IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUGASHA, J.A, SEHEL, J.A. And KAIRO, J.A.)

CIVIL APPEAL NO. 4 OF 2020

PASCHAL BANDIHO..... APPELLANT

VERSUS

ARUSHA URBAN WATER SUPPLY & SEWERAGE AUTHORITY (AUWSA).....RESPONDENT

(Appeal from the decision of the High Court of Tanzania (Labour Division) at Arusha)

(Nyerere, J.)

dated the 25th day of July, 2016
in
Revision No. 76 of 2015

.....

JUDGMENT OF THE COURT

14th & 21st February, 2022

SEHEL, J.A

The appellant in this appeal was an employee of Arusha Urban Water Supply and Sewerage Authority (AUWSA) (the respondent). He was employed on 1st July, 1999 as a Construction Artisan Grade III. Among of his basic duties were to visit sites, conduct survey, prepare and sign cost estimates forms for customers in need of new water connections. His employment with the respondent was for a period of about 13 years until termination on 28th August, 2012 on grounds of misconduct/gross

dishonesty. He was alleged to have forged a drawing for the new water connection having reported less measurements of the water pipe of 80 metres instead of 220 metres for a customer, one Paul Minja (PW2); diverted a route for the water connection on PW2's premises; sourced and used sub-standard materials to construct a new route measuring 140 metres and that, he connected water to a customer, one Augustino Shawshi Manda in Kiranyi Ward which was a restricted area and outside his area of operation. As he was not satisfied with both the procedure and reasons for his termination, he filed a complaint to the CMA sought and to be paid compensation of 12 months' salary for unfair termination and severance allowance. He also sought to be issued with a certificate of service.

At the end of the hearing, the CMA was satisfied that there was a valid reason for termination of appellant's employment, thus, the termination was substantially fair. Regarding the procedure, the CMA noted that the respondent did not serve and cause the appellant to sign the minutes of the disciplinary hearing. However, the CMA held that the omission did not go to the root of the procedure so as to vitiate it. At the

end, it awarded the appellant one months' salary for employer's failure to cause the applicant to sign the minutes of the disciplinary hearing.

Dissatisfied with the award, the appellant filed an application for revision in the High Court. After hearing the parties, the High Court concurred with the CMA's Award that the termination of employment of the appellant was substantially fair and that the respondent to a greater extent complied with the procedure save for a minor infraction where there was no proof of service of the minutes of the meeting to the appellant as he did not sign them. Accordingly, the High Court dismissed the application by upholding the CMA's award. Still aggrieved, the appellant filed the present appeal.

In his memorandum of appeal, the appellant listed the following six grounds: -

1. *That, the learned judge erred in law and fact by failing to set aside an arbitrator's award which was improperly procured with contradictory evidence.*
2. *That, the learned judge and the trial arbitrator erred in law and fact by failing to recognize that the reasons for termination of employment was both substantively and procedurally unfair.*

3. *That, the learned judge and the trial arbitrator erred in law and fact by assuming that the documentary evidence and facts by the respondent were true while there was no proof on misconduct.*
4. *That, the learned judge erred in law and fact by ruling in favour of the respondent that the inconsistencies of the witnesses, arguments, documentary evidence and lack of corroboration were not sufficient to overturn the findings of fact.*
5. *That, the learned judge erred in law and fact by violating the principle of natural justice as it was put to her attention that the respondent had been a judge of his own case in that he was a complainant, prosecutor/charging the appellant, judge and suspender.*
6. *That, the learned judge and the trial arbitrator erred in law and fact by failing to recognize that the punishment imposed by the respondent was exorbitant, that is, given the nature of the appellant's job and circumstances the misconduct occurred could not have attracted termination of employment.*

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas the respondent was represented by Ms. Stella Machoke, learned Principal State Attorney assisted Ms. Jeniffer Kaaya,

learned Senior State Attorney and Mr. Peter Musseti, learned State Attorney. Both parties had earlier on filed written submissions in support and in opposition of the appeal, respectively which they adopted during the hearing of the appeal.

Before going into the merits of the appeal, we wish to start with a point of law addressed to us by the learned Senior State Attorney on the legality of some of the grounds in the memorandum of appeal.

Mr. Musseti argued that, in terms of section 57 of the Labour Institutions Act, Cap. 300 R.E. 2019 (henceforth "the LIA"), the Court has no jurisdiction to hear and determine grounds 1, 3 and 4 which raise issues of fact and not law. For that reason, he urged the Court to disregard the grounds. The Appellant, being a layperson, did not have anything to reply. He left the issue to be determined by the Court as it deems fit.

It be noted that there are plethora of authorities that the jurisdiction of this Court is conferred by statute. Among them are **Tanzania Revenue Authority v. Tango Transport Company Ltd**, Civil Appeal No. 84 of 2009y and **National Bank of Commerce Limited v. National Chicks Corporation Limited and 4 Others**, Civil Appeal No. 129 of 2015 (both

unreported). As rightly submitted by the learned Senior State Attorney, section 57 of LIA confers and restricts the jurisdiction of this Court as it requires an intended appellant to appeal to the Court on point (s) of law only against the decision arising from the High Court, Labour Division – see the case of **Tanzania Teachers Union v. The Chief Secretary and 3 Others**, Civil Appeal No. 96 of 2012 (unreported).

In the case of **CMA – CGM Tanzania Limited v. Justine Baruti**, Civil Appeal No. 23 of 2020 (unreported) the Court defined as to what constitutes a point of law. In that appeal, preliminary points of objection were raised on the competency of the appeal. Among the points of law raised was that, the three grounds of appeal advanced by the appellant involved issues of fact and not law, thus, contravened section 57 of the LIA. The Court adopted and applied the definition of the term *"matters involving questions of law only"* as it appears in section 25 (2) of the Tax Revenue Appeals Act, Cap. 408 R.E. 2006 (now R.E. 2019). The definition was given in the cases of **Atlas Copco Tanzania Limited v. Commissioner General**, Tanzania Revenue Authority, Civil Appeal No. 167 of 2019 and **Kilombero Sugar Company Limited v.**

Commissioner General (TRA), Civil Appeal No. 14 of 2007 (both unreported).

For instance, in the case of **Kilombero Sugar Company Limited** (supra) defined the term *"matters involving questions of law only"* as follows:

> *"Thus, for the purpose of section 25 (2) of the TRAA, we think, a question of law means any of the following:* ***first****, an issue on the interpretation of a provision of the Constitution, a statute, subsidiary legislation or any legal doctrine on tax revenue administration.* ***Secondly****, a question on the application by the Tribunal of a provision of the Constitution, a statute, subsidiary legislation or any legal doctrine to the evidence on record.* ***Finally****, a question on a conclusion arrived at by the Tribunal where there is failure to evaluate the evidence or if there is no evidence to support it or that it is so perverse or so illegal that no reasonable tribunal would arrive at it."*

Similarly, in this appeal, we adopt the same and apply it to the grounds of appeal complained of. We start with the 1st ground that faults the Judge for her failure to set aside the arbitrator's award which was improperly procured, the appellant in his written submission argued that it

was improperly procured because there was contradiction in evidence thus, the High Court ought to have exercise its powers judiciously as conferred upon it under section 91 (2) (b) of the Employment and Labour Relation Act, Cap. 366 R.E. 2019 (henceforth "the ELRA") by setting it aside. This ground of appeal invites the Court to re-assess the evidence which the law prohibits. Thus, in terms of the provisions of section 57 of the LIA, the Court has no jurisdiction to determine the first ground. Nevertheless, when determining other grounds of appeal, we shall demonstrate as to whether the High Court judiciously exercised the revisional powers.

Regarding the 3rd and 4th grounds of appeal, reading through them and having gone through the appellant's submission we find that they do not fit squarely within the ambit of section 57 of the LIA because they both call upon the Court to re-assess and weigh the evidence of DW1, DW2 and Exhibit D1. As the complaint is not on misapprehension of the evidence be it by CMA or the High Court, we shall thus not consider them.

We turn to the remaining grounds of appeal that raise points of law which this Court has jurisdiction to determine.

We shall start with the 2nd ground of appeal where the appellant complained that the reasons for his termination were substantially and procedurally unfair. Elaborating on this ground, the appellant submitted that he was terminated on ground of dishonesty/misconduct that; he forged a drawing of new water connection for PW2 by reporting less measurements of the water pipes of 80 metres instead of 220 metres and formed a water connection for a customer, one Augustino Shawshi Manda in Kiranyi Ward which is a restricted area and outside his area of operation. He argued that there was no proof on the allegations as his drawings for PW2 had an estimate of 80 meters. It was his submission that, if there was an addition of 220 meters, it was done by an engineer who went to lay down pipes without following his drawings. In an attempt to fortify his submission, he referred us to the evidence of DW2 who testified that the work of laying down pipes is done by the engineer who is required to follow the drawings prepared by the AUWSA surveyor. He also referred us to the evidence of PW2 who testified that he was told by the casual labourers that the drawing was changed by AUWSA engineers after his neighbour refused wayleave. Regarding connection to Mr. Augustino Shawshi Manda, he submitted that the cost estimates form was approved

by his seniors and connection was done, thus, he did not commit any offence.

It was responded by Mr. Musseti that there were valid reasons for the termination of appellant's employment which were in accordance with section 37 of the ELRA read together with regulations 2.10.7 (iv) (b), (f) and (h) of the Arusha Urban Water Supply and Sewerage Authority Staff Regulations, 2006 (AUWSA Staff Regulations) that provide for the grounds upon which an employee may be summarily dismissed. He contended that the appellant was charged with the offence of gross dishonesty following a recommendation by an investigating committee which on 19th April, 2012 issued its report and recommended for action to be taken against all perpetrators, Exh. D1. He further submitted that the respondent's witnesses whom their evidence was found to be consistent and well supported by both the CMA and the High Court sufficiently proved the charged offences of reporting less measurements to the premises of PW2 and the connection of water services to the restricted area in the premises of Augustino Shawshi Manda. With that submission, he urged the Court to find that the complaint has no merit.

The appellant simply re-joined that the respondent is misleading the facts and reiterated his earlier submission.

After a careful consideration of the written submissions and oral submissions of the parties, we find that the central issue for our determination on this ground is whether there was a valid and sound reason to terminate the appellant's employment. Section 39 of the ELRA requires an employer to prove that the termination of an employee was fair. Termination is considered unfair if the employer fails to prove that: (a) the reason for termination is valid; (b) such reason related to the employee's conduct, capacity or compatibility or based on the operational requirements of the employer is fair; and (c) the employment was terminated in accordance with a fair procedure – see: section 37 (2) (a), (b) and (c) of the ELRA. As to the standard of proof, rule 9 (3) and (5) of the Code of Good Practice requires an employer to prove, on balance of probabilities, that the reason was not only fair but sufficiently serious to justify termination.

It is in common ground that the appellant was charged for contravening regulation 2.10.7 (iv) (b) (f) and (h) of the AUWSA Staff

Regulations which attracts a punishment of summary dismissal. He was also charged with gross dishonesty under rule 12 (3) (a) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007 (henceforth "the Code of Good Practice"). Generally, regulation 2.10.7 (iv) of the Code of Good Practice which the appellant was charged with numerous enumerates grounds upon which a summary dismissal may be effected. For the case of the appellant, the grounds were: - (b) he was involved in illegal dealings with the customers of the Authority, which create conflicts with the Authority, (f) he did an act which is forbidden by the Authority for reason of safety or liabilities to the Authority and (h) he committed acts, which were against the interest of the Authority.

In this appeal, the appellant does not dispute the fact that he prepared the drawing which shows that the distance from PW2's premises to the main pipeline was 80 meters. He further does not dispute that he created a water connection for Mr. Augustino Shawshi Manda. His main defence was that it was the engineers who changed the route for PW2's to be connected with water when they went to dig trenches and lay down pipes and that the application of Mr. Manda was approved by his seniors. With such a defence, the employer had to prove that it was the appellant

and not the engineer who changed the route and made water connection to PW2 and Mr. Augustino Shawshi Manda.

In order to be satisfied as to whether the employer proved the allegations against the appellant, we revisited the record of appeal and noted that the respondent called a total of four witnesses, namely; Happy God Matoi (DW1), a human resources manager; Amza Said (DW2), a water technician; Mr. Eliud Eliapenda Mbesere (DW3), the engineer and Tumaini Kundi (DW4), a casual labour and tendered five exhibits which are investigation report (Exh. D1), charges (Exh. D2 and D3), minutes of the disciplinary committee (Exh. D4) and minutes of the Board of Directors (Exh. D5).

It was the evidence of DW1 that while in office, the appellant received PW2 then he went to survey PW2's area, prepared the drawing which shows the measurement of 80 metres and filled the cost estimates form. However, when, DW3 went to dig the trench and lay down pipes, he was stopped by PW2's neighbour from passing the pipeline over the plot.

DW3 testified that he only placed pipes up to 80 metres and then went to Mr. Hamza Mushi, the immediate supervisor of the appellant to

report that there was 60 metres deficit for the water to be connected. Upon receipt of such report, Mr. Mushi halted the engineer from continuing working on the site so that the issue could be investigated. However, after a week and a half, DW2 found casual labourers continuing with the work of connecting the remaining 140 metres. When asked as to who engaged them, they replied that it was the appellant. DW2 further told the CMA that she investigated the matter and found out that the pipes used to connect the 140 metres were not procured from the respondent and they were below AUWSA's standards. A report of such investigation was admitted in evidence as Exh. D1. Among the findings of the investigation were that there was dishonesty on the drawings made by the surveyor, there was a diverted route measuring 220 metres, and materials used to construct the extra 140 meters on the diverted route were procured outside AUWSA system, and they were sub-standard.

The evidence of DW4 was that he was aware that the respondent prohibited to make new connection in Elikirei-Kinyari area around Arusha-Moshi Road. However, with the instructions from the appellant and having been shown cost estimates form, they went to Kinyari area and made water connection to Mr. Augustino Shawshi Manda. He further told the

CMA that, although the cost estimate form indicated the area to be worked upon was Elerai as approved by the technical manager and planning manager, they went to work in Kiranyi Ward on the instructions of the appellant. The evidence of DW4 is further supported by Exh. D5 where at page 83 of the record of appeal, last paragraph of 6.2 reads:

> *"Tarehe 29/3/2012 aliandaliwa makadirio (cost estimates) yaliyoonesha eneo la Sakina kata ya Elerai na baadaye ikaidhinishwa na viongozi husika na taratibu zinavyotaka."*

Literally translating that:

> *"On 29th March, 2012 the cost estimates for Sakina area in Elerai Ward was prepared and approved by responsible people and thereafter other procedures followed."*

From that clear evidence coming from DW1, DW2, DW3, DW4 and Exh. D5, we are satisfied, just like the CMA and the High Court, pursuant to regulation 2.10.7 (iv)(b) (f) and (h) of the AUWSA Staff Regulations, there were valid reasons warranting punishment of summary dismissal as

the appellant's acts were against the interest of the respondent, being the Authority mandated to supply water in the vicinity.

With respect, we find that the evidence of DW2 supported the respondent's case because it was the case of the respondent that engineers of AUWSA are responsible in laying down pipes but the appellant sourced his own casual labourers like DW4 and instructed them to lay down pipes which is contrary to his line of duty. As for the evidence of PW2, we revisited his evidence and we entirely agree with the observation of the CMA that when this witness was cross-examined, he said he was not at the site, and he was not sure as to whether the casual labourers were sent by AUWSA. We therefore find that this complaint concerning unfair reasons is unfounded. We dismiss it.

Having found that there were valid reasons, let us examine whether the procedure was fair in terminating the appellant's employment. The appellant's submission on this issue was on three-fold: **one**, the charge regarding connection to Mr. Augustino Shawshi Manda was preferred contrary to rule 13 (1) of the Code of Good Practice as it was made without first conducting an investigation. **Two**, the respondent was a judge of his

own case because it was the Managing Director who appointed members of the investigating team and at the same time, he chaired the Disciplinary Committee meeting which fired him. **Three**, the recommendation from the Management to the Board of Directors was made in contravention of rule 48 (1) (3) of the Public Service Regulations, G.N. 168 of 2003 as it was forwarded with the form and nature of punishment to be imposed on the appellant.

In reply, Mr. Musseti prefaced his submission by arguing that the respondent substantially complied with all the procedures save to the fact that the appellant was not supplied and caused to sign the minutes of the disciplinary hearing. He contended that, prior to the charge being preferred to the appellant, an investigation was conducted (Exh. D1). After the investigation, the appellant was formally charged (Exh. D2 and D3) and the same was served upon the appellant for him to respond which he did. After receipt of his response, the disciplinary committee chaired by the Managing Director conducted an inquiry and this was done in accordance with regulations 7.2.1.3 and 7.22 of AUWSA Staff Regulations, that, the record of proceedings and the report of the disciplinary committee was forwarded to the disciplinary authority which for the case of the appellant was the

Board of Directors as per the provisions of regulations 7.2.1.1 and 7.2.2.2 of AUWSA Staff Regulations. Mr. Musseti further submitted that at the disciplinary committee and the Board of Directors, the appellant was given a right to be heard since he was present, cross-examined witnesses and defended himself. He argued that the failure to serve and cause the appellant to sign the minutes of the disciplinary committee cannot invalidate the entire process. He thus urged the Court to dismiss the ground of appeal.

The appellant re-joined that rule 13 (1) and (4) of the Code of Good Practice was not complied with in that no investigation was done in respect of the charge that he formed a new water connection in a restricted area and that the Managing Director who constituted the investigation team also chaired the hearing in the disciplinary committee.

From the parties' submissions, both oral and written, we gather that the appellant's complaint on procedure is on three aspects. **First**, he complained that the charge concerning the formation of a new water connection preferred against him was made without conducting an

investigation. He submitted that was in contravention to rule 13 (1) of the Code of Good Practice which provides that:

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

Luckily, the above rule was lucidly considered 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. In that appeal, the appellants were dismissed from their employment without being formally charged. Thus, when deliberating as to whether the procedure regulating lawful termination was followed, the Court having cited in full rule 13 of the Code of Good Practice stated:

> *"In terms of sub-rule (1) what entails an investigation to ascertain whether there are grounds of the hearing includes as well, exhausting the prescribed internal measures in the Employment Institution regulating the operational aspects which are binding on both the employees and the employer."*

Yet, in the Republic of South Africa in the case of **Avril Elizabeth Home for the Mentally Handicapped v CCMA** [2006] ZALC 44 sourced

from https://www.saflii.org/za/cases/ZALC/2006/44.html when deliberating on the compliance of the procedure for fair termination as provided in the Labour Relations Act, 1995 under item 4 of schedule 8 on Code of Good Practice: Dismissal, the Labour Court echoed that item 4, which is almost similar to rule 13 of the Code of Good Practice, requires employers to afford employees a fair chance of hearing before a decision is taken and nothing more. It said:

> *"This conception of the right to a hearing prior to dismissal ... is reflected in the Code. When the Code refers to an opportunity that must be given by the employer to the employee to state a case in response to any allegations made against that employee, which need not be a formal enquiry, it means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss. In the absence of exceptional circumstances, the substantive content of this process as defined by Item 4 of the Code requires the conducting of an investigation, notification to the employee of any allegations that may flow from that investigation, and an opportunity, within a reasonable time, to prepare a response to the employer's allegations with the assistance of a trade union*

representative or fellow employee. The employer should then communicate the decision taken, and preferably communicate this in writing."

It follows then that an investigation prior to a hearing is variable. The process of investigation depends on each institutional internal mechanisms but central to that is that an employee should be afforded an opportunity to be heard prior dismissal. In the present appeal, we note that on 19th April, 2012, an investigation was conducted. The reason for such kind of investigation is clearly reflected in the first paragraph of Exh. D1 that reads:

"Uchunguzi huu umetokana na agizo la Mkurugenzi Mtendaji baada ya kusikia kuwa kuna vifaa ambayo havina ubora katika kuwaunganishia wateja maji."

The above literally translates that:

"The present investigation is conducted following the Managing Director's order after he had received complaints concerning sub-standard materials used in connecting water to customers."

It is in record that after the investigation, on 24th April, 2012, the appellant was charged with forging a drawing by reporting less measurement of 80 metres instead of 220 metres, diverting a route in order to connect water to the premises of PW2 and for sourcing and using sub-standard materials. Again, on 30th May, 2012, the appellant was charged with forming a new water connection in a restricted area. Therefore, given the stated aim of conducting investigation and going by the sequency of events, we are satisfied that he was formally charged after investigation. We find that the appellant's complaint has no merit. We dismiss it.

The second argument by the appellant on the procedure is that, the Managing Director was the judge of his own cause. It is pertinent to point out here that this is also the appellant's fifth ground of appeal. With respect, we do not find substance in this complaint. Although we agree with the appellant that the Managing Director chaired the disciplinary hearing, he chaired the same in accordance with the institutional internal procedures as provided under regulations 7.2.1.3 and 7.22.3 of AUWSA Staff Regulations that the disciplinary committee shall comprise of the Managing Director as chair, Managers, the head of department/section

under whom the accused employee works and three members of staff selected by the Managing Director. Besides, as rightly submitted by Mr. Musseti, it was the Board of Directors that dismissed the appellant from his employment and not the Managing Director. Thus, we hold that this complaint and the fifth ground of appeal are baseless and we dismiss them.

Lastly on the procedure, the appellant complained that the recommendation to the Board of Directors contravened rule 48 (1) and (3) of the Public Service Regulations. This should not take much of our time because the law cited by the appellant is not applicable to the respondent. The appellant is much aware that the respondent has in place its own regulations, that is, AUWSA Staff Regulations. As the appellant's complaint is not pegged on AUWSA Staff Regulations, we are satisfied that the complaint is misconceived. We, as well, dismiss it.

In the end, we find that the appellant's termination of employment was substantially and procedurally fair. Accordingly, we dismiss the second and fifth grounds of appeal.

Lastly, the sixth ground of appeal on the severity of punishment. The appellant submitted that for the past 13 years, he had a good record until when he was charged with dishonesty. He therefore argued that the respondent ought to have exercised lenience. Mr. Musseti briefly replied that given the nature of the offence which the appellant was charged with, the punishment imposed was in accordance with regulation 7. 10.7 (iv) (b) (f) and (h) of the AUWSA Staff Regulations and rule 12 (3) (a) of the Code of Good Practice.

The central issue on this ground is whether the punishment was severe. We have earlier on stated that the appellant was charged for contravening regulation 2.10.7 (iv) of AUWSA Staff Regulations and rule 12 of 2007 (3) (a) and (f) of the Code of Good Practice. These provisions of the laws require the respondent to terminate the employment of the appellant after being satisfied that the appellant has committed the charged offences. Generally, these provisions of the law do not provide for the alternative punishments such as a warning. They call for summary dismissal. In that respect, in the eyes of law, dishonesty is a misconduct which is a serious disciplinary offence which attracts termination. For that reason, having found that the appellant's employment was substantially

and procedurally fair, we are satisfied that the punishment imposed on the appellant by the respondent was justified. Accordingly, we find that the sixth ground is devoid of merit.

From what we have endeavoured to discuss we find that the High Court judiciously exercised its revisional powers. We thus, find the appeal is devoid of merit, accordingly, dismiss it. We make no order as to costs because the appeal arose from a labour dispute.

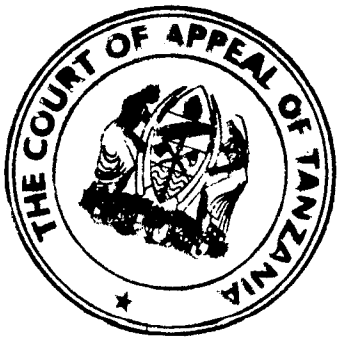
DATED at **ARUSHA** this 21st day of February, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

This Judgment delivered this 21st day of February, 2022 in the presence of Appellant in person unrepresented and Mr. Mukama Musalama, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL