation report and was informed all the evidence that will be produced at the hearing. He added that; on page 4 of Exhibit A14, the Hearing Form clearly shows among the documents produced as evidence was the investigation report.

It was the view of Mr. Elingaya that; the case of **Kiboberry Limited v. John Van Der Voort,** Civil Appeal No. 248/2021 referred by the Arbitrator was applied out of context and is irrelevant to this matter. He stated that in that case, the Appellant was not at all involved in the investigation process and was not at all given the Investigation report. While in this matter the Respondent was involved in the process of

investigation as per Exhibit A7 her interview statements and further she was given a copy of the report as the Arbitrator herself admitted.

It was further submitted by Mr. Elingaya that; reviewing Exhibits D10, D11, D12, D13, D14, D15 and D16, the Applicant fairly followed the procedures and clearly complied with *Rule 13 of GN. No. 42 of 2007.* He stated that; the provisions of the Constitution relied upon by the Arbitrator were applied out of context because in this case the Respondent was afforded the right to be heard. He stated that; the Respondent gave her defence in writing and defended herself during the hearing and cross-examination of all of the witnesses of the Applicant. He urged the Court to fault the Arbitrator's decision.

As to the reliefs awarded, Mr. Elingaya submitted that; after the termination, the Respondent was informed to do clearance and return the Applicant's properties as evidenced by Exhibit A16. He stated that for reasons known to herself, the Respondent refused to do clearance and return the Applicant's properties. He said, following her refusal, the Applicant could not pay the Respondent terminal benefits and repatriate her because she did not do the clearance to the date of the case.

Mr. Elingaya added that; such testimony is also acknowledged by the Arbitrator on page 10 of the Award. It was further submitted that;

throughout the hearing, the Respondent neither contested such fact nor denied the testimony and evidence of DW2. Mr. Elingaya was of submission that; the Arbitrator is not justified to make her own finding out of evidence on record. To support his position, he cited the case of **Nelson S/o Onyango v. Republic;** Criminal Appeal No. 49 of 2017 Court of Appeal of Tanzania at Mwanza (unreported).

Mr. Elingaya further argued that the Arbitrator ignored the decision of this Court without giving a reason, which is to the effect that, an employee who has refused or delayed to do clearance is not entitled to substance allowances. To strengthen his submission, he put his reliance to the case of **Serengeti Breweries Limited Vs Samuel Nyaki;** Revision No. 177 of 2020; High Court of Tanzania at Dar es Salaam (unreported) at page 11 last paragraph where this Court held that:

> As for the repatriation expenses, as correctly argued by Mr. Ngowi, that as per the EXP2, the payment of repatriation expenses was to be done after completion of exit procedures and since it is the Respondent who delayed the process, then he is not entitled to any payment by the employer as the delay was caused by him.

It was also submitted that; it is unfair and against common-sense, for the Arbitrator to compel the Applicant to pay the Respondent subsistence allowance while she has refused to do clearance and return the Applicant's properties. Mr. Elingaya submitted that; it is to bless disobedience and disregard employer's rules and allow employees to benefit out of their wrongs which he prayed for this Court of record not to set such a law and precedent. He further argued that it is a well-established principle that every right has its corresponding obligation. While the employee has the right to be repatriated, on the other hand, the employee has an obligation to hand over office matters before she is repatriated. To buttress his position, he again referred the Court to the case of **Serengeti Breweries Limited** *(supra).* He added that; the Respondent caused the delay herself and therefore she is not entitled to any substance allowances. In the upshot, the counsel prayed for this Court to revise and set aside the CMA award.

In response to the application, Mr. Mirumbe submitted that; all the charges brought against the Respondent were brought to her as show cause and she denied all the allegations as evidenced by exhibits A14 and M5. He strongly submitted that; the stated account of Rajab Ramadhani Ismail was not created or opened by the Respondent. On

the allegation that the investigation report indicated the account was owned by the Zanzibar Branch Manager, one Majid, Mr. Mirumbe questioned; why wouldn't the Applicant hold accountable the said Majid but instead associate the Respondent with the said account.

It was further submitted by Mr. Mirumbe that; the Applicant did not state how much tax was evaded by the so called business person and how the Respondent was directly involved in the whole process of that tax evasion.

It was submitted by Mr. Mirumbe that; the Applicant's submission is contradicting. He pointed that; the Applicant stated that the investigation report indicated that the account of Rajab Ramadhan Ismail was owned by Zanzibar Branch Manager, one Majid. However, in his submission, he also stated that the same investigation report indicated that when Rajab Ramadhan Ismail was interviewed, admitted to own the two accounts both for TZS and USD.

Mr. Mirumbe submitted that; such submission is contradicting from the same investigation report as to who owns the said accounts between Majid Mohammed and Rajab Ramadhan Ismail. He further challenged that when Rajab Ramadhan Ismail was interviewed, he denied being aware of the nature of the transactions and the so called

businesspersons who transacted in his account. However, at the same time, Rajab Ramadhan Ismail claims that his account was used by Majid Mohammed and the Respondent.

It was further submitted by Mr. Mirumbe that; the said Rajab Ramadhan Ismail was not procured or brought neither before the Disciplinary Hearing Committee Meeting nor before the CMA to testify and give evidence of his so called interview statement - Exhibit A3. Mr. Mirumbe submitted that; in the circumstances, the said Rajab Ramadhan Ismail's statement remains to be a mere hearsay and unmerited evidence not to be relied upon by any Court to arrive to its conclusion.

It was further submitted by Mr. Mirumbe that; it was not indicated by the Applicant how the Respondent herein was responsible in assisting the said business persons contrary to the Bank policies and procedures. Mr. Mirumbe added that; the Applicant failed to state how suspicious and risky were the stated transactions if the stated transactions were used to buy goods from abroad. The allegations that it was not stated how the said email correspondences were related to the said violations was disputed. Mr. Mirumbe further contended that; it was not stated what was the message revealed from the so called jargon language.

Mr. Mirumbe maintained that; the Respondent never admitted of any charge or any allegation brought against her. That, the stated responses of the Respondent in the disciplinary hearing meeting do not, by any means, imply any admission of any allegations brought against her. He firmly submitted that; the Applicant has failed to substantiate the involvement of the Respondent in the so called suspicious transactions or dishonest acts.

Mr. Mirumbe was of the view that the trial Arbitrator correctly comprehended the misconducts which were laid against the Respondent. He stated that; reading Exhibits A13, A14 and M5, it is apparent that the Respondent was charged with gross dishonest and gross negligence for being involved in facilitating suspicious transactions contrary to the Bank policies and her job descriptions.

Mr. Mirumbe submitted that; from the charged misconducts the Arbitrator reasoned what amounts to negligence and relied to the case of **Twiga Bancorp Limited v. Zuhura Zidadu and Mwajuma Ally,** High Court of Tanzania Labour Division, at Dar es Salaam, Revision No.206 of 2014 (unreported). The Arbitrator continued to reason that, according to the cited case above:

> It is an established principle that the Applicant to succeed in proving negligence, he must prove that a

duty of care was owed by the Respondents, there was breach of that duty of care, the breach caused damage and the damage was foreseeable and that the duty to prove those elements lies upon the one who alleges, that is the Applicant.

It was further submitted that the trial Arbitrator was correct in holding that there was no deposit slip or any TT transfer showing any deposit of any kind to Rajab Ramadhan Ismail's account and that of Chukwani Investment. He stated that; the only available evidence is the so-called interview statement of Majid Mohammed and that of Rajab Ramadhan Ismail.

He added that; the deposit slips were crucial because the Respondent was charged with allegation of assisting or facilitating the so called businesspersons in their suspicious transactions to import goods from abroad. He stated that the Applicant failed to testify before the CMA, who were those so called business persons.

Mr. Mirumbe supported the Arbitrator holding that the Respondent directing one Jesca Bachwa to send an invoice to another office colleague was a normal business transaction in the course of discharging office duties. He stated that; a mere instruction to a subordinate to send an invoice belonging to a customer in itself did not amount to any

violation. He added that, the Applicant did not procure any Bank policy violated in the course of the Respondent instructing her subordinate assisting to send an invoice belonging to a client. He added that; the trial Arbitrator correctly ruled out that the Respondent herein was unfairly terminated because *Rule 12(5) of GN. No. 42/2007* was not adhered.

Mr. Mirumbe further supported the Arbitrator's finding that the Respondent was not afforded with the Investigation Report at the right time. It was submitted that; failure to give the Respondent the Investigation Report before the disciplinary hearing amounted to violations of the fair principle of right to be heard. To support his preposition, he cited the case of; **Tanzania Telecommunication Co. Ltd. v. Nkayira Moshi,** Revision No. 29/2015 (unreported) where it was stated:

> there were irregularities in the disciplinary hearing as the investigation report which form the basis of the charge against the Respondent was not given to the Respondent to assist him to prepare his defence and defend on the said allegations before the disciplinary hearing. In the absence of that, the Respondent was denied the right to heard.

Also, Mr. Mirumbe cited the cases of; **Severo Mutegeki and Another v. Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA),** Civil Appeal No. 343 of 2019 Court of Appeal of Tanzania, at Dodoma (unreported); and **Higher Education Students Loan Board v. Yusufu Kisare,** Revision No. 755 of 2018 and the case of **Tanzania Breweries Limited v. Magnus K. Laurian,** Revision 283 of 2016 (unreported).

As regards the payment of terminal benefits, it was submitted that; the Respondent was not paid her terminal benefits as entitled per the Labour Laws. The counsel submitted that; the Respondent was not paid the following benefits:

i. One month salary in lieu of notice;
ii. Salary for worked days;
iii. Leave accrued but not taken;
iv. Repatriation allowance;
v. Transport to place of recruitment together with legal dependents.
vi. Certificate of service

Mirumbe that; the Respondent completed all the clearance and exit procedures as instructed by the Applicant. He added that, the Applicant submitted all Applicant's tools, properties and equipment's as instructed. He contended that the Applicant should have tendered evidence to prove the contrary pursuant to the provision of *Section 39 of ELRA*.

Mr. Mirumbe added that; the Respondent is entitled to be paid subsistence allowance from the date her termination to the date when the Applicant will decide to repatriate the Respondent and her dependents as stipulated under *Section 43(1)(c) of the ELRA.*

In his final reply submission, Mr. Mirumbe insisted that the Respondent was unfairly terminated both substantively and procedurally. He therefore urged the Court to dismiss the application and uphold the CMA's decision.

In rejoinder, Mr. Elingaya reiterated his submissions in chief by insisting that the Respondent was fairly terminated both substantively and procedurally. Thus, the CMA's award be revised.

After considering the rival submissions of the parties, I find the Court is called upon to address the following issues: *One*; *whether the Respondent was fairly terminated substantively. Two; whether the*

Applicant followed procedures in terminating the Respondent. Third, what reliefs are the parties entitled.

To start with the first issue; *whether the Respondent was fairly terminated substantively.* In terms of *Section 37 of the ELRA* employers are required to terminate employees only on fair and valid reasons. *Section 37 (supra)* further indicates the basis of fair reasons of termination of employment. In the application at hand, as it is indicated in the termination letter (exhibit A16), the Respondent was terminated for the following misconducts. Gross Misconduct in terms of gross dishonesty and gross negligence associated with breach of Anti – money laundering and Counter terrorism Financing Policy Section 5.2.11 bullet 4; Human Resources Policy Section 4.4 bullet 1, 4 and 5; and her job description – Key Accountability, bullet 1 and 3.

To be more precise, as indicated in the Charge Sheet and A16 Termination Letter, the Respondent, was charged and found guilty of gross dishonesty for being involved and facilitating suspicious transactions contrary to her job description and the Bank's policies. She was also charged for gross dishonest and negligent for being involved in suspicious transactions at the Kariakoo Branch contrary to her job description and the Bank's policies. The Respondent strongly denied all

the charges levelled against her. As to the misconduct of negligence, at page 24 of the impugned award the Arbitrator found that:

> DW1 when cross examined, he clearly said that the Respondent did not suffer any damage and no loss occurred as a result of the suspicious transactions. Even if the complainant had a duty of care, as per policy and job description breach believed to have been committed because of transaction made by Majid Mohamed by assisting businesspersons to transfer money for importation of goods. This facilitation of transaction did not cause any damage and as admittedly, by DW1, damage was not foreseeable by them. Therefore, it is the Commission's findings that there was no gross negligence.

The Arbitrator relied to the elements of negligence stated in the case of **Twiga Bancorp Limited** *(supra).* That in any claim of negligence there must be a duty, breach of that duty of care, the breach caused damage and that the damage was foreseeable.

In this case, there is no doubt that the Respondent regardless of her position, she had a duty to ensure that no suspicious transactions were conducted in the Applicant's Bank. The answer as to whether the Respondent breached such duty must be substantiated with evidence. The record reveals that the Respondent's involvement in the suspicious

transaction was named by the Zanzibar Branch Manager, Majid Mohamed who later on resigned from employment. This is indicated so at *page 6 of the Investigation Report (exhibit A3)*. When questioned, the Respondent denied her involvement in the suspicious transactions which were conducted in the account of the customer namely: Rajab Ramadhan Ismail. Further investigation was conducted and it was revealed that the Respondent was involved in the alleged transaction.

The Investigation Report indicated that; on 30th October, 2020 the Respondent, Jesca Bachwa, Customer Experience Assistant at NCBA Kariakoo Branch sent an invoice of USD 63,870 dated 18th September, 2020 addressed to Zhongshan City Kuwaida Trade Co. Ltd to Branch Manager Zanzibar, Mr. Majid Mohamed. The Respondent did not dispute such finding. However, she claimed that the same was done in good faith. She insisted that; it was a normal bank transaction. During disciplinary hearing, the Respondent was asked and responded to the following questions as reflected at page 7 of the Disciplinary Hearing Minutes (exhibit M5):

Qn: Where do you live?

Ans: I live at Makongo Juu.

Qn: Trying to look on the level of coincidence, I see as planned. Being on leave and just passing by? Was that really a coincidence or a planned deal?

Ans: I passed by Kariakoo Branch with a friend who wanted to do shopping. So, I decided to take some cash. When I reached, Seifdin called me and informed there was a guy on the phone. I took the phone and moved out from Seifdin office. Upon talking over the phone, did not know the guy over the phone neither the guy who gave me that paper.

Qn: As a Senior Manager, you received a paper from the guy whom you do not know, did not see that it was important to check the details?

Ans: I was on leave and was on a rush, just passed by to withdraw some cash, did not have time to check.

The above quotation justifies negligence on the part of the Respondent. Her conduct raise doubt on the alleged coincidence over the incident. *First*, why the Respondent visited at Kariakoo Branch and attended a customer while on leave. *Second*, the Respondent was not working at Kariakoo Branch during the incident, so why did she accept to attend the alleged unknown customer? *Third*, why the Respondent did not take trouble to examine what was written in the paper she received from unknown customer? *Fourth*, why couldn't the Respondent

inform the Branch Manager at Kariakoo Branch? *Fifth*, why did the Respondent trust an unknown customer and proceeded to direct the Customer Experience Assistant at Kariakoo Branch to send such invoice to the Zanzibar Branch Manager? All those questions leads to an inference or to the conclusion that the incident was planned by the Respondent and her colleague as rightly found by the disciplinary committee. In the circumstance of this case, I have no hesitation to say that the Respondent went at Kariakoo Branch with an evil purpose.

During disciplinary hearing, the Respondent was questioned as to; whether what she did was proper. She admitted that the same was not proper. I quote the question posed to her and her response:

> Question; Is that proper to send an invoice from one Branch to another branch?
>
> Answer; Not Proper.

From the Respondent's answer above, it is crystal clear that she knew the procedures ought to have been followed but proceeded to violate the same. On those circumstances, I join hands with Mr. Elingaya that the Respondent acted negligently in this case and the Applicant proved the same. The Respondent's misconducts were also justified by Mr. Elingaya with the three reasons stated at page 11 of this decision.

It is my found view that the allegation that the Applicant did not suffer any loss as held by the Arbitrator is not justified. If an account is registered as personal account and a client conducts business over that account, it goes without much words, that the Bank suffers loss in various ways. Loss have to be measured on the income the Bank would have generated if such an account was properly registered an as a business account.

The only duty imposed to the Applicant was to misconducts levelled against the Respondent. As stated a Applicant proved on balance of probabilities that the Respo involved in suspicious transactions which directly impact the Applicant's business conduct, regardless the fact she incurred loss or not.

The Applicant further tendered the email conversations, exhibit A6 to prove that there were suspicious conversations between the Respondent and the Branch Manager Zanzibar. I have noted the Respondent's Counsel submission that; in the referred emails they were using jargon language and no one has proved the content of the said messages. It is my view that; such allegation lacks merits. The fact that there is proof of suspicious communication between the Respondent and

the Zanzibar Branch Manager, justifies that they conspired to facilitate suspicious transactions as testified by the Zanzibar Branch Manager.

Besides, I cannot disregard the Respondent's allegation that Mr. Majid, Mr. Ramadhani and the alleged business persons were neither summoned at the disciplinary hearing nor before the CMA to prove the allegations against the Respondent. It is my humble view that, in this case, the Applicant did not solely rely on the information received from the named people. He conducted his own investigation and proved that the Respondent was involved in the alleged suspicious transactions. I further subscribe to the decision in the case of **Charles Mwita Siaga** *(supra)* that in the banking industry, honesty by its employees is key stock in trade.

On the basis of the foregoing analysis, it is my humble view that the Applicant proved on balance of probability that the Respondent committed the misconducts charged as correctly stated by Mr. Elingaya.

Coming to the second issue on termination procedures, as indicated above, the Respondent was terminated on the ground of misconduct. The termination procedures on such ground are provided under *Rule 13 of GN. No. 42 of 2007 (supra)*. The Applicant insisted that; all the termination procedures required by the law were followed in

termination of the Respondent's employment. On her part, the Applicant in his CMA F1 mentioned the violated procedures as; she was not availed with the investigation report to prepare for her defence. She was not given the necessary documents to prepare for her defence. The Arbitrator found the alleged procedures to have been violated by the Applicant herein.

Under the procedures provided under *Rule 13 (supra),* there is no direct requirement of serving an employee with an investigation report after investigation has been conducted. However, *Rule 13(1) of GN. No. 42 of 2007* demands employers to conduct investigation. The provision provides:

> The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held.

The requirement to avail an employee with an investigation report has been developed by numerous Court decisions including the case of **Severo Mutegeki & Another v. Mamlaka Ya Maji Safi na Usafi Wamazingira Mjini Dodoma (Duwasa)** *(supra)* cited by the Arbitrator, in which it was held that:

> In that regard, the non-involvement of the Appellants and subsequent conviction based on that report was irregular because they could not adequately prepare for

the hearing before the disciplinary committee of the Respondent. Instead, it is the Respondent who being in possession of the report had all the ammunition to make a stronger case which was to the disadvantage of the appellants which rendered what followed to be un-procedural.

In the application at hand, it is not disputed that the Respondent was not served with the investigation report and other necessary documents before hearing. Even in her letters, the Respondent insisted to be availed with all necessary documents but the Applicant did not comply with the same.

It is my view that, failure to avail the Respondent with the necessary documents including the disciplinary report violated her right to respond to the evidence gathered by the employer as rightly found by the Arbitrator. Thus, in violation of such necessary procedure, it is my view that the Respondent was not fully afforded the right to be heard. I therefore join hands with the Arbitrator's findings that the termination procedures in this case were not followed.

Turning to the parties' reliefs; through the CMA F1, the Respondent prayed for 72 month's remuneration as compensation for the alleged unfair termination and repatriation allowance. As stated

above, the Arbitrator awarded the Respondent 12 month's salaries as compensation for unfair termination, one month salary in lieu of notice, one month salary as leave payment, repatriation allowance amounting to 1,716,000/= and subsistence allowance of 18 months equal to TZS 101,198,233.98.

To start with the award of leave payment, one month salary in lieu of notice and transport allowance, the Court finds no need to interfere with the same. The Applicant did not dispute the awarded entitlements. Thus, this Court finds no justifiable reason to interfere with the leave payment, one month salary in lieu of notice and transport allowance.

As to the award of compensation, since it is found that the Respondent was unfairly terminated only procedurally, it is my view that she is not entitled to the 12 months' salaries awarded by the Arbitrator. The same is hereby reduced to 3 months salaries which I find to be reasonable and justifiable to the circumstance at hand. This award is in light with the Court of Appeal decision in the case of **Felician Rutwaza v. World Vision Tanzania**, Civil Appeal 213 of 2019 (unreported) where it was held that:

> In the context of the case in which the unfairness of the termination was on procedure only, guided by some decisions of that Court, the learned Judge reduced

> compensation from 12 to 3 months. With respect we agree with her entirely...under the circumstances, since the learned Judge found the reasons for the appellant's termination were valid and fair, she was right in exercising her discretion ordering lesser compensation than that awarded by the CMA. We sustain that award.

Therefore, being bound by the decision in the case of **Felician Rutwaza** *(supra),* and in the circumstances of this case, it is my view that the award of three months is appropriate and would suffice justice.

As regards to the award of subsistence allowance, the Arbitrator awarded the same pursuant to *Section 43(1)(c) of ELRA* which provides:

> Pay the employee an allowance for transportation to the place of recruitment in accordance with subsection (2) and *daily subsistence expenses during the period, if any, between the date of termination of the contract and the date of transporting the employee and his family to the place of recruitment.* [Emphasis supplied]

The Arbitrator awarded the Respondent subsistence allowance because there is no proof that the Applicant paid her transport allowance on the date of termination. Under the circumstances of this case, it is my view that the Respondent is not entitled to subsistence allowance awarded to her on the following reasons:

First, there is no proof that the Respondent handed over the Applicant's properties and his belongings. The duty to hand over upon termination is also stated at *Clause 12.6 of the Employment Contract (exhibit A1)* where it is clearly provided that:

> Upon expiry or termination of the employee's employment with the Employer for any reason whatsoever, the Employee shall deliver to the Employer all property belonging to the Company in his/her possession in proper working order, intact with all the data/information contained in such property, and with the assurance that no such articles or copies remain in his possession.

The Respondent was also reminded to hand over and observe clearance procedures upon termination. This is stated so at paragraph one of the second page of the termination letter (exhibit A16) where it stated that:

> ...kindly observe clearance procedures and return all properties of the Bank under your possession to Human Resources Office and to the security & investigation Office including but not limited to:
>
> - Staff identification card/Security entry and exit card;
> - Strategies Insurance Tanzania Limited membership cards allocated to you and your dependants;

- Working tools such as laptop and any other item belonging to the Bank in your possession;
- Returning all unused cheque book leaf of your staff current account.
- Business cards

Upon going through the records, I noted the following: *First*, there is no proof that the Respondent complied with the above instruction. I am not in agreement with the Arbitrator's findings that the Applicant was supposed to tender proof showing that the Respondent did not comply with the instruction. To the contrary, the obligation to prove that the Respondent complied with the above instruction lied on the Respondent.

Second, on failure to observe the above instructions, the Applicant was also in the position not to transport her to the place of recruitment. The Respondent still have her belongings required to be handed over before she is transported to her place of recruitment.

Third, it is absurdity to punish an employer for the employee's breach of terms of the employment contract. As quoted above, the Respondent's duty to hand over was one of the terms agreed in the employment contract. Therefore, the Respondent cannot benefit violation of her terms of employment contract. Such an award will

defeat the purpose of labour laws which aims at protecting both employers and employees.

Fourth, it is my view that subsistence allowance is ordered to be paid against an employer who willingly and unreasonably, refuse to timely pay transport allowance to the terminated employee upon termination of employment contract. This is not the position in the case at hand.

Fifth, I subscribe to the decision in the case of **Serengeti Breweries Limited v. Samuel Nyaki** *(supra)* cited by the Applicant's Counsel that; payment of repatriation expenses was to be done after completion of exit procedure. In the premises, since the Respondent did not comply with the same, she was the one who caused the delay. Therefore, the Respondent is not entitled to the payment of subsistence allowance. On that basis, the award of subsistence allowances is hereby quashed and set aside.

In the end result, I find the revision application to have partly succeeded. The award of compensation is reduced to three months salaries, the Court finds no need to interfere with the award of leave payment, transport allowance since the same was not disputed by the

Applicant. As to the award of subsistence allowances, the same is hereby quashed and set aside.

It is so ordered.

Y.J. MLYAMBINA

JUDGE

17/03/2023

Judgement pronounced and dated 17th March, 2023 in the presence of learned Counsel Peter Clavery holding brief of Luka Elingaya for the Applicant and the Respondent in person.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) DIVISHENI YA MAHAKAMA YA KAZI (Labour Division)

Y.J. MLYAMBINA

JUDGE

17/03/2023