IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 77 OF 2023

(Arising from an Award issued on 17/03/2023 by Hon. Mbena M.S, Arbitrator, in Labour dispute No. CMA/DSM/ILA/337/2021/137/2021 at Ilala)

DITRICK EDWARD KAPINGA ..... APPLICANT

VERSUS

DIAMOND TRUST BANK ..... RESPONDENT

JUDGMENT

Date of last order: 26/07/2023
Date of Judgment: 07/08/2023

B. E. K. Mganga, J.

Brief facts leading to this application are that, on 1st September 2019, Diamond Trust Bank, the abovementioned respondent, employed Ditrick Edward Kapinga, the abovementioned applicant, as a Principal officer Bank assurance for permanent term contract with monthly salary of TZS 2,720,000/=. It is undisputed that, on 18th August 2021, respondent terminated employment of the applicant allegedly due to dishonest that is a gross misconducts contrary to the respondent's Human Resource Policy. Respondent terminated employment of the applicant due to two allegations namely (i) that applicant withheld insurance premium amounting to TZS 13,800,000/= that he received

from Ms. Mariam Haulier, the customer of the respondent at the time applicant was performing his duties as Principal Insurance Officer between September 2020 and February 2021 and (ii) that on 19th May 2021 applicant submitted false information to the Head of Human Resources showing that he had already paid in full the outstanding debt of TZS 9,000,000/= to Mr. Ramadhani Mkuni while the same was not paid.

Applicant felt unhappy with termination of his employment, as a result, he filed Labour dispute No. CMA/DSM/ILA/337/2021/137/2021 before the Commission for Mediation and Arbitration (CMA). In the Referral Form (CMA F1), applicant indicated that he was claiming to be paid compensation to the tune of TZS 76,800,000/= for unfair termination. In the said CMA F1, applicant also indicated that there was no valid reason for termination and further that respondent did not follow fair procedures of termination.

On 17th March 2023, Hon. Mbena, M.S, Arbitrator, having heard evidence and submissions of the parties, issued an award dismissing the dispute filed by the applicant. In the award, the arbitrator stated that termination was both substantively and procedurally fair since applicant contravened the rules set by the respondent.

Applicant was aggrieved with the said award, as a result, he filed this revision application. In his affidavit in support of the Notice of Application, applicant raised six (6) grounds namely: -

1. *Whether the trial arbitrator properly made a finding that applicant did acknowledge to have issued insurance cover note without payment while evidence is clear that insurance cover note is issued by the insurance Company after proof of payment (bank deposit slip) from the customer.*
2. *Whether there was substantive reasons and procedural followed by employer capable of terminating employment of the applicant*
3. *Whether the employer provided the applicant with a right of appeal to the country director.*
4. *Whether the disciplinary committee held by employer was properly convened.*
5. *Whether the applicant was availed with a copy of investigation report and charge sheet as per HR policy manual of the employer.*
6. *Whether the trial arbitrator properly evaluated evidence presented before her in deciding the matter in favor of the respondent.*

In opposing the application, respondent filed the counter affidavit of Victoria Lupembe, her Head of Legal and Company secretary.

When the application was called on for hearing, Mr. Frank Kilian, learned Advocate, appeared and argued for and on behalf of the applicant while Ms. Oliver Mkanzabi, learned Advocate, appeared and argued for and on behalf of the respondent.

Arguing the 1st issue on behalf of the applicant, Mr. Kilian, learned advocate submitted that, it was alleged that applicant took money from three individuals namely Mariam Hauler, Annaclara, and Ramadhan Mkani. Arguing in relation to the allegation relating to Mariam Hauler, Mr. Kilian, submitted that applicant did not take money from Mariam Hauler. Counsel submitted further that, respondent was only an agent of the insurer namely phoenix and that there was no possibility of the insurer to issue insurance cover note to the said Mariam Hauler without the later to show proof of payment. He added that the said Mariam Hauler did not testify. Mr. Kilian submitted further that, DW1 testified that she had no evidence to prove that Mariam Hauler complained but it is phoenix that complained to the respondent that money relating to the insurance cover note of Mariam Hauler was not in her bank account. He went on that there is no proof that the said Mariam Hauler paid cash for her cover note. He went on that, there is no witness from the insurer (phoenix)who testified against the applicant in relation to that allegation. He added that, in his evidence, applicant denied to have processed insurance cover of Mariam Hauler. He concluded that the arbitrator erred to hold that applicant admitted to have received the alleged money from Mariam Hauler.

Mr. Kilian also submitted that the allegation relating to Annaclara was not proved because, DW1 testified that the said Annaclara went to the respondent apologize for the complaint.

On allegations relating to Ramadhan Mkani, Mr. Kilian submitted that, that was personal business activities between applicant and the said Ramadhan Mkani that was legally done out of the respondent's premises. Counsel argued that respondent victimized applicant based on that allegation because the said Ramadhan Mkani revoked the business of purchasing the motor vehicle from the applicant. He went on that respondent forced applicant to refund the said Ramadhan Mkani advance payment for the said money and that, at the time of disciplinary hearing, applicant had already refunded. He submitted that all members of the disciplinary hearing committee and the respondent were aware of that fact, but respondent proceeded to termite applicant based on that allegation. Counsel for the applicant specifically mentioned that both DW1 and DW2 who attended the disciplinary hearing committee were aware of that fact. He concluded that there was no valid reason for termination of applicant's employment.

On procedural fairness, counsel for the applicant submitted that procedures were not followed because applicant was not served with a

charge sheet contrary to the respondent's disciplinary manual (exhibit D10) that requires a charge sheet be served to the employee. He went on that; applicant was not afforded fair hearing for failure to be served with the charge sheet. He added that applicant was not served with investigation report even though investigation was conducted, and a report (exhibit D1) was tendered. Mr. Kilian submitted further that internal report (exhibit D1) was not issued in accordance with disciplinary manual (exhibit D10) because in exhibit D1 it was recommended that disciplinary action be taken against applicant while the disciplinary manual (exhibit D10) provides that investigation report should not recommend disciplinary action to be taken against an employee. In his submissions, counsel for the applicant conceded that, in the CMA F1, applicant did not indicate that he was not served with the charge sheet or that he was not served with the investigation report.

Submitting on the the 3rd issue counsel for the applicant referred the court to para 4 of exhibit D10 and submitted that, respondent was not supposed to terminate applicant before expiry of five (5) days from the date he was found guilty. He went on that; the outcome of the disciplinary hearing was communicated to the applicant on 18th August 2021, but applicant was terminated on the same date. He concluded that respondent violated her own manual on procedure for termination.

On the 4th issue, it was submitted by Mr. Kilian that the disciplinary manual (exhibit D10) provides seven people as members of the disciplinary hearing committee and that three must seat in the disciplinary hearing. He submitted that in the application at hand, it is only the Company Secretary who, out of the mandatory members who were supposed to attend, attended the disciplinary hearing and referred the court to exhibit D9.

Counsel did not specifically submit to the 5th issue on ground that he covered that issue in due course of submitting to the aforementioned issues.

On the 6th issue, counsel for the applicant submitted that the arbitrator did not evaluate the strength of exhibits that were tendered. Counsel prayed the Court to evaluate evidence of the parties to ascertain whether termination was fair.

Mr. Kilian learned counsel for the applicant concluded his submissions by praying the application be allowed, CMA award be quashed and set aside and an order of reinstatement without loss of remunerations be issued.

Resisting the application, Ms. Mkanzabi, learned counsel for the respondent submitted to the 1st issue that, applicant admitted to have committed the allegation relating to TZS 13,000,000/= he received from Mariam Hauler and referred the court to the Hearing Form (exhibit D9). Counsel for the respondent submitted that applicant admitted to the disciplinary hearing committee by pleading guilty to that count. She submitted further that; applicant signed the hearing form (exhibit D9) to confirm that what was written was correct. She added that, during cross examination at CMA, applicant also admitted that Mariam Hauler got insurance cover note without payment. Ms. Mkanzabi submitted that applicant is estopped from denying that he committed the alleged misconduct and cited that case of ***Muhimbili National Hospital v. Linus Leonce,*** Civil Appeal No. 190 of 2018, CAT (unreported) to support her submissions.

Counsel for the respondent submitted that in the 2nd charge, applicant was charged for submitting false information to the Head of Human Resource. She went on that in exhibit D6, applicant was requested to submit explanation in relation to Ramadhan Mkani's complaint, but he responded that on 19th May 2021 he resolved the issue with the said Ramadhan Mkani but on 27th May 2021 the Human Resource Department received the complaint from the said Ramadhan

Mkani dated 27th May 2021 the matter has not been resolved. Counsel for the respondent concluded that respondent had valid reason to terminate employment of the applicant.

On procedural fairness, Ms. Mkanzabi submitted on behalf of the respondent that, applicant was notified of the hearing on 19th July 2021 and hearing took place on 22nd July 2021. Counsel submitted that, the allegation that applicant was not served with the charge sheet is new because applicant neither indicated so in the CMA F1 nor testified at CMA that he was not served with the charge. Ms. Mkanzabi submitted further that on 20th May 2021, applicant was served with show cause letter (exhibit D6) showing the allegations. She added that, applicant was notified of the hearing as per the notice to attend disciplinary hearing (exhibit D9) in which he was afforded fair hearing.

Counsel for the respondent submitted that the issue that respondent was not served with the investigation report is new because it was never addressed at CMA. Counsel for the respondent was quick to submit that upon applicant's admission on the 1st count that he committed the said misconduct, investigation report became irrelevant.

Responding to the 3rd issue, counsel for the respondent submitted that, applicant was afforded right to appeal as per exhibit D9. She went

on that; applicant was Manager Bank Assurance Retail Banking and that in terms of the disciplinary manual (exhibit D10) applicant was supposed to appeal to the Board Compensation by virtue of his position as Manager (Senior Officer). Counsel for the respondent strongly submitted that it is a misconception that applicant was denied right of appeal while he chose on his own not to appeal.

Arguing the 4th issue on behalf of the respondent, Ms. Mkanzabi submitted that, the notice to attend disciplinary hearing (exhibit D9) at Page 29 provides that at least three members mentioned therein must attend the disciplinary hearing. She went on that respondent complied with the policy because the Chief Finance Officer, Head of Compliance and the Company Secretary attended the disciplinary hearing. In her submissions, counsel for the respondent conceded that DW2 and DW1 attended the disciplinary hearing though DW2(the Human Resource officer) is missing from the record.

Counsel for the respondent concluded that termination of the applicant was both substantively and procedurally fair and that the arbitrator properly evaluated evidence. She therefore prayed that the application be dismissed for want of merit.

In rejoinder, Mr. Kilian, learned counsel for the applicant reiterated that there were no charges at all against the applicant hence there was no admission or plea of guilty. He submitted that exhibit D9 shows that applicant denied the claims of Annaclara. In his submissions, counsel for the applicant conceded that applicant signed exhibit D9 showing that he admitted the allegation. Counsel for the applicant was quick to submit that applicant did not have time to go through exhibit D9. When probed by the court as to whether at CMA applicant testified that he did not have time to read the said exhibit D9, Mr. Kilian readily conceded that there is no such evidence.

On issue estoppel, counsel for the applicant submitted that ***Linus* case** (supra) is distinguishable because in the application at hand applicant did not admit to have committed the alleged misconduct.

On right of appeal, Mr. Kilian submitted that minutes of disciplinary hearing shows that applicant was informed to appeal to the CEO contrary to the Human Resource policy that required him as a senior member to appeal to the Board Compensation Committee.

On the issue of the charge sheet and investigation report, counsel for the applicant maintained that they are not new issues because they

were discussed at CMA. He also maintained that the disciplinary hearing committee was not properly composed.

Counsel for the applicant submitted further that the show cause letter was issued to the applicant even before investigation report was released. He argued that the show cause letter cannot be a substitute of the charge sheet. In his submissions counsel for the applicant conceded that allegations in the show cause letter are similar to those in the disciplinary hearing. He submitted further that, during the disciplinary hearing, applicant prayed for adjournment to look for evidence and was permitted.

I have examined the CMA record and considered submissions of the parties in this application and find that the issues to be resolved in this application are whether termination was fair in terms of reason and procedure and to what relief(s) are the parties entitled to.

This being a dispute relating to termination of employment, in terms of section 39 of the Employment and Labour Relations Act [Cap. 366 R.E. 2019], it is the duty of the employer to prove that termination was fair both in terms of reason and procedure.

As pointed hereinabove, termination of the applicant was based on two allegations namely (i) withholding insurance premium amounting to TZS 13,800,000/= that he received from Ms. Mariam Haulier, between September 2020 and February 2021 and (ii) giving false information to the Head of Human Resources in relation to payment of TZS 9,000,000/= to Mr. Ramadhani Mkuni. Submissions by Mr. Kilian learned counsel for the applicant in relation to allegations that applicant took money from Annaclara are not valid because they are not reflected in the disciplinary hearing Form (exhibit D9) and the findings thereof. More so, evidence of Nancy Malekia (DW2) shows that applicant was charged with the above counts only. I should point out that neither of the parties tendered termination letter despite the fact it was filed at CMA. I will therefore not consider the said termination letter because it is not part of evidence.

It was complained by counsel for the applicant that arbitrator did not evaluate strength of exhibits (evidence) tendered. I am therefore bound to reevaluate evidence adduced by the parties.

It was evidence of Merciful Tasia (DW1) that applicant lied that he had refunded TZS 9,000,000/= to Ramadhani Mkuni but after a week, the said Ramadhani Mkuni complained that applicant has not refunded the

said money. He testified further that; Mariam Hauler paid TZS 13,000,000/= as premium insurance cover note for her vehicles but applicant did not send the said money to the insurer as a result, respondent demanded Mariam to pay the said money. In her evidence, Nancy Malekia (DW2), testified that applicant pleaded guilty to the charge relating to insurance cover of TZS 13,000,000/=.

In his evidence, Ditrick Kapinga (PW1) while testifying in chief he is recorded stating: -

> *"Naomba kurejea kielelezo D4 Demand for explanation ya tarehe 10/7/2021 niliongezewa kosa lingine linalohusiana na COMESA insurance ya Tsh 13.8 milioni ya mteja Mariam Hauliers ambayo alinipa cash nyingine aliniingizia kwenye simu kwa malipo ya insurance…"*

While under cross examination, applicant (PW1) is recorded stating: -

> *"Ni kweli nilikuwa namdai Mariam Haulier kwa niaba ya bank hivyo ni kweli alipata huduma akiwa hajalipia…Sikuchukua pesa ya Mariam Haulier ila huduma nilimpa…Nilideposit mimi hizi cheque deposits baada ya kuwa submitted ofisini na mteja Mariam Haulier…Account ya Mariam Haulier haionyeshi kama imetoa pesa."*

It is clear from the above quoted evidence that applicant admitted that Mariam Haulier got insurance cover without applicant submitting money to the respondent. That is also reflected in the hearing form that applicant pleaded guilty to that count. With that admission of the

applicant in his evidence and his plea of guilty in the hearing form (exhibit D9), I find submissions by Mr. Kilian unmerited. In fact, the best evidence is that of a witness who confesses his guilty. See the case of ***Paulo Maduka & Others vs Republic*** (Criminal Appeal 110 of 2007) [2009] TZCA 69, ***Jacob Asegelile Kakune vs DPP*** (Criminal Appeal 178 of 2017) [2020] TZCA 75. I have no reason for not believing what applicant stated in his evidence. Applicant signed exhibit D9 and during trial at CMA, did not challenge it and in fact, the said exhibit was admitted without objection. Applicant is therefore estopped from denying that truth. See the case of ***Muhimbili National Hospital vs Linus Leonce*** (Civil Appeal 190 of 2018) [2022] TZCA 223.

Submissions by Mr. Kilian that applicant did not have time to go through exhibit D9 is not supported by applicant's evidence as was correctly conceded by Mr. Kilian. More so, after signing exhibit D9, applicant cannot now argue that at the time of signing the said exhibit, his hand did not go together with his brain. If he signed negligently without reading and think critically the effect thereof, that chance has gone and cannot complain now as it was held in the case of ***Nyerembe Nyampiga vs Access Bank Tanzania Co. Ltd*** (Revision Application No. 972 of 2019) [2021] TZHCLD 464.

On the allegation relating to TZS 9,000,000/=, on 19th May 2021, applicant wrote exhibit D6 (demand for explanation) to the Human Resources Manager stating *inter-alia*: -

> *"To avoid further misunderstanding I have cleared the full amount of TZS 9,000,000/=…"*

On 27th May 2021, respondent received a letter (part of exhibit D6) from Ramadhan Mkuni showing that as of 27th May 2021, applicant had not paid the said amount. It is my view that applicant told lies in his afore quoted letter.

For the foregoing, I hold as the arbitrator did, that respondent had valid reasons to terminate employment of the applicant. I therefore dismiss the 1st, 2nd, and 6th issues on validity of reasons for termination.

It was submitted by counsel for the applicant that termination was unfair procedurally because applicant was not served with the charge, the investigation report and that he was not afforded time to appeal.

It was admitted by DW2 in her evidence under cross examination that applicant was neither served with the charge sheet nor the investigation report. I have examined the show cause and find as it was correctly in my view conceded by counsel for the applicant that, the charge sheet. In his submissions counsel for the applicant conceded that

allegations in the show cause letter are similar to those in the disciplinary hearing. In my view, applicant was aware of the charges he was facing. In fact, letters dated 19th May 2021 and 13th July 2021 (exhibit D6 collectively) both written by applicant to the respondent is clear on this aspect.

It was evidence of DW2 that applicant was not served with the investigation report. In fact, in his evidence, applicant stated that he was not served with the investigation report as such, that is not a new issue. It is my opinion that failure of the respondent to serve applicant with the investigation report amounted to unfair termination procedurally because respondent violated Rule 13 of the Employment and Labour Relations (Code of Good Practice Rules) Rules, GN. No. 42 of 2007. See the case of ***Paschal Bandiho vs Arusha Urban Water Supply & Sewerage Authority (AUWSA)*** (Civil Appeal 4 of 2020) [2022] TZCA 42, ***Severo Mutegeki & Another vs Mamlaka Ya Maji Safi Na Usafi Wa Mazingira Mjini Dodoma*** (Civil Appeal 343 of 2019) [2020] TZCA 310 and ***Kiboberry Limited vs John van der Voort*** (Civil Appeal 248 of 2021) [2022] TZCA 620 just to mention a few. The disciplinary manual (exhibit D10) of the respondent provides that investigation report should be served to the employee. In the

application at hand, respondent violated also her own disciplinary manual for failure to serve applicant with the investigation report.

It was submitted on behalf of the applicant that the disciplinary hearing committee was not properly constituted. In his evidence, applicant testified that exhibit D10 requires General Manager, Assistant General Manager, Chief Manager, Head of Human Resources, and company secretary to attend the disciplinary hearing but only the company secretary attended. I have read clause 3.6.3 of exhibit D10 and find that General Manager, Assistant General Manager, Chief Manager, Assistant Chief Manager, Senior Manager, Head of Human Resources, and company secretary are members of the disciplinary hearing Committee and that at least three must attend. In the application at hand, only the company secretary attended. In my view, respondent did not comply with her own procedure of conducting disciplinary hearing.

It was submitted by counsel for the applicant that applicant was denied right to appeal because he was served with termination letter on the date disciplinary hearing was concluded. With due respect, there is no evidence showing as to when applicant was served with termination letter because as I have pointed out hereinabove, the termination letter

was not tendered to form part of evidence of either party. Even in their oral evidence, no witness either of the sides testified as to the date applicant was served with termination letter. What is clear in evidence is that on 18th August 2021, applicant was served with the hearing form (exh. D9) and the outcome thereof wherein he was advised to appeal to the CEO within five days. Since there is no evidence as to the date applicant was served with termination letter, I find the complaint that applicant was denied right to appeal unsupported by evidence.

Since I have held hereinabove that it was procedural unfair for the respondent not to serve applicant with investigation report and that the disciplinary hearing committee was not properly constituted, I hold that termination was unfair procedurally. I therefore decide the 2nd issue on procedure, 4th, and 5th in favour of the applicant.

Since termination was fair substantively but unfair procedurally, the only issue is the relief the parties are entitled to. It was held by theCourt of Appeal in the case of ***Felician Rutwaza vs World Vision Tanzania*** (Civil Appeal 213 of 2019) [2021] TZCA 2 that when termination is fair substantively but only unfair procedurally, the arbitrator or the court may award the employee below the minimum period of 12 months salaries provided under section 40(1)(c) of the Employment and Labour

Relations Act[Cap. 366 R.E. 2019]. In the application at hand, termination was fair substantively but only unfair procedurally. Being guided by the decision of the Court of Appeal in ***Rutwaza's case*** (supra), I hereby order respondent to pay applicant a total of TZS 10,880,000/= being four (4) months' salary compensation for procedural unfair termination.

For the foregoing, I partly allow the application, set aside the CMA award to the extent only explained hereinabove.

Dated at Dar es Salaam on this 07th August 2023.

B. E. K. Mganga
JUDGE

Judgment delivered on 07th August 2023 in chambers in the presence of Ditrick Kapinga, the Applicant but in the absence of the Respondent.

B. E. K. Mganga
JUDGE