

TANZANIA / JUDGMENT

CIVIL APPEAL NO 459 OF 2021

PATRICK MUGA VS NATIONAL BANK OF COMMERCE NBC LTD

COURT
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1 January 2021

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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM fCORAM: MKUYE, J.A..
MWAMPASHI, J.A. And NGWEMBE, 3.A.\ CIVIL APPEAL NO. 459 OF 2021 PATRICK
MUGA..... APPELLANT VERSUS NATIONAL BANK OF
COMMERCE (NBC LTD).....RESPONDENT (Appeal from the judgment and decree of
the High Court of Tanzania at Dar es Salaam) (Nqunvale, 3.) dated the 28th day of June, 2021 in
Labour Revision No. 99 of 2020 JUDGMENT OF THE COURT 28 October & 2 J d December, 2024
MKUYE, J.A.: This is an appeal against the judgment and decree of the High Court (Hon.
Ngunyale, J.) dated 28/6/2021 in Labour Revision No. 99 of 2020. The background of the matter
leading to this appeal is as follows: The appellant, Patrick Muga, was in 1990 employed by the
respondent, the National Bank of Commerce Limited (NBC LTD), in the position of clerk. He was
later a promoted to the position of Personal Banker, a position he held at the respondent's
Mbagala Branch until his 1 termination from employment on 1/8/2018. The reason for his
termination was attributed to gross misconduct. It was alleged by the respondent that between
16/3/2018 to 26/6/2018, the appellant was appointed by the Branch Manager to conduct snap
check to verify the physical cash in the strong room as against what was reported to be in
existence. That, upon conducting the said snap check, the appellant failed to report a shortfall of
money to the tune of TZS. 244,990,550.00 to his superiors. It was also alleged that the appellant
took physical cash from the strong room to the tune of TZS. 1,300,000.00 and in its place handed
over an undated cheque to one Grace knowing that there were insufficient funds in his bank
account. And on inquiry he refunded the money immediately. As a result, disciplinary
proceedings were instituted against him on two offences of gross negligence in carrying out snap
check resulting into financial loss and misappropriation of funds amounting to TZS. 1,300,000. 00
and the outcome was that he was found guilty of the charges. It was recommended that he be
terminated from his employment. His appeal to the management was unsuccessful. Still
aggrieved, he approached the Commission for Mediation and Arbitration (the CMA) vide labour
dispute registered as CMA/DSM/TEM/568/18/208/18 in which the appellant's complaint based on
unlawful termination. Having heard both parties, the CMA observed that the appellant's
termination was both substantively and procedurally valid. Dissatisfied with that outcome, the

appellant lodged revisional proceedings in the High Court which also confirmed the decision of the CMA observing that it was justified. Still aggrieved, the appellant has appealed to this Court fronting four grounds of appeal which can be extracted as hereunder:

1. That, the High Court erred in law for failure to observe the spirit of section 37 (2) of the ELRA, Cap 366 and rule out that the termination of the appellant did not meet the requirement of the law.
 2. That, the High Court erred in law for upholding the decision of the CMA without taking into account that the arbitrator did not append his signature at the end of each witnesses' evidence which led to rendering the proceedings a nullity.
 3. That, the High Court erred in law for failure to nullify the proceedings of the CMA which was recorded in form of questions and answers contrary to Order XVIII rule 5 of the Civil Procedure Code.
 4. That, the High Court erred in law for failure to consider that the disciplinary hearing was not in accordance with the Employment and Labour Relations (Code of Good Practice) GN 3 No. 42 of 2007 in that the appellant was not availed a dear right to be heard. When this appeal was called on for hearing, the appellant was represented by Messrs. Makubi Kunju and Hosea Chamba, both learned counsel whereas the respondent had the services of Ms. Josephine Safiel, also learned advocate. It is noteworthy that both parties filed written submissions for and against the appeal under Rule 106 (1) and
- (7) of the Tanzania Court of Appeal Rules, 2009 which were sought to be adopted to form part of their submissions. It is the appellant's argument that the appellant's termination did not meet the requirements of section 37 (2) of the Employment and Labour Relations Act, (the ELRA) since; one, the respondent failed to prove/show a valid reason/fair reason for his termination. He contended that, neither did the respondent prove negligence on the part of appellant in conducting the snap checks nor was the loss of TZS. 244,990,550.00 established by evidence. He was of the view that, under section 37 (2) of ELRA, the termination was unfair for want of fair and valid reason. Two, the investigation report which could have shown the loss occasioned was taken by the police for investigation. So, it was not shown how the appellant occasioned such loss. Three, the appellant was not the custodian of the strong room taking into account that other 4 persons entered into such premises. In addition, Mr. Chamba submitted orally that the loss allegedly occasioned by the appellant was not proved as the investigation report was neither tendered in the Disciplinary Committee nor the CMA which also failed to rule out on it (hence unfair reason). Besides that, the learned counsel for the appellant asserted that there was a discrepancy in evidence adduced at Disciplinary Committee on the dates when the loss was occasioned. He said, while one Meshack Shashi (page 196) testified that the appellant conducted snap check between 3/3/2018 to 29/6/2018 and testified the same in the CMA, meaning money was stolen during that period, the disciplinary charge shows that the appellant entered in the strong room between 16/3/2018 to 26/6/2018 and yet other persons did so during the same period of

time. Besides that, the learned counsel assailed the evidence of Alphonse Musiba (page 191) who said that the appellant started entering in the strong room on 3/4/2018 to 23/4/2018 and on 2/5/2018 to 25/5/2018. He, therefore, insisted that, it was important for the investigation report to be tendered in the CMA. He referred us to the case of Kiboberry Ltd v. John Van Der Voort, Civil Appeal No. 248 of 2021 [2022] TZCA 620(7 October 2022). 5 In relation to ground No. 1 of appeal that the High Court failed to 'observe the provision of section 37 (2) of ELRA, it was the respondent's argument that the termination was fair and further that, the procedure was followed. Ms. Safiel clarified in her oral submission that, as was concluded by the High Court, it was proper for disciplinary proceedings to proceed while the police investigations were going on since police investigations are not criminal charges. She acknowledged that under rule 13 of the Code of Good Practice Rules GN No. 42 of 2007, the respondent is required to conduct investigation before commencing disciplinary hearing, however, she countered the appellant's argument by submitting that the respondent (DW1) testified on what he saw in his investigation and even when he was cross examined at CMA, he said, the appellant was heard and the charge was read over to him and that failure to tender the investigation report did not vitiate proceedings. Ms. Safiel went on clarifying on the discrepancies on the dates on which the appellant was allegedly involved in that, much as at page 193 of the record of appeal, it is shown that he entered in the strong room on 3/4/2018, 23/4/2018, 2/5/2018 and 25/6/2018, the period or dates within which the loss occurred. That is the period when the appellant conducted the snap checks in which the appellant is shown to have 6 participated. On the contention that other people were also involved and that the appellant was not the custodian of strong room, she argued that, even those others who participated were subjected to similar disciplinary proceedings. We note that the appellant's grievance in the ground No. 1 is three-fold. That is, one, that there was no proof that the appellant was negligent in conducting snap check; and two, there was no evidence establishing the loss of TZS 244,990,550.00 since apart from mere allegation that appellant occasioned the loss, there was no tangible evidence from the respondent to that effect. Three, there were discrepancies in the dates the alleged offence was committed between the evidence and the charge sheet. Indeed, under section 37 (2) of ERRA, it is clearly provided that termination would be valid if it is based on a fair reason/valid reason and fair procedure. Otherwise, if the termination of employment is not based on such factors i.e. valid reason and fair procedure, it would be unfair under such provision of the law. This is important to ensure that the employees are terminated by their employers only on valid reasons and not on their wishes. It is true, as alluded to earlier on, that, DW1 said he conducted investigation but the report thereof could not be produced in the CMA because it was with the police. Indeed, the investigation report would have been the best evidence to prove the allegations levied against the appellant. This is the centre of the controversy. However, there is evidence of DW1 who explained on how he detected the said loss when he went to verify the money report against the physical check. Besides that, there was evidence from TRIAL BALANCE - ALL GLS (Brach: 054) REPORT of 28 June 2018 (page 184) and the END OF DAY SUMMARY (EOD SUMMARY) (Exhibit NBC - 7 collectively). 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. This was a position of the Court in the case of *Nyerere Nyangue v. Republic*, Criminal Appeal No. 67 of 2010 [2012] TZCA 103 (21 May 2012), when it was faced with a similar situation, it stated as follows: "As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted the matter and will be estopped from asking the trial court to disbelieve what the witness said. [See also *Issa Hassan Uki v. Republic*, Criminal Appeal No. 129 of 2017 [2018] TZCA 361 (10 May 2018 and *Cyprian A. Kibogoyo v. Republic*, Criminal Appeal No. 88 of 1992/' Even in this case, since the appellant failed to cross examine the respondent on the alleged report, he cannot question it at this stage. Another grievance is with regards to the proof of the loss and on discrepancies on dates the appellant allegedly entered in the strong room. As was argued by the appellant and conceded by the respondent, there was a variance in dates as indicated in the charge and the evidence adduced by DW1. Going by the evidence adduced during the disciplinary hearing and the CMA, it shows some discrepancies as stated by both sides in so far as the dates/period when the appellant entered in the strong room. Whereas the offence in relation to the loss of TZS. 244,990,550.00, was committed in the period between 16/3/2018 to 28/6/2018; one Alphonse Musiba indicated that the appellant had entered in the strong room on 3/4/2018, 23/4/2018, 2/5/2018 and 25/5/2018. Yet, Meshack Shashi (DW1) testified that, the loss was occasioned from 3/3/2018 to 29/6/2018 when the appellant was conducting the snap checks. However, as the learned counsel for the respondent argued, the period within which the appellant was charged to occasion the loss is within the period covered under the charge sheet. Looking at the period stated in the charge (between 16/3/2018 to 26/6/2018) comparing with the period stated by Alphonse Musiba, that is, 3/4/2018, 23/4/2018, 2/5/2018 and 25/5/2018, it is clear that it is a period which is within the period in the charge sheet. Even looking at the evidence of DW1 that, the appellant entered in the strong room between 3/3/2018 and 29/6/2018, still it is within the period stated in the charge sheet. In this regard, we find that the High Court was justified to hold that the termination was based on a valid or fair reason and hence we find no merit on this ground. With regard to grounds 2 of appeal, the appellant's argument is that the arbitrator failed to append signatures at the end of each witness's testimony. It is argued that, it is a well-established principle of law to append signatures so as to authenticate the witnesses' evidence and that failure to do so vitiates the proceedings. The appellant relied on the cases of *Unilever Tea Tanzania Ltd v. David John*, Civil Appeal No. 413 of 2020 [2021] TZCA 547 (30 September 2021) and *John Fortunatus Makoko v. GPH Industries Limited*, Civil Appeal No. 108 of 2018 [2021] TZCA 723 (3 December 2021). 10 In reply, the respondent submitted that, though the arbitrator did not append his signature at the end of each witnesses' testimony, the record bears out that he signed at page 142 of the record of appeal. He argued that, although the appellant relied on

the provisions of the Civil Procedure Code, Cap 33 [R.E. 2002 now R.E. 2019] (the CPC), such provisions are not applicable to the CMA to which the applicable law is the Employment and Labour Relations (Mediation and Arbitration) Rules. To fortify her argument, he referred us to the case of Security Group Ltd v. Steven Gerson Kizinga, Consolidated Appeals No. 386 of 2020 & 50 of 2021 [2024] TZCA 107 (23 February 2024), where the Court held that failure to append signatures does not vitiate the proceedings. The issue in this ground is whether the arbitrator failed to append signature at the end of each witnesses' testimony and if so, what would be the effect. Having gone through the record of appeal we observe that, indeed, the arbitrator did not append her signature at the end of the evidence of all the witnesses, that is, Meshack Shashi (DW1) Sweetbert Marko Mapolu (DW2) and Patrick Muga (PW1) (See pages 139, 144 and 153 of the record of appeal). Even the signature cited by the respondent's counsel at page 142 was not proper as it was signed in the middle of the DW2's testimony and not at the end of his testimony. Previously, failure to append such signatures at the end of each ii witnesses' evidence was a serious irregularity. It was fatal as it had the effect of vitiating the proceedings. See: Unilever Tea Tanzania Ltd (supra) and John Fortunatus Makoko (supra). However, this is no longer position. According to the case of Security Group (T) Limited (supra), when this Court was confronted with a similar scenario it stated as follows: "Following the introduction of overriding objective into the Appellate Jurisdiction Act, Cap 141 (the A3A), this Court is now obliged to take into account the overriding objective principles before hastening to strike out matters on procedural grounds. In that respect, section 3 A o f the AJA is instructive that the main role (overriding) o f this Court is to facilitate the just, expeditious, proportionate and affordable resolution o f all matters governed by the AJA. As alluded earlier on, procedures at CMA aimed at achieving the goal o f dealing with substantive merit o f the dispute fairly, quickly and with minimum legal formalities. We therefore find that the failure o f the arbitrator to append signature at the end o f each witnesses' testimony did not, in the circumstances o f this case, occasion miscarriage of justice to the parties. Consequently, issue number one has been answered in the negative" 12 Even in this case, being guided by this recently decided authority, we find that failure by the arbitrator to append his signature at the end of each witnesses' evidence did no occasion any miscarriage of justice. Hence, this ground is unmerited and we dismiss it. In 3rd ground of appeal, the appellants' complaint is that the arbitrator recorded evidence in question and answer form instead of narration which was contrary to Order XVIII rule 5 of the CPC. And, in his view, this rendered the proceedings a nullity. In relation to the complaint that the arbitrator recorded the witnesses' evidence by way of question and answer instead of a narration, we note that it is true that, the evidence of DW1 found at pages 127 to 139; and that of DW2 from page 139 to 144 as well as PW1 at pages 144 to 153, was taken in the form of question and answer. According to the appellant this offended Order XVIII rule 5 of the CPC which states as foliows: "The evidence o f each witness shai! be taken down in writing, in the language o f the court, by or in the presence and under the personai direction and superintendent o f the Judge or Magistrate, not ordinarily in the forms of question and answer, but in that of a 13 narrative and the Judge or Magistrate shall sign the same". [Emphasis added]. As it is, the above cited provision requires the witnesses'

evidence to be recorded in narrative form. However, we are mindful of rule 19 (1) of the Labour Institution (Mediation and Arbitration Guidelines) Rules 2007 (G.N. No. 67 of 2007) which permits the arbitrator to regulate his/her own proceedings or to select the manner in which to conduct the proceedings. This means that the law allows selection of mode of procedure in labour matters. In our view, the manner the evidence of witnesses was recorded in this matter, was not prejudicial to the appellant. We say so because all processes such as examination in chief, cross examination and re- examination were complied with. Not only that even the arbitrator had an opportunity to seek clarification from the witnesses. Of course, we are alive of the findings of this Court in criminal cases, which we find to be relevant to this case. For instance, in the case of Mashaka Juma Ntalula v. Republic, Criminal Appeal No. 159 of 2015 [2015] TZCA 124 (7 December 2015) in which the evidence was recorded in reported speech, the Court dismissed the appellant's complaint while referring to rule 3 (a) of the Civil Procedure (Recording 14 of Evidence) (High Court) Rules 1953 GNs No. 28 of 1953 and 286 of 1956 and stated that: "In the fight o f the cited rule, the recording of the evidence o f the witnesses was not in compiiance with the iaw. We are mindfui that, the Rules read together with the enabling section 210 o f the CPA mandatory require the recording o f the evidence in narrative form. We are o f the considered view that the irregularity has no prejudicial effect and as such, it is curable Yet, we are mindful of the case of Magalu Maduluu v. Republic, Criminal Appeal No. 158 of 2022 [2024] TZCA 780 (21 August, 2024), which is the most recently decided case, where the Court held a position that the recording of evidence in the form of questions was an unorthodox method. Consequently, the Court allowed the appeal, nullified the proceedings against the appellant, quashed the conviction and set aside the sentence meted out against him. Then, a retrial was ordered. Much as the above principle emanates from the criminal matter, we think, in our case, the provisions of Rule 19 (1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules 2007 (GN No. 67 of 2007) are pertinent. The said rule empowers the arbitrator to 15 determine the manner or how the proceedings are to be conducted. For clarity we reproduce the said provision as follows: "19 An arbitrator has the power to determine how the arbitration should be conducted In the matter at hand, it is true that the witnesses' evidence from both sides was taken in the form of questions and answers. However, we do not think that it offended the provisions of Order XVIII rule 5 of the CPC simply because it is not applicable in labour matters. That is why, given the nature of the disputes, the arbitrator is given discretion to determine the procedure to be used. In any case, looking at the manner the evidence was given we are satisfied that it did not occasion any injustice to the parties since both sides were given opportunity to give their evidence and were heard effectively. All other procedures such as examination in chief, cross-examination, re-examination and clarification from arbitrator were complied with. As it is, none of the parties was prejudiced. In the result, this ground also fails. As regards ground no. 4, the appellants' complaint is that the termination was unfair as the procedure was not fair. It is contended that the notice of disciplinary committee (exhibit NBC 8 and Exhibit NBC

- 9) issued on 28/7/2018 for hearing on 1/8/2018 was not adequate to ensure fair hearing as it seems the respondent had a predetermined 16 outcome. The appellant was not accorded reasonable opportunity to prepare himself contrary to the Rules. On his part, the respondent maintained that the procedure was complied with while insisting that the appellant was heard. In this ground of appeal, the appellant's complaints are twofold. The complaint in the first limb is that, the appellant was not availed with a clear right to be heard due to a minimum time allocated for him to respond and to attend the disciplinary hearing. It is the appellant's argument that a period of three days from 28/7/2018 when he was issued with notice vide Exhibits NBC 8 and NBC 9 to 1/8/2018 which was the date scheduled for hearing, was not enough or guaranteeing a fair hearing. Hence, he could not have a reasonable time to prepared for hearing contrary to the Rules. On the part of the respondent, it was argued that, there was no wrong committed as the Disciplinary Committee Proceedings were conducted. That, the charge was read over to the appellant and that he was accorded with opportunity of being heard. Regarding the complaint that the appellant was not given sufficient notice of disciplinary hearing, it is well settled that a right of fair hearing to any party before the court is very crucial. This is a position that was taken in a celebrated case of Mbeya Rukwa Auto 17 Parts and Transport v. Jestina George Mwakyoma, Civil Appeal No 45 of 2001 [2001] TZCA 14 (9 August 2001) where the right to be heard was emphasized to be one of the ingredients of fair hearing. In the matter at hand, we note that it is true that the appellant was given a notice of three days of disciplinary hearing. According to the record of appeal, he was served with the notice of hearing on 28/7/2018 while the said hearing was scheduled to be on 1/8/2018. Of course, the appellant is complaining that out of the three days one was a Sunday, meaning there remained only two days. Indeed, the period of two days might not have been sufficient. However, according to rule 4 (3) of the Code Good Practice Rules, the notice of disciplinary hearing is required to be given within forty-eight hours before. This means that the notice of three or two day was sufficient under the law. At any rate, since on the date of hearing the charge consisting two offences was read over to him and he was afforded time to be heard, we are of the view that, the appellant was not prejudiced. We say so because, he even admitted to the second offence of misappropriation of funds and decided to refund immediately after being questioned about it. The appellant was also given a chance to mitigate and appealed to the higher management. The other limb of the complaint is that there was no separate consideration of the appellant's verdict and sanction as per rule 4 of the Code of Good Practice Rules. It was argued that, the mitigation, seriousness of offence, the nature of employee and circumstances of the job and how the incident occurred, were not considered. It was stressed that, the verdict and penalty ought to have considered separately as per section 37 (2) of the ELRA and rule 4 (3) of the Code of Good Practice Rules but the procedure under those provisions was not adhered to. Regarding a separate session for considering a verdict of the employee, we note that the appellant's contention may not be substantiated. It is crystal clear that rule 4 (3) of the Code Good Practice Rules requires consideration of the verdict and sanction of an employee to be held in separate sessions. The said rule provides as follows: "The question of guilt and the penalty to be imposed should be considered

separately and the employee or the representative is entitled to make representations in regard to an appropriate penalty. Mitigating and aggravating factors to be considered should include the - (a)seriousness of the offence and the likelihood of repetition; (b)employee's circumstances (including personal circumstances, length of service and previous disciplinary record);

- (c) nature of employee's job (including health and safety consideration); and
- (d) circumstances of the infringement itself " Section 37 (2) of the ELRA deals with the requirement for the employer to show valid reason for terminating an employee and compliance with a fair procedure. It is, also, important to note at this juncture that under rule 12 (2) of the Code Good Practice Rules, a first offence of an employee does not justify termination of that employee. Nevertheless, according to the above cited provision, mitigation and other aggravating factors such as seriousness of the offence and the likelihood of repetition; employee's circumstances (including personal circumstances, length of service and previous disciplinary record); nature of employee's job (including health and safety consideration); and the circumstances of the infringement itself, are to be considered. In the matter at hand, having gone through the record of appeal, we have gathered that the disciplinary committee considered the verdict and the sanction to be imposed to the appellant, separately. The record bears out that after the completion of the hearing of the matter and after the Committee had found the appellant guilty, the appellant was 20 availed with an opportunity to mitigate as shown at page 61 of the record. Also, aggravating factors such as the length of service (27 years) were also taken into account (see page 62) then the sanction of termination was reached at page 63 of the record of appeal. In our view, the fact the appellant was given a chance to mitigate shows that there were separate sessions for considering the verdict and sanctions as opposed to what the appellant tries to suggest. In other words, the provisions of rules 4 (3) and 12 (2), (4) of the Code Good Practice Rules were complied with. But again, looking at the record of appeal, it is crystal clear that the appellant in his mitigation indicated that he worked for 28 years without a warning being given to him by his employer or previous disciplinary charges levelled against him. This could be translated as a sign of a good employee. However, taking into account the nature of the job and the circumstances under which the misconduct occurred, it may be viewed that the misconduct committed by the appellant was not so serious as it was linked with his act which was associated with occasioning the loss and misappropriation involving a small amount of money to the tune of TZS. 1,300,000.00 only. But, to a person working with a financial institution, which deals with peoples' money, misappropriation of even a merger amount of money may have a 21 serious implication, more so, when taking into account that TZS. *244,990,550.00 went missing mysteriously. We think, honesty of employees in banking institution is very crucial - See also: National Bank of Microfinance PLC v. Andrew Aloyce, Revision No. 01 of 2018 (HC. Labour Division) (unreported). The appellant was charged with gross negligence and misappropriation of funds as provided for under rule 12 (3) of the Code of Good Practice Rules. The two offences fall under gross misconduct or serious misconduct which are clearly provided for under rule

12 (3) (a) and (d) of the Code of Good Practice Rules. They are under the category of gross dishonesty and gross negligence which attract a sanction of termination of the employment. Since the acts committed by the appellant as per the available evidence show clearly that he committed not only gross negligence in his performing snap check but also of gross dishonesty in misappropriating the bank's funds for his own use, there is only one remedy for such acts, which is, termination from his employment as was held by the CMA and confirmed by the High Court. Therefore, this ground as well is devoid of merit and we dismiss it. 22 All said and done, we find the appeal unmerited and we dismiss it in its entirety. Considering that this appeal emanates from a labour matter, we do not make any order as to costs. DATED at DAR ES SALAAM this 18th day of December, 2024. R. K. MKUYE JUSTICE OF APPEAL A. M. MWAMPASHI JUSTICE OF APPEAL P. J. NGWEMBE JUSTICE OF APPEAL The Judgment delivered this 23rd day of December, 2024 in the presence of Mr. Joseph Ndazi, learned counsel for the Respondent also holding brief for Mr. Makubi Kunju, learned counsel for the Appellant, is hereby certified as a true copy of the original. u- f _
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Prepared on 13 October 2026 · Esheria