IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 232 OF 2023

(Arising from the award of the Commission for Mediation & Arbitration of DSM at Temeke) (H, Nyanguye: Arbitrator) Dated 18th August 2023 in Labour Dispute No. CMA/DSM/TEM/574/2018/198/2018)

NATIONAL BANK OF COMMERCE LIMITED.....APPLICANT

VERSUS

SADY MWANG'ONDA.....RESPONDENT

JUDGEMENT

Date of last order: 20/2/2024

Date of Judgement: 15/3/2024

OPIYO, J.

In this application, the applicant is seeking for this Court to call for the record of Labour Dispute No. CMA/DSM/TEM/574/2018/198/2018 from the Commission for Mediation and Arbitration of Dar es salaam with the view of revising and set aside the CMA award.

In this matter as derived from records is that, on 2nd August 2016 the applicant employed the respondent as a Branch Manager on permanent basis. On 03rd August 2018 termination was initiated against the respondent for the alleged misconduct (gross negligence). Believing to have been unfairly terminated, the respondent referred his dispute to

the CMA. The arbitrator in the CMA awarded that, the applicant was unfairly terminated both substantively and procedurally. The arbitrator then issued an order of reinstatement without loss of remuneration in respondent's favour. Being annoyed with the CMA award, the applicant filed the present application.

In the affidavit supporting this application, the applicant advanced two (2) legal issues of revision which are: -

i. Whether the arbitrator erred in law and fact in declaring that the termination was unfair.

ii. Whether the arbitrator considered the reasonableness and legality of awarding reinstatement as compensation.

The application was defied by the respondent's sworn counter affidavit. The deponent of the counter affidavit vehemently disputed the applicant's assertion that his employment was fairly terminated. He further disputed the fact that the arbitrator erred in law by issuing an order of reinstatement without loss of renumeration.

The application was disposed of by a way of written submissions. The Applicant was represented by Ms. Comfort, A Milicent Opuku, advocate,

while the respondent was represented by Mr. Omary Mwenegoha, Advocate.

On first issue, as to whether the arbitrator erred in law and fact in holding that the termination was unfair both procedurally and substantially, Ms. Opuku submitted that the respondent was terminated for gross negligence in carrying out his duties due to failure in supervising other staffs which resulted in financial loss of TZS 244,990,550.00.

Mr. Opuku argued that gross dishonesty is a good ground for termination of employment as stipulated under Rule 12(3) of the Employment and Labour Relations (Code of Good Practices), as was discussed in the case of **Sanganga Musa v. Institute of Social Work,** Consolidated Labour Revision No. 370 of 2013, High Court of Tanzania, Lab. Division, at Dar es salaam(unreported) and **Institute of Social Work v. Sanganga Musa,** Consolidated Labour Revision No. 430 of 2013, High Court of Tanzania, Lab. Division, at Dar es salaam(unreported), he referred this court to.

It was further submitted that, the issue of gross negligence in supervising staff on multiple duties caused loss to the applicant and led to his termination. According to her, the arbitrator was incorrect on the

evaluation of evidence tendered before her, hence improper award as reflected at page 3, 4 and 5 of the award. Insisting on what amount to negligence, she cited the case of **Ovadius Mwangamila and Others v. Tanzania Cigarate Company Limited,** Consolidated Revision No. 333 and 354 of 2020, at Dar es salaam and the case of **Twiga Bancorp(T) v. David Kanyika,** Lab Revision No. 346 of 2013, at Dar es salaam. He added that the respondent as a Branch Manager, had a duty to supervise staff on multiple duties such as conducting snap checks at strong room to confirm and verify the amount of money available in the strong room as stipulated in Exhibit D-1.

Ms. Opuku averred that, the respondent admitted that he performed snap check on 26th August 2018 and failed to notice the loss of money, until after 3 days when the investigator visited the branch and noticed that the loss started since March 2018. On that basis, he is of the view that there was a good reason for termination, as was held in the case of **Tanzania Revenue Authority v. Andrew Mapunda,** Labour Revision No. 104 of 2014 (unreported).

Regarding procedure, the learned counsel argued that all procedures were followed in terminating respondent's employment, as the respondent was given an opportunity to explain about the loss through

written statement (exhibit D1) before he was issued with the notice to attend disciplinary hearing (Exhibit D10). Lastly, the respondent was afforded with a chance of challenging the decision by the way of appeal. She further asserted that, in common law, the employee is required to act in good faith towards the employer when performing their duties, as was well addressed in the case of **NMB v. David Bernad Haule,** Revision No. 5 of 2014 (unreported).

In challenging the reliefs awarded, Opuku submitted that, the arbitrator erred in law in awarding reinstatement, while he had option of awarding other suitable reliefs. On that basis, she is of the view that the relief awarded is impracticable. She thus, prayed for the application to be granted.

In dispute, Mr. Mwenegoha had a long submission which can be summerised as hereunder. Starting with the reason for termination, Mwenegoha submitted that, according to the law applicant had a duty to prove misconducts (gross negligence) as alleged to be committed by respondent through evidence.

He continued his argument by stating that, it was expected that the applicant would testify and produce evidence and prove how the

respondent acted negligently in carrying out his duties and how he failed to supervise other staff members and how such act resulted to financial loss amounting to Tanzania Shillings (TZS) 244,570,550.00. There was no any applicant's witness who testified on that realm and there is no proof on the said misconduct that respondent did. He argued that this fall short of requirement under section 37(2) (a) and (b) read together with section 39 of The Employment and Labour Relations Act, Cap 366 R.E 2019 which puts the burden on the employer to prove that the reason for termination was a fair and valid.

Challenging the respondent testimony, Mr. Mwenegoha submitted that, all the three (3) respondent witnesses at the Commission, failed to testify and produce reliable evidence on how complainant was negligent in carrying out his duties. That, the first witness, Meshack Shashi, who is the investigator testified that the respondent was not conducting snap checks and if he was doing so, he did not notify or recognize the loss of (TZS) 244,570,550.00. He submitted further that, such testimony stand to be untrue because the records show that respondent conducted snap checks as shown in exhibit D 11, Disciplinary Hearing Report at page 3, but there was no shortage or the said loss of (TZS) 244,570,550.00 all the time the respondent and other staffs conducted snap checks. The

ounsel added that, the respondent could have provided concrete evidence that the said loss occurred in the periods within which respondent conducted snap checks, something which was not proved by the applicant. In his view, the said exhibit D 11 did not show how respondent was negligent in carrying out his duty and how he failed to supervise his staff as a line manager. The testimony concentrated on the fact that the respondent did not conduct snap check rather than proving how respondent was negligent.

Finally on this issue, Mr. Mwenegoha submitted that investigation report, exhibit D5, did not say anything about what caused the loss as a result, until now no one knows if the loss of TZS) 244,570,550.00 is real, or there was a misbehaviour in the bank system or there was error in records by tellers who might have recorded large amount than what they were given by customers at the material day or there was theft of the money at the time investigator went at Mbagala Branch. Supporting his stand regarding concrete evidence on proving the case he cited the case of **Tanganyika Estate Agents Limited v. vs Raphael D. Nondi,** Labour Revision No. 938 of 2019. Again. Mr. Mwenegoha submitted that the action initiated against the respondent is discriminatory in nature as investigation report prepared by DWI,

investigator, at page 5, recommendation 5 exonerate one Rahma Mkumba from being subjected to disciplinary hearing while the same witness, DWI investigator who testified in disciplinary hearing exhibit D 11 page 4 showed the involvement of the said Rahma Mkumba. He further stated that whenever termination of employee involves discrimination practices at workplaces leads termination of employee to be substantively unfair as was discussed in the case of **James Leonidas Ngonge v. DAWASCO,** Revision No .382 of 2013, High Court of Tanzania, Labour Division, at Dar es salaam, (unreported).

On procedural aspects, Mr. Mwenegoha argued that, the respondent was never afforded with an opportunity of challenging the investigation report as it was not availed to him. On that basis he is of the view that the applicant's right of being heard was violated, something which is contrary to our law. As was addressed in the case of **Severo Mutegeki and another v. Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA),** Civil Appeal No. 343 of 2019, CAT, at Dodoma, (unreported) and the case of **M- PESA Limited v. Loius Epiphane Maro,** Revision No. 401 of 2022, High Court of Tanzania, Labour Division, at Dar es salaam, (unreported) at page 28 where it was held that failure to serve respondent with investigation report amount to

procedural unfairness. He contended that apart from the above cases, even the applicant Rules and Regulation advocated that respondent be served with investigation report as per, exhibit D10, NBC Disciplinary, Capability and Grievances Standard. That, clause 3.1.1. of the same states that employee will be provided with report and investigation documents, witness statements and other documents. According to him, not giving respondent investigation report is procedural unfair in termination of his employment process.

Regarding reliefs, Mr. Mwenegoha submitted that the equitable and just relief to the respondent is reinstatement without loss of remuneration during the period that he was absent from work. This is because the circumstance of the case attracts reinstatement, as the termination of respondent's employment is both substantive and procedural unfair. Again, the complainant in CMA form No. 1 prayed for the same remedy. Also the fact that termination of respondent employment was unreasonable and violated respondent's constitutional right to work which normally require high protection, no most suitable remedy to him than reinstatement without loss of remuneration. Supporting his position, he prayed for this Court to consider the case of **National Microfinance Bank v. George Athanasio Makange,** Revision No. 7

of 2013, High Court of Tanzania, Labour Division, at Morogoro, at page 7 paragraph 2 to page 8. It was stated that; -

> *"The law, section 40 (1) of the Employment and labour relations act provides that; following a finding of unfair termination, an Arbitrator has discretion in deciding the issue of award of remedies, the term used is that "if an arbitrator.... finds termination unfair... may order...." That means, the Arbitrator has discretion to order or not to order a) reinstatement or b) reengagement or c) compensation of employee. In practice, a decision marker's exercise of such discretion is guided by peculiarfäcts of each case. Generally, where termination is adjudicated unfair on procedural ground only, and depending on the importance of the flouted procedure, a decision maker will award compensation instead of reinstatement or re-engagement under section 40 (l) (a) or (b) respectively. But where termination is adjudicated both substantively and procedurally unfair, reinstatement would be the appropriate remedy, unless there are justifiable grounds such as those enumerated under rule 32 (2) (a) to (d) of the GN 67 2007.*
>
> *It is my understanding of the law and practice and therefore my decision on this aspect that, provided there are circumstances that justify such order, it is a proper exercise of discretion for decision maker to order reinstatement even where, the nature of the employer's business requires utmost trust between it and employee, and circumstances of the case indicate that such trust*

no longer exists as appears to have been the position in this case. that is why, an employer who feels that trust has been broken down beyond repair has an option to pay compensation of twelve months wages in addition to wage due and other benefits from the unfair termination to the date of final payment in lieu of reinstatement section 40 (3) of employment and labour relation act."

It was further submitted by Mr. Mwenegoha that, since the respondent was employed under permanent basis as per exhibit D4 (employment contract), he believes that reinstatement order issued by the Commission is the proper remedy, in relation with his expectation of working until retirement. On that basis, respondent prayed for this Court to upheld the CMA decision.

In rejoinder Ms. Opuku reiterated her submission in chief and adding challenge to the respondent's submission regarding discrimination by insisting that, it was not among the issues raised at the Commission, hence cannot be entertained at this stage.

Parties' submissions have been painstakingly considered. The issue for determination is fairness of respondent's termination. In determining the first issue one aspect has to be considered which validity of the reason for termination is. It is the established principle that for the termination

of employment to be considered fair it should be based on valid reasons and fair procedure. The rationale for that is derived in the case of **Tanzania Revenue Authority V. Andrew Mapunda,** Labour Rev. No. 104 of 2014 where it was held that the intention of the legislature is to require employers to terminate employees only basing on valid reasons and not their will or impulses.

The issue of valid reason is also well appreciated under international Labour laws under Article 4 of ILO Convention which also put emphasis that the employment of an employee shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking.

In the instant case, the applicant was terminated for allegedly committing a misconduct (gross negligence) for failure to supervise other staff members multiple duties as their Line Manger which resulted to financial loss of TZS 244,570,550.00/=. This is what is exhibited in the termination letter, Exhibit D14. Considering the rival arguments on this aspect of termination, in ascertaining whether the arbitrator was

right in his findings regarding reason for termination, this court finds consideration of evidence in CMA records paramount.

The records available reveal that the respondent was charged for misconduct which was alleged to have been committed between 03rd March 2018 and 28th June 2018 as per Exhibit D-9 (respondent's charge sheet), also it is undisputed that on 29th June 2018 respondent become aware of the loss not less than 200 Million after investigation was done by forensic investigation team. Moreover, it is on record that before the incident, on 16th March 2018 and on 26th June 2018 the respondent conducted snap check two times, but he failed to sight the alleged loss. It is a well-established principle in civil cases that, the standard of proof is on balance of probabilities (**Crescent Impex (T) Limited vs Mtibwa Sugar Estates Limited** (Civil Appeal No.455 of 2020) the Court of Appeal on page 10 had this to say;

> *"It is also elementary that, the standard of proof, in civil cases, is on a balance of probabilities which means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved.*

From the above authority, the question before this Court is how the loss occurred and not the existence of alleged loss. Since the respondent

admitted that he used to conduct snap checks and failed to notice the loss until 29th June upon the forensic team's investigation, I am of the view that he cannot exempted himself from the liability of negligence. He admitted noting the loss as he participated in the snap check of 29th June. In essence, what that means is that he admitted existence of the loss. What he disputes is how the loss occurred, to amount to gross negligence on his part he was charged with. He claims that the existence of the loss was not proved by stating that the said loss may not be real, but merely a result of system malfunction or teller's data entry errors. What the respondent is forgetting is that, he was the manager who could have implored and detected those alternatives in the first place and presented the same to the investigation team, instead of leaving it to the investigation tem to do.

In the above circumstances, in my view, the applicant managed to prove the case on balance of probability on the existence of the loss as the respondent admitted in his written statement as per Exhibit D-1 that there was a loss, but he failed to notice as a manager. Therefore, respondent's allegation that he was not responsible lacks merits. Since it is undisputed that the respondent failed to establish the existence of loss of such huge amount of money timely, basing on nature of

applicant's business and the position of the respondent he had, as a Senior officer he ought to have been more ardent and keen in his duties especially at the time of conducting snap checks.

Having such legal stand, I hold no doubt in finding that the offence committed by the respondent amounts to gross negligence as per rule 12(3) (d) of GN No. 42 of 2007. This is among the misconducts that may fetch a termination penalty even if it is the party's first offence. In the instant matter, there is no doubt that the allegations against the applicant amounted to misconduct. Therefore, the applicant had a valid reason for terminating the respondent's employment after finding him guilty of misconduct. On that basis, arbitrator's finding that, there was no valid and fair reason for termination lacks merits.

Having found that the respondent termination was initiated for a valid reason of prove misconduct, the next issue for determination is if the procedure for termination was in place. At CMA it was found that respondent's termination was procedurally unfair as the applicant, employer, failed to afford him with investigation report and the same was not tendered at disciplinary hearing.

In answering this question, as the termination was for misconduct the relevant provision is Rule 13 of the Code. Together with the rival submissions in respect of investigation report rule 13(1) of GN 42 (supra) fall important here. Under the rule the employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held, i.e. whether there is ground of initiating hearing. In the instant matter, it is undisputed that investigation was conducted as per exhibit D-5 (investigation report) to establish the existence of the alleged loss. The question is whether the respondent was afforded with an opportunity of challenging the investigation report.

The record available reveals nothing as to whether the respondent was given investigation report. The applicant argued that, as the respondent was part of investigation team during snap check which detected loss as he admitted being present when the loss was detected, failure to avail him with the report was not fatal. I agree with the applicant on the above argument because, what was established in the investigation was existence of the loss, which respondent also admits as he was part of the detection team. The rationale of availing one with the report is to know the nature of allegation leveled against him. In this case, the respondent was well aware of the charge against him, therefore not

being availed with the report makes no difference in enabling him build his defence. Therefore, although procedurally it may seem that he was not availed with the report, but the impact of doing that has no same effect if he did not know the nature of the charge against him. this is especially because the report was not squarely on what he was charged with.

What he seems to want the report for by arguing he was never afforded with an opportunity of challenging the investigation report contrary to the holding in the case of **Severo Mutegeki** (supra) is to find out how the loss occurred rather that whether the loss existed which he failed to detect timely as a manager imputing gross negligence on his part. As he was not charged with perpetrating the loss, the report establishing how the alleged loss occurred was no use to him. His charge was just failure to take necessary care in detecting the loss at his branch as the manager. Had it been that he was charged with direct involvement in the loss rather that failure to exercise utmost care in discharging his duties, the report on how the loss occurred would be a necessary document to him to make an informed defence. But since that was not the case, failure to be availed with such report in no way hindered his

defence case. . In the case of **Justa Kyaruzi V NBC Ltd,** Revision No. 79 of 2009, Lab Division at Mwanza, it was held that:

> *"What is important is not application of the code in the checklist fashion, rather to ensure the process used adhere to the basics of fair hearing in the labour context depending on the circumstances of the parties, so as to ensure the act to terminate is not reached arbitrarily. Admittedly, the procedure may be dispensed with as per Rule 13(12) of the Code."*

From the above authority, irrespective of the fact that the respondent was not availed with the investigation report, this did not impair adherence to principles of natural justiceas Mr. Mwenegoha insinuates. The knowledge of the respondent made it possible to conduct fair hearing without the report being availed to him. In the circumstances, I find the need to fault the arbitrators finding on procedural unfairness aspect. As long as the procedure is not to be followed in checklist as suggested by the above authority, the respondents hearing made no big deal without the report.

On the issue of discrimination, respondent argued that his termination was discriminatory as some of those implicated were not subjected to disciplinary actions. As challenged by the applicant in rejoinder that it

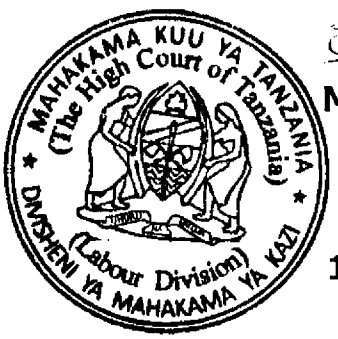
was not an issue at the trial Commission. In resolving the concern, I found wisdom to go through the records, especially the impugned award and CMA proceedings, both revealed that the issue of discrimination was not among the issues during trial or in parties' pleadings. The principle against raising an issue at revisional or appellate stage has been addressed by numerous cases including the case of **Astepro Investment Co. Ltd v. Jawinga Investment Limited,** Civil Appeal No. 8 of 2015 (unrported) it was held that; -

> *"...parties are bound by their own pleadings...the function of the pleading is to give notice of the case to a party must therefore, so state his case that his opponent will not be taken by surprise. If is also to define with precision the matters on which the parties differ and the points on which they agree, thereby to identify with clarity the issues on which the court will be called upon to adjudicate and determine the matter in dispute."*

Basing on that established principle, I find no need to labour much on the issue regarding discrimination as the same was raised by the respondent at revisional stage and did not form part of pleadings and trial proceedings.

Upon finding that the respondent's termination was both substantively and procedurally fair, contrary to what was decided by the CMA, I hereby quash and set aside the CMA award.

Application granted.



M.P. OPIYO

JUDGE

15/3/2024