

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: KWARIKO, J.A., LEVIRA, J.A. And NGWEMBE, J.A.)

CIVIL APPEAL NO. 487 OF 2020

NMB BANK PLC APPELLANT

VERSUS

NICKSON LIVINGSTONE TEMU RESPONDENT

**(Appeal from the judgment and decree of the High Court of Tanzania
at Mwanza)**

(Madeha, J.)

dated the 27th day of February, 2020

in

Labour Revision No. 71 of 2019

.....

JUDGMENT OF THE COURT

7th & 14th February, 2024

LEVIRA, J.A.:

The appellant and the respondent had employer/employee relationship from April, 2008 up to July, 2018 when the appellant who had employed the respondent terminated him from employment on allegations of gross misconduct and negligence. Being dissatisfied with the termination, the respondent referred his complaint to the Commission for Mediation and Arbitration (the CMA) which was registered as Employment Dispute No. CMA/M/ILEM/612-154/2018. However, things did not work in

his favour as the CMA in its award found that his termination from the employment by the appellant was both, substantively and procedurally fair. As a result, it dismissed the dispute for lacking in merit. Aggrieved, the respondent preferred Labour Revision No. 71 of 2019 before the High Court of Tanzania at Mwanza (subject of the present appeal) with intention to challenge the CMA award.

It is on record that, initially, the respondent was employed by the appellant as a Bank Teller. Later, he was promoted and became a Relationship Officer with a responsibility of processing loans among other responsibilities. In the course of executing his duties, it was alleged, he unprocedurally advanced unserviced loans to clients who were not eligible and caused loss to his employer. As a result, he was suspended from employment, investigation was conducted, disciplinary actions were taken against him and ultimately, he was terminated from employment as alluded to above. The respondent presented his matter before the CMA unsuccessfully and his Revision before the High Court ended up nullifying the proceedings and award of the CMA with an order for trial *de novo*.

We further observe from the record of appeal that the High Court Judge examined the CMA record and made a finding that, the award which was delivered in favour of the appellant by the CMA contained extraneous

matters which if left to exist, may cause confusion. She thus nullified the proceedings and the said award. Subsequently, she ordered trial *de novo* and did not see the need to deal with other grounds of Revision presented before her. The appellant was not happy with the decision of the High Court on Revision, hence, the present appeal. The following are the grounds of appeal:

- 1. That, the Judge erred in law and fact by ordering trial de novo while on the other hand agrees that the error is only reflected in the award.*
- 2. That, the Judge erred in law and fact by nullifying both the proceedings and the decision of the Commission for Mediation and Arbitration (CMA) while the error was only in the decision of the CMA.*
- 3. That, the Judge erred in law and fact for failure to exercise jurisdiction to enter judgment and decree based on the evidence available on record.*

At the hearing of the appeal, the appellant was represented by Mr. Sabas Shayo, learned advocate, whereas the respondent appeared in person, unrepresented.

Mr. Shayo adopted the appellant's written submissions as part of his oral submission before the Court with no more. While responding to the question by the Court regarding what would be a way forward should the

Court finds that the appeal is meritorious, Mr. Shayo started by acknowledging presence of extraneous matters in the CMA award. Despite that fact, he argued that, since the said matters did not form the basis of the CMA decision as found by the High Court, it was wrong for the Judge to nullify both, the proceedings and award and order trial *de novo*. According to him, the High Court ought to have determined other grounds of Revision raised before it. He thus urged us that, if we find the appeal meritorious, we should nullify the decision of the High Court and remit the matter back to the High Court for it to determine the Revision on merit.

In reply, the respondent adopted his written submissions as part of his oral account and stated further that, the decision of the High Court was correct. He lamented that this matter has taken so long, about six years now. Finally, he prayed for justice to be done so that he may be reinstated to work. Mr. Shayo had no rejoinder to make.

We have carefully considered the submissions by the parties, grounds of appeal and the entire record of appeal. We wish to note at the outset that there is no dispute between the parties that, the High Court Judge was right to make a finding that the CMA award contained extraneous matters when she held at page 282 of the record of appeal as follows:

*"Concerning the second point about the **drill rods which the arbitrator said to have been stolen by the applicant**, it is true that the reasons for termination were stated to be failure to comply with the employer's terms and conditions for the employment by the applicant".*

From the excerpt above, it is clear that, the issue of theft of drill rods was not among the grounds for respondent's termination from the employment though featured in the CMA award. For better understanding of what was stated by the CMA, we find it apposite to quote the relevant part of the CMA award at page 232 of the record of appeal hereunder:

*"DW2 states that the complainant work is governed by NMB Product Manual and when a new employee is employed by the respondent is accorded with code of conduct, staff rules and human resource policy manual code of conduct where he tendered EXHD1 and D2. Mr. Joel witnessed that **the complainant did not follow the procedures in issuing loan and collateral** this was recognized after investigation which involves two accounts.... Mr. Joel stated that **the complainant issued loan unprocedurally to two beneficiaries....**"*

[Emphasis added].

Unexpectedly, at page 235 of the record of appeal, the Arbitrator went on to state as follows:

*"In this case **the main reasons for complainant termination were attempt to steal 5 drlli rods, dishonest and unsafe transport procedure....** I have passed through the complainant evidence, it seems that the complainant tried to shift liability to Branch Manager simply because he was the one who approves the loans which lead to this matter. I have passed parties' submissions it shows that approval of loan by Branch Manager is the last process simply because before he approves, he must rely on the information given by relationship officer."*

[Emphasis added].

It does not take an extra effort to note from the above excerpts that, the Arbitrator included matters which were not part of the dispute between the parties. However, the dispute between the parties in this appeal centers on how the High Court Judge treated that finding. While the counsel for the appellant argued that the proper course was for the Judge to nullify the award and remit back the case file to the CMA for the Arbitrator to compose a proper award, the respondent was firm that the

Judge was correct to nullify both the proceedings and the award and order trial *de novo*.

The issue as to whether the High Court was correct to make such an order cannot be properly answered unless we consider the impact of the same on the rights of the parties. The record of appeal is very clear on the reasons which led the High Court Judge to arrive at that decision. At page 282 of the record of appeal, having considered the argument by the counsel for the appellant that inclusion of those matters in the award did not form the basis of the decision of the CMA, the Judge had this to say:

*"The argument that it did not form part of the award doesn't hold water, **what the respondent ought to have said is how and where did it come from** to the award which the allegation is about unprocedural award of loan? ... I am of the opinion that the inclusion of non-existing subject matter in the award **which even if is not relied upon but can cause confusion**, has an impact to the award and the same cannot be looked down at since it is incurable error".*

[Emphasis added]

We have thoroughly gone through the record of appeal to satisfy ourselves as to whether the inclusion of those new matters in the award occasioned miscarriage of justice. Just as it was argued by the appellant and confirmed by the High Court Judge, that part of the award stating that *"the main reasons for complainant termination were attempt to steal 5 drill rods, dishonest and unsafe transport procedure"* appeared once in the whole record of appeal. It was only in the award as quoted above and it did not form the basis of the award. At any stretch of imagination, such a statement could not form part of the award without parties being accorded an opportunity to be heard on the issue of stolen drill rods. Besides, we do not find that there was miscarriage of justice as no party's right was affected by mere presence of such statement in the award. Yet, we agree with the parties and the High Court Judge that it was wrong for the arbitrator to include extraneous matters in the award.

Back to the impugned decision, we need to consider the effect of the acknowledgment by the High Court Judge that those matters were not relied upon by the CMA in its award and whether the High Court was justified to nullify the proceedings and the award and ultimately order trial *de novo*. In our considered opinion, since the High Court ruled out that those extraneous matters were wrongly included in the award, it means the said information is not part of the record. We are unable to go along

with the reasoning of the High Court Judge that, the confusion which might be caused could affect the award. Increasingly, we hold the view that having ruled out that those extraneous matters did not form the base of the decision (award), the High Court Judge ought to have proceeded to determine other grounds of Revision, but that was not the case.

We do not find any justification on the part of the High Court Judge in nullifying both the proceedings and award of the CMA in the circumstances of this matter. In fact, it was a misdirection on the part of the High Court Judge to do so. We say so because, **first**, before her there was no any complaint regarding the CMA proceedings; **second**, being a higher court, having ruled out that those matters did not form part of the decision, there was no room for her to nullify the award basing on matters out of the record. **Third**, the trial was not illegal and thus there was no need to order for trial *de novo* – see: **Fatehali Manji v. R** [1966] EACA 343; **Shabani Madebe v. Republic**, Criminal Appeal No. 72 of 2002 and **Elia John v. Republic**, Criminal Appeal No. 306 of 2016 (both unreported). Otherwise, ordering it under the circumstances may amount into unwarranted prolonged litigation.

Having so stated, we allow the appeal, nullify the proceedings and decision of the High Court. We restore the proceedings and award of the

CMA. We remit back the record of appeal to the High Court to determine Revision No. 71 of 2019 on the remaining grounds in accordance with the law before another Judge.

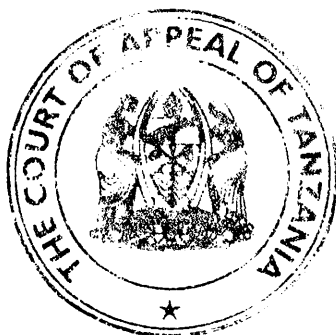
DATED at **MWANZA** this 13th day of February, 2024.

M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. J. NGWEMBE
JUSTICE OF APPEAL

Judgment delivered this 14th day of February, 2024 in the presence of the Respondent in person, and in absence of the Appellant, is hereby certified as a true copy of the original.




C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL