IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MZIRAY, J.A., MWAMBEGELE, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 29 OF 2018

NATIONAL MICROFINANCE BANK .....APPELLANT

VERSUS

VICTOR MODEST BANDA.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania Labour Division, at Tanga)

(Mipawa, J)

dated the 16th day of June, 2017
in
Revision No. 16 of 2015

JUDGMENT OF THE COURT

17th & 26th February, 2020.

KEREFU, J.A.:

In April, 2013, the respondent, Victor Modest Banda who was the former employee of the appellant at the position of Bank Teller lodged an employment dispute against the appellant, his employer before the Commission for Mediation and Arbitration (the CMA), alleging unfair termination from his employment. The CMA determined the matter and ruled in favour of the respondent by ordering the appellant to reinstate him **OR** in the alternative, pay him compensation at the tune of Tshs.

24,000,000/=. Aggrieved, the appellant unsuccessfully applied for revision of that CMA's decision before the High Court of Tanzania, Labour Division at Tanga (Mipawa, J.) in Revision No. 16 of 2015. The High Court varied the decision of the CMA by ordering the appellant to reinstate the respondent **AND** pay him compensation of twelve (12) months' salaries. Believing that the two courts below were wrong in issuing those orders, the appellant has appealed to this Court on the following three grounds:-

1. *The High Court, (Labour Division) erred in law by taking consideration of matters that were not in dispute for determination;*
2. *The High Court, (Labour Division) erred in law for improper interpretation of Rule 12 (with all subsections thereto) of the Code of Good Practice GN No. 42 of 2007; and*
3. *The High Court, (Labour Division) erred in law by holding that the respondent should be reinstated and be paid compensation instead of one option of reliefs under section 40(1) of the Employment and Labour Relation Act, Cap. 336.*

Before dealing with the merits of the appeal, we find it necessary to set out the facts of the case as obtained from the record of appeal. That, on 28th December, 2010 the respondent was employed by the appellant at

the position of a Bank Teller at one of the appellant's branch located in Tanga Region styled *'NMB Mkwakwani'* until 16th February, 2013 when his employment was terminated. The reason for the termination was gross negligence by suppression of deposits in the customer's account. It was alleged that the respondent failed to deposit an amount of Tshs. 150,000/ in the client's account No. 42301100006 belonging to the Tanzania Revenue Authority (TRA) and instead he deposited Tshs. 10,000/ only. The mistake was revealed by the client when making reconciliation. The matter was reported to the branch manager, who demanded the respondent to refund the suppressed amount at his own costs, which he did and confessed that what happened was only a human error which was done unintentionally and without any ill motive. However, he was later charged and brought before the appellant's disciplinary committee, where his employment was terminated. Being unhappy with the action taken against him, the respondent instituted a labour dispute as indicated above.

When the appeal was placed before us for hearing, both parties were represented. Mr. Pascal Kamala, learned counsel entered appearance for the appellant, whereas Mr. Switbert Rwegasira assisted by Mr. Mathias Nkingwa, both learned counsel represented the respondent. The said

learned counsel had earlier on lodged their respective written submissions and reply written submissions in support of and in opposition to the appeal in compliance with Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 (the Rules) as amended by GN No. 344 of 2019 which they sought to adopt at the hearing to form part of their oral submissions.

Submitting on the first ground of appeal, Mr Kamala faulted the learned High Court Judge for introducing the issue of '*application of sanction consistently' suo motu* without according opportunity to the parties to address the court on that issue. He argued that, such an issue was not in dispute before the CMA. According to Mr. Kamala, such an issue could have only arisen if there were employees charged for disciplinary offences on the same cause, whereas others were terminated and others left on employment, which he said, is not the issue in this matter.

As regards the second ground of appeal, Mr. Kamala challenged the interpretation given by the learned Judge on Rule 12 of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007 (the Code of Good Practice) that it was not correct. He specifically referred us to Rule 12 (4) and argued that, while interpreting that provision the learned Judge failed to appreciate the nature of the appellant's business which is

very sensitive industry requiring high degree of trust, honesty, integrity and confidence. He said, the learned Judge was required to note that, since the respondent was working in that sensitive industry any element of dishonesty could not have been tolerated. Amplifying further on that issue, Mr. Kamala argued further that, under the Code of Good Practice gross misconduct are among listed offences leading to the termination of an employee. He said, since the respondent was guilty of gross misconduct, which he admitted, it was not proper for the learned Judge to find that his termination was unfair. To buttress his position he referred us to various decisions of the High Court and from foreign jurisdiction which are not binding to this Court. To that extent, he urged us to find that, since the respondent had breached his Employment Contract, Code of Conduct and the appellant's Human Resource Policy, his termination was fairly done.

Submitting on the third ground of appeal, Mr. Kamala cited section 40 (1) of the Employment and Labour Relations Act, Cap. 336, Act No. 6 of 2004 (the ELRA) and argued that the reliefs awarded by the learned Judge are contrary to the spirit of that provision. He clarified that, among and between the sub sections (a), (b) and (c) of section 40 (1) the phrase used is ***'OR'*** which means an option between or among the available reliefs. He

referred us to section 13 of the Interpretation of Laws Act, Cap 1 R.E 2002 (the Interpretation Act) and argued that the said section provide proper guidance on the applicability of the word **'OR'**. He thus insisted that, it was not proper for the learned Judge to award the two reliefs; *'reinstatement'* ***AND*** *'compensation'* to the respondent, conjunctively. He further faulted the learned Judge to rely on authorities from other jurisdiction, while the Interpretation Act is express and clear on that aspect.

Arguing on the executability of the order of reinstatement of the respondent, Mr. Kamala submitted that, for purposes of promoting economic development and social justice, the ELRA has set a time limit of thirty (30) days for the determination of a labour dispute from the date of its institution. He said, in the current case, the respondent was terminated on February 2013 and the decision to reinstate him was made in 2017, after a span of almost more than three (3) years. He thus argued that, given the span of time, it was obvious that the order for reinstatement was inappropriate in the circumstances, as the vacancy at the appellant`s office could have not been left open for all those years. As such, Mr. Kamala prayed the Court to find that, it was improper for the learned Judge to order for the reinstatement of the respondent in the circumstances. In

conclusion and on the strength of his arguments, Mr. Kamala urged us to allow the appeal, reverse the decisions of both, the Labour Court and the CMA with costs.

In response, Mr. Rwegasira resisted the appeal. Disputing what was submitted by Mr. Kamala on the first ground of appeal, Mr. Rwegasira argued that the issue of '*application of sanction consistently*' was not a new issue as claimed by Mr. Kamala, but one of the issues within the ground of fairness of reasons for termination determined by the CMA. To support his assertion he cited Rule 12 (1) (b) (iv) of the Code of Good Practice and argued that, the provision requires the employer, upon termination of any employee, to prove that the sanction imposed was fair and applied consistently to all employees found with similar mistakes. He said, in the case at hand the appellant has completely failed to execute that duty.

Regarding the second ground of appeal, Mr. Rwegasira, though conceded that the appellant's industry is sophisticated and requires high degree of trust, honesty and integrity, but he challenged the appellant for failure to prove willfulness aspect or even previous misconduct, warnings or long record of infringements by the respondent before the CMA. To support his assertion he referred us to pages 19, 29 and 31 of the record

of appeal. Mr. Rwegasira submitted further that, though the appellant claimed that the respondent was guilty of gross misconduct and dishonest and that the same could not be tolerated but Prudence Bimily the fraud officer at the appellant's office who testified as DW1 admitted that the mistakes done by the respondent are normal in the banking business and were previously committed by other employees. However the appellant did not prove that he took the same action of termination against those other employee. As such, Mr. Rwegasira argued that it was correct for the CMA and the High Court to find that the appellant subjected the respondent into disciplinary hearing and termination discriminatively, as only a warning could have been enough in the circumstances. Therefore, Mr. Rwegasira challenged all cases cited by Mr. Kamala by arguing that they are distinguishable and not binding to this Court.

In respect of the third ground of appeal, Mr. Rwegasira argued that the Labour Court correctly interpreted section 40 (1) of the ELRA. He cited section 40 (2) and (3) of the ELRA and argued that, in terms of those sections compensation is given in addition to what the employee is entitled in other laws or agreement. He also challenged the appellant for relying on the decision in **Michael Kirobe Mwita v. AAA Drilling Manager** (2014)

II LLCD 2016 as he said it was decided *per incurium*. He finally prayed for the entire appeal to be dismissed for lack of merits.

In a brief rejoinder, Mr. Kamala reiterated what he submitted earlier and prayed for the appeal to be allowed.

Having carefully considered the parties' written and oral submissions together with the grounds of appeal in the light of the record of appeal, we should now be in a position to confront the grounds of appeal in the same manner as presented to us by the counsel for the parties.

Starting with the first ground, we do not think that this ground need to detain us much as we find the claim by Mr. Kamala not to be supported by the record of appeal. We shall demonstrate. At page 153 of the record of appeal, the issues framed by the CMA to determine the dispute between the parties were:-

1. *Whether there was reason for terminating employment of complainant and its legality;*
2. *Whether such termination followed fair procedures; and*
3. *Reliefs sought by each party.*

From the above extracted framed issues, it is clear that the dispute between the parties centered on the issue *whether the termination of the respondent's employment was unfair.* It is therefore obvious that, the CMA and the High Court could not have managed to solve the first and second issues above without determining as to whether the sanction of termination imposed against the respondent was fair in terms of the Code of Good Practice. To justify our observation we have closely scrutinized the entire record and noted that the said issue is featuring in (i) the CMA Form No. 1 used by the respondent to institute the dispute found at pages 288 to 296, (ii) the CMA proceedings (pages 155 to 198), (iii) the appellant's closing submissions before the CMA (pages 199 to 206) and (iv) the CMA Judgement and the CMA award (pages 95 to 120). We are therefore in agreement with Mr. Rwegasira that the claim by Mr. Kamala that the said issue was new is unfounded. We equally find no merit in the first ground of appeal.

As for the second ground of appeal, we have noted that Mr. Kamala is faulting the learned Judge for giving an improper interpretation of Rule 12 of the Code of Good Practice. In principle the said Rule, among others

provides guidance on how an allegation on unfair termination could be handled. The said Rule provides that:-

12 (1) Any employer, arbitrator or judge who is required to decide as to termination for misconduct is unfair shall consider:-

(a) Whether or not the employee contravened a rule or standard regulating conduct relating to employment;

(b) If the rule or standard was contravened whether or not:-

(i) It is reasonable;

(ii) It is clear and unambiguous;

(iii) The employee was aware of it, or could reasonably be expected to have been aware of it;

(iv) It has been consistently applied by the employer; and

(v) Termination is an appropriate sanction for contravening it.

(2) First offence of an employee shall not justify termination unless it is proved that the misconduct is so serious that it makes a continued employment relationship intolerable;

(3) The acts which may justify termination are:-

(a) Gross dishonesty;

(b) Willful damage to property;

(c) Willful endangering the safety of others;

(d) Gross negligence

(e) Assault on a co –employee, supplier, customer or a member of the family of, any person associated with the employer; and

(4) In determining whether or not the termination is the appropriate sanction, the employer should consider –

(a) The seriousness of the misconduct in the light of the nature of the job and the circumstances in which it occurred, health and safety, and the likelihood of repetition; or

(b) The circumstances of the employee such as the employee's employment record, length of service, previous disciplinary record and personal circumstances.

(5) The employer shall apply the sanction of termination consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who commit same misconduct.

Our reading of all the above sub-sections in Rule 12 in relation to the interpretation given by the learned Judge at pages 19 – 24 of the record of appeal leaves us with no doubt that the learned Judge correctly interpreted the above Rule and applied the same properly in the circumstances of this matter. As we have intimated above, the main controversy between the parties was on unfair termination of the respondent's employment. In determining that issue, the learned Judge examined the circumstances of the case against the guidance provided under the above Rule. (See the Labour Court's judgement from pages 19 – 24 of the record of appeal).

It is common ground that the appellant under Rule 12 (1) (iv) (v) (2) (3) (4) and (5) of the Code of Good Practice was required, among others to prove, **one**, whether the mistakes done by the respondent amounted to serious misconduct, **two,** whether the disciplinary procedures were complied with and **three,** whether the sanction imposed against the respondent has been consistently applied to other employees who committed the same mistakes.

In addition, under section 39 of the ELRA, the employer owes a burden of proof on whether the termination of the respondent's employment was fairly done. The said section provides that:-*"In any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair."* See also our decision in **Elia Kasalile and 20 Others v. The Institute of Social Work,** Civil Appeal No. 145 of 2016 (unreported) at page 29 where the issue of unfair termination was also discussed.

It is on record and as eloquently argued by Mr. Rwegasira that, in the case at hand, the appellant has completely failed to prove the above issues. We have scrutinized the evidence adduced by the parties before the CMA and observed that, the appellant summoned two witnesses namely, Prudence

Bimily, the fraud officer (DW1) and Tumaini Dincon, the HR Coordinator (DW2). DW1 at pages 158 -159 testified to the effect that the mistakes done by the respondent are normal mistakes in the banking industry and were previously committed by other employees and the same disciplinary measure was not applied. In addition, DW2 at pages 185 – 187 testified that the disciplinary committee which heard and determined the respondent's case is not recognized in the appellant's disciplinary policy or the Human Resource Policy that the appellant's disciplinary procedures were not complied with. It is also on record that the appellant has as well failed to prove previous disciplinary conducts on the part of the respondent. After considering all evidence adduced and tendered by the appellant before the CMA the learned Judge correctly observed at page 31 of the record of appeal that:-

> *"There were no aggravating factors on part of the respondent and* ***the employer did not adduce evidence to prove on balance of probabilities that there was willfulness on the part of the respondent, lack of remorse, previous warnings or long record of infringements****...Terminating the employment of the respondent in the circumstances...was too harsh and severe penalty, a warning to the respondent could have been fair to*

both sides. It was therefore ***unfair for the employer to terminate the respondent...he had no valid reasons,*** *so to speak". [Emphasis added].*

In the circumstances, we are satisfied that the interpretation of Rule 12 of the Code of Good Practice given by the learned Judge is correct and cannot be faulted. We are in agreement with both, the CMA and the High Court findings that the respondent's termination was vitiated as the procedure was not followed and the appellant had since failed to prove his allegations. As such, we also find the second ground of appeal to have no merit.

In relation to the third ground of appeal the main complaint is that the two reliefs of *'reinstatement'* ***AND*** *'compensation'* awarded by the High Court goes contrary to the spirit of section 40 (1) of the ELRA. Mr. Kamala cited section 13 of the Interpretation Act and argued that the law requires the said reliefs to be awarded disjunctively and not conjunctively. Mr. Rwegasira supported the award given and argued that section 40 (1) of the ELR Act was properly interpreted. He also cited sections 40 (2) and (3) of the same Act and argued that, in terms of those sections compensation

is given in addition to what the employee is entitled in other laws or agreement.

We wish to note that the process of awarding the said reliefs is governed by Section 40 (1) of the ELRA which provides that:-

> *"If an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer-*
>
> *(a) To reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination;* ***OR***
>
> *(b) To re-engage the employee on any terms that the arbitrator or Court may decide;* ***OR***
>
> *(c) To pay compensation to the employee of not less than twelve months' remuneration." [Emphasis supplied].*

It is clear that the word used in the above sub-sections is **'OR'** and pursuant to section 13 of the Interpretation Act cited to us by Mr. Kamala the use of that word means 'disjunctively.' For the sake of clarity section 13 provides that:-

> *"In relation to a written law passed or made after the commencement of this Act, but subject to section 2 (4), "**or**", other, and otherwise shall be construed disjunctively and not as implying similarity unless the word similar or some other word of like meaning is added."*

It is on record that in awarding the said reliefs the learned Judge awarded them conjunctively i.e *'reinstatement **AND** compensation'* (See the decision of the High Court found at page 39 of the record of appeal). It is our considered opinion that this is contrary to the dictates of section 40 (1) of the ELRA. It is a cardinal principle of statutory interpretation that words used in the section must be given their ordinary grammatical meaning. See **Katani A. Katani v. The Returning Officer, Tandahimba District and 2 Others,** Civil Appeal No. 115 of 2011 (Unreported). Since, it is clear that the word used under section 40 (1) (a) (b) and (c) is **"OR"** then it was improper for the learned Judge to award the two reliefs conjunctively. It is also important to note that the compensation envisaged under section 40 (1) (c) is qualified and explained in section 40(2) of the same Act that, *"An order for compensation made under this section shall be in addition to, and not a substitute for, any*

other amount to which the employee may be entitled in terms of any law or agreement." This means that the order of compensation made under section 40 (1) (c) shall not be in substitution of any other entitlements which are available to an employee who is terminated and may be entitled in terms of any law or agreement.

We have as well observed that the learned Judge arrived at that conclusion by citing the decision of the High Court in **Michael Kirobe Mwita** (supra) which relied on the decision of the Labour Court of South Africa in **Almalgated Beverage Industries (Pty) v. Jacker** [1993] 14 ILJ 12 33 (LAC). In our considered opinion, it was not proper for the learned Judge to import and rely on authorities from other jurisdictions, while the law of Interpretation Act is expressly, elaborate and clear on that aspect. We are thus in agreement with Mr. Kamala on this point.

It is therefore our considered view that the learned Judge misconstrued section 40 (1) of the ELRA and we find the authorities he cited and relied upon to be inapplicable in the circumstances of this case. We thus find the third ground of appeal to have merit.

In the final analysis, we allow the appeal to the extent explained above. We accordingly quash and set aside the decision of the High Court

and uphold the decision of the CMA pronounced on 8th July 2014. Since this is a labour matter we make no order as to costs.

DATED at **TANGA** this 24th day of February, 2020.

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 26th day of February, 2020 in the presence of Mr. Waherema Kibaha, learned counsel holding brief for Mr. Pascal Kamala, learned counsel for the Appellant and Mr. Erick N. Ndwella, learned counsel holding brief for Mr. Sweertbert Rwegasira and Mr. Mathias Nkingwa both learned counsel for the Respondent is hereby certified as a true copy of the original.

H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL