

TANZANIA / JUDGMENT

REFINED AHMED MWERANI FINAL

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB - REGISTRY AT MBEYA LABOUR REVISION NO. 22982 OF 2024 CASE REFERENCE NO.
202409161000022982 (Arising from Labour Dispute Number CMA/MBY/Mby/71/2022/ARB.40)
ALLY AHMED MWERANI APPLICANT VERSUS NATIONAL
MICROFINANCE BANK (NMB) PLCRESPONDENT

JUDGMENT

3th December 2024 & 5th March 2025 NONGWA, J. The applicant Ally Ahmed Mwerani was employed on 12th March, 2014 by the respondent, National Microfinance Bank Plc as Zonal System administrator on permanent and pensionable basis. His services were terminated on 17th May 2022 by the respondent on the ground of insubordination and gross misconduct. Dissatisfied with the termination of his employment, he preferred a complaint to the Commission for Mediation and Arbitration (the CMA) vide Labour Dispute No. CMA/MBY/Mby/71/2022/ARB.40 claiming that his termination was both substantively and procedurally unfair. Before being charged was suspended from work to pave way for investigation. Upon investigation the applicant was charged with commission of an act of insubordination and repeated insubordination 1 contrary of section 16.15(3.3.4) of Human Resource Policy. Other offences were fraudulently preparing fictitious/fabricated travel claim contrary to section 16.15(9.9.) of the policy. In his response, he admitted to the offence of insubordination and denied other allegations. After disciplinary hearing, the applicant was terminated from his employment as per charges. Aggrieved with his termination of employment, the applicant referred a claim to the CMA. After hearing the parties, the CMA was satisfied the respondent had proved that the termination of the applicant's employment was based on valid and fair reason and was in accordance with a fair procedure. His findings were based on admission by the applicant to the offences of insubordination. It thus dismissed the complaint. Unamused, the applicant has filed this application for revision challenging the award on ground mentioned under paragraph 10 of the supporting affidavit which essentially revolves, one; whether the applicant's termination was both procedurally and substantively fair, and two; what were the reliefs the parties were entitled to. When the matter came up for hearing, the applicant was under the representation of Mr. William Mambo, learned advocate whereas the 2 respondent under Ms. Ester Shoo, also learned advocate. The application was argued by filing written submission. Submitting in the substantive aspect whether the respondent had valid reason for termination. Mr. William restated the law on

burden of proof in unfair termination dispute as embodied under section 37 and 39 of the Employment and Labour Relation Act Cap 336 (the ELRA). His contention was that hearing and presentation of evidence starts with the disciplinary committee and evidence has to be repeated in the CMA. He referred to evidence of DW3, DW4 and DW5 together with exhibit Rx6, Rx7, Rx8, Rx9, Rx11, Rx14 and Rx16 to have not been tendered during disciplinary hearing. He contended the CMA do not serve as a platform of first instance, arguing reason for termination has to be proved before the disciplinary committee and the CMA duty is more less an appeal. He referred to rule 13(5) of the Employment and Labour Relations Citation (Code of Good Practice) Rules, 2007 G.N. 42 of 2007 (Code of Good Practice) which required allegation to be proved before the disciplinary committee. He supported the argument with the case of Finca Microfinance Bank Ltd vs Jalala Hussein, Labour Revision No. 28234 of 2023 [2024] TZHC 1086 (26 March 2024; TanzLII). He further complained that the arbitrator did not consider applicant's closing submission but only that of the respondent. 3 Mr. William went on to state that the arbitrator blessed termination based on two offences of insubordination allegedly admitted by the applicant out of six. His contention was that the applicant did not admit to the offences of insubordination but to have written email. He referred to words found in exhibit Rx4 and Rx14. He stated he was not informed that Manyiluzi Masanja was the acting zonal manager and that no evidence was tendered in the disciplinary or CMA to prove the same. According to the counsel elements of insubordination as enumerated under section 16.15 of exhibit Rx11 were not proved. He supported the stance with the case of John Paul Ndanshau vs A-One Products and Bottlers Ltd (Revision Application No. 17722 of 2024) [2024] TZHCLD 166 (26 September 2024; TanzLII). On other offences of fictitious or fabricated travel, Mr. William submitted were not proved and evidence tendered in the CMA was not adduced or tendered before the disciplinary committee. Once again referred to the case of Finca Microfinance Bank Ltd (supra). Other arguments were that the outcome of the disciplinary was not in consonance with offences in the charge, that is to say while the applicant was charged with insubordination and falsification of travel, the applicant was terminated on ground misconduct. 4 On procedural aspects, counsel stated disciplinary hearing was not conducted. He alluded that although he was told to attend on 11/5/2022 the hearing forms reflect it was conducted on 17/5/2022 contending that it was not signed by the chairman. Counsel argued that the applicant was given to signed the minutes on 17/5/2022 at Mbeya office while the meeting was scheduled on 11/5/2022 at Dar es Salaam. Generally, counsel submitted that rule 13(5) of the code of good practice was not complied with. He submitted, the applicant was not served with investigation report contrary to rule 13(7) of the Code of Good Practice, that was not given right to mitigate and his right of appeal was curtailed in defiance of Article 13(6)(a) of the Constitution of the United Republic of Tanzania. He referred the court to the case of Severo Mutegeki & Another vs Mamlaka Ya Maji Safi Na Usafi Wa Mazingira Mjini Dodoma, Civil Appeal No. 343 of 2019 [2020] TZCA 310 (19 June 2020; TanzLII) on non compliance with termination procedure. On reliefs, submission by Mr. William was based on the fact that the applicant proved that his termination was unfair. To him there was no proof that the applicant was paid his terminal benefits. Responding to the above, Ms. Ester had opposite view, she submitted that the respondent proved the allegations to the standard required. Further that all evidence to substantiate the allegations was 5 tendered before the disciplinary committee as

explained in exhibit Rx16, outcome of the disciplinary hearing. He said evidence of DW4 and DW5 on visit of the applicant on respective branches was also given by DW1 on what he discovered during investigation. On allegation that all offences were not proved, counsel submitted that through exhibit Rx16 and Rx14 the appellant admitted to the offences of insubordination, which is also reflected in exhibit PY3 and referred to rule 12(3)(f) of the Code of Good Practice in that gross insubordination is sufficient reason for termination. Replying to procedural aspect, counsel stated the same was complied and referred to exhibit Rx3, Rx12, RX13, Rx14, Rx16 and Rx17, indicating that the applicant was involved in the investigation process, given chance to respond to chargesheet, commissioned to attend disciplinary committee and which was actually conducted and given right of appeal. On reliefs it was submitted that as the respondent proved that termination was both substantively and procedural fair, the applicant was entitled to no relief. In rejoinder Mr. William maintained that evidence of DW3, DW4, DW5, DW6 and DW7 were not tendered during disciplinary committed 6 thus constituted new evidence. He added it was not shown to who words of insubordination was directed and insisted the applicant did not admit to such offence. On procedural flaws and reliefs, it was the repetition of submission in chief. I have considered the rival submissions and records of the application, the issue for my determination is whether termination was both substantively and procedural fair. Before I get to the above issue, I have to resolve first submission that proceedings in the CMA is not a fresh case but traces its origin in the disciplinary committee. Outright this is a misconception of the law, disciplinary hearing is administrative procedural aspect of the labour disputes under rule 13 of the Code of Good Practice, it is only relevant to investigating whether the allegations against the employee were committed, hearing the employee against the accusation and assessing sanction to be imposed. That rule provides; '13(1) The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held;

- (2) where a hearing is to be held, the employer shall notify the employee of the allegations using a form and language that the employee can reasonably understand. 7
- (3) The employee shall be entitled to a reasonable time to prepare for the hearing and to be assisted in the hearing by a trade union representative of fellow employee. What constitutes a reasonable time shall depend on the circumstances and the complexity of the case, but it shall not normally be less than 48 hours.
- (4) The hearing shall be held and finalised within a reasonable time, and chaired by a sufficiently senior management representative who shall not have been involved in the circumstances giving rise to the case.
- 5) Evidence in support of the allegations against the employee shall be presented at the hearing. The employees shall be given a proper opportunity at the hearing to respond to the allegations, question any witness called by the employer and to call witnesses if necessary.
- (6) N/A

- (7) Where the hearing results in the employee being found guilty of the allegations under consideration, the employee shall be given the opportunity to put forward any mitigation factors before a decision is made on the sanction to be imposed. The provisions require the following aspects to be adhered to: First, there must be an investigation to warrant hearing to be conducted. Second, the employee should be informed properly and, in a language well understood to that employee. Third, employee should be afforded reasonable time to prepare for the hearing of the disciplinary charges. Fourth, hearing should be done within reasonable time. Fifth, evidence should be tendered in the disciplinary hearing and opportunity to challenge such evidence should be availed to the employee. To be noted is that proof of the allegation is on the basis of weight of evidence and not number of documentary or witnesses paraded. On the other hand, CMA is a forum designed to deal with disputes on labour matter, it is the court with powers to decide rights of parties in labour related transaction. Thus, CMA is not sitting to correct error committed by the disciplinary committee, but acting as a court of first instance by receiving evidence and making findings on the presented claim. Disciplinary hearing is only relevant in assessing whether the provision of rule 13 of the Code of Good Practice was complied in terminating the employment. Relevant to this is the holding in the case of Platinum Credit Limited vs Martin Joaqim, Civil Appeal No. 138 of 2022) [2023] TZCA 17740 (6 October 2023) when the court stated; 'It is not a requirement of law that the witnesses who testified before the disciplinary committee should also appear and testify before the CMA to prove that a fair procedure was followed by the disciplinary committee before termination of employment. All that is required is evidence of the manner the 9 disciplinary proceedings were conducted which evidence could be presented by any officer of the appellant as DW1 satisfactorily did.' It is not necessary that all what took place in the disciplinary committee be repeated in the CMA or a bar to presenting evidence or witnesses not presented in the disciplinary committee. The purpose of the rule 13 is to provide an employee with a fair hearing of the allegation raised against him at the disciplinary committee (fairness of the procedure). It has nothing to do with the hearing before the CMA. I therefore decline the argument that duty of arbitrator in the CMA is in the form of appellate body. This takes me to the issue whether the respondent proved the allegations. The applicant was charged with two sets of misconduct, first was two counts of insubordination and the second category was preparing fictitious or fabricated travel per diem, it mainly consisted four counts. In his written defence exhibit Rx14, the applicant admitted to the offence of insubordination and denied the other offences. It is in dispute if the applicant admitted to the first and second counts which was on insubordination. Mr. William submitted that the applicant only admitted to have written email and not acts of insubordination. I have gone through exhibit Rx14, it indeed contains admission to the offences 10 of insubordination and not writing emails as argued by the counsel for the applicant. For clarity I reproduce the said response; 'WRITTEN STATEMENT OF DEFENCE

1. Complaint 1 & 2: Commissioning of serious/acts of insubordination and Commissioning of repeated acts of insubordination. That I truly admit that I wrote an E-mail to my line manager read as follows "I think your starting teaching me now on what to do in my profession "Dear branch management, kindly starting from today till ZM s returns channel all your ICT issues to Manyilizu Massanja and he will advise ICT team what to do for your calls closure" Again, the other one "Don't take it personal". When reading between the lines I sympathies that I acted unprofessional as I wrote them out of anger, though I had no ill motive of disobeying the line Manager. He was telling me what to do (remote assistance) which it was not in line with my technical aspects by then. This lead to a break of communication between us otherwise it would have been resolved around the table and keep the institution roll. Despite a negative picture it has brought and a wrong approach used, I was doing for the interest of institution. 11 I apologize for all what I have done Kindly accept My apology.' Emphasize added. Further to that during disciplinary hearing as indicated in exhibit Rx16 the applicant admitted to the first offence. This may also be inferred in exhibit Rx17 (appeal against termination) in which the applicant was clear that his apology on allegation of misconduct was not considered. From the presented evidence the applicant admitted to the offence. I don't agree with the applicant's counsel that it was in regard to writing email, exhibit Rx14 is self-explanatory that it was in relation to the offence of insubordination and repeated insubordination as quoted above. From the above emerges another complaint in submission of Mr. Mambo that no evidence was presented to prove the offences. Regarding offences of insubordination based on exhibit Rx14, applicant's own admission, just like any trial when the offence is admitted by the accused, the respondent was relieved from calling evidence to prove such offence. The applicant, due to his own admission, is precluded from blaming the respondent for not calling witnesses who accused him as the same proved unnecessary. Once he admitted to the allegation, all that was left was for him to convince the respondent that the circumstances surrounding the mistake were defensible. I therefore find 12 that the applicant was rightly convicted on his own admission on the offence of insubordination as rightly found by the CMA and disciplinary committee.' From the above, the complaint that no investigation report was tendered dies naturally for after admission contained in exhibit Rx14 tendering the investigation report becomes redundant. Regarding other offences of preparing fictitious travel, Mr. William submitted that were not discussed by the arbitrator to see if were proved. Need not take long root in discussing this complaint because having proved that the applicant committed insubordination, the respondent was at liberty to terminate the applicant. The arbitrator cannot be blamed for not considering the other offences for could not have made any difference in the final result but a wastage of time. The complaint is not virgin in this territory, in the case of Zambia Cargo & Logistics Limited vs Ally Said Amanzi, Revision No. 185 of 2023

[2023] TZHCLD 1502 (14 November 2023; TanzLII), My sister Opiyo. J. was faced with similar scenario and observed that; 'Since the admission of the offence suffice to convict the respondent, then respondent allegation regarding other offences stipulated in exhibit D6

(charge sheet) and exhibit D4 (notice of appearance) lacks merits on the reason that, such 13 minor discrepancy does not take away the reality that the applicant was found guilty of the offence on his own admission. Further to that, Exhibit D9 (termination letter) under item 2 contains the offence admitted by the applicant during disciplinary hearing. On such legal findings, I am of the view that, applicant's allegation of being charged with other offences could have legal merits if he was found guilty of those other offences contrary to what he pleaded at disciplinary hearing. I subscribe to the above observation and find that there was no necessity in discussing whether the respondent proved that the applicant prepared fictitious travel. In the circumstance of this matter having upheld that the applicant was rightly convicted on the offence of insubordination, submission that DW4, DW5, DW6 and DW7 together with exhibits Rx3 and Rx5 which I agree were not tendered in the disciplinary committee will make no difference. For sake of argument, based on evidence of all respondent's witnesses and DW4 and DW5 together with exhibits Rx5 and Rx7 the applicant did not go to Mbozi and Iringa to attend and fix the problem it was reported. When DW4 and DW5 were explaining on procedure of visit and signing of register they were not cross examined on it nor there is no dispute that it was not the procedure obtained in that institution. On the circumstance, the respondent proved the offence of preparing fictitious travel. 14 Regarding procedural aspects, from evidence presented the same was complied with, the accusations against the applicant was investigated by DW1 and tendered in the CMA as exhibit Rx3. Mr. William submitted it was not availed to the applicant, however upon going through the proceedings the applicant did not complain in the CMA, it is afterthought. Further to that its contents were explained by DW1 and was not cross - examined. In *Patrick Muga vs National Bank of Commerce (NBC Ltd)*, Civil Appeal No. 459 of 2021 [2024] TZCA 1297 (23 December 2024; TanzLII) the court stated; 'Much as the investigation report was not tendered in disciplinary committee hearing or the CMA, still DW1 testified on what he detected as an investigator during his investigation as testified in the disciplinary committee hearing as well as before the CMA. In other words, the gist of the report was stated during the disciplinary hearing and before the CMA; and the appellant had an opportunity to cross examine the witness on it which he could not do. In our jurisdiction, it is now a settled law that, if a party fails to cross examine a witness on a relevant matter, it implies that he or she accepts the veracity of the witnesses' testimony.' After investigation the respondent was served with chargesheet (exhibit Rx13 and prepared his written defence thereof (exhibit Rx14). Further hearing was conducted; I don't agree that it was not conducted 15 as complained by the applicant. Exhibit Rx16 shows it was conducted on 17th May 2022 and is signed by the applicant, there is no complaint that the signature is forged. Regarding complaint that was not accorded right of appeal, the same is reflected in exhibit Rx17 dated 30th May 2022. Overall, the termination procedure was adhered to by the respondent. On entitlement, the applicant stated was not paid all his terminal benefits. As it was found that there was valid reason for termination, the applicant was not entitled to reliefs under sections 40(1) and 42 of the ELRA. However, upon his termination was entitled to reliefs under section 43 and 44 of the ELRA. It has been submitted that the

applicant was not paid his terminal benefits. The respondent submitted was paid. In its award the arbitrator held that the respondent was not entitled to terminal benefits as was terminated on grounds of misconduct. This was error because termination on misconduct disentitled the employer only severance pay under section 42(2) of the ELRA and not terminal benefits under section 44 of the ELRA. The question is whether the applicant was paid, DW7 said the applicant was paid all his terminal benefits and produced bank statement exhibit Rx18 and was cross examined if it included all his entitlement. For start upon termination, the employee has to be transported to his place of recruitment, in this case the applicant, said 16 was recruited from Bukoba region and terminated in Mbeya region. Regarding terminal benefits section 44 of the ELRA provides; '44(1) On termination of employment, an employer shall pay an employee –

- (a) any remuneration for work done before the termination;
 - (b) any annual leave pay due to an employee under section 31 for leave that the employee has not taken;
 - (c) any annual leave pay accrued during any incomplete leave cycle determined in accordance with section 31(1);
 - (d) any notice pay due under section 41(5); and
 - (e) any severance pay due under section 42;
 - (f) any transport allowance that may be due under section 43.
- (2) On termination, the employer shall issue to an employee a prescribed certificate of service.' From the above and in circumstances of the case, the applicant was not entitled to subparagraph (d) and (e). Further from the evidence of DW7 and contents of exhibits Rx18 the applicant was paid terminal benefits. I note that in his CMA form No. 1 on schedule of claim, the applicant claimed Tsh. 5,763,750/= as transportation of his personal effects however that claim is not listed in section 44(1) of the ELRA, no there was any evidence that according to his position he was entitled to 17 such transportation. Further to that there is no complaint from the applicant that he was underpaid his terminal benefits. Flowing from the above, I hold that the applicant was fairly terminated from employment and paid all his terminal benefits as discussed above. In the end, the application has no merits and hereby dismiss it. This being a labour matter, I refrain from awarding costs. V.M NONGWA JUDGE 5/3/2025 Dated and Delivered at Mbeya this 5th March 2025 in presence of Applicant, Mr. William Mambo (PR) for Applicant and Mr. Enock Nyangi HRDP Manager for the Respondent. V.M NONGWA JUDGE 18

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