

IN THE HIGH COURT OF TANZANIA

AT MWANZA

LABOUR REVISION NO.71 OF 2019

(Arising from the Award of Mwanza CMA/MZ/ILEM/612-154/2018 dated 21/6/2019)

NICKSON LIVINGSTONE TEMU.....APPLICANT

VERSUS

NMB BANK PLC.....RESPONDENT

JUDGEMENT

21.11.2019 & 27.2.2020

U.E. MADEHA, J.

This application is made under Rules 24 (1) (2) (a) (b) (c) (d) (e) (f) and 24 (3) (a) (b) (c) (d) and 28 (1) (c) of the Labour Courts Rules G.N 106/2007 and section 91 (1) (a) (b) (2) (a) and 94 (1) (b) (i) of the employment and Labour Relation Act No. 6 of 2002. The revision is sought before this court by the Applicant who is aggrieved by the award of the Commission for Mediation and Arbitration of Mwanza delivered on the 21st of June, 2019.

Brief facts of this case are, the applicant was employed by the NMB bank way back in the year 2008 as operation officer of the bank and was stationed at Buzuruga branch. Applicant was later transferred to Biharamulo District in the same capacity. It was later revealed by the Bank

that the applicant was un procedurally engaged and awarded the loan to un illegible persons namely Elizabeth Basili and Kelvin Kinyoka Mantokali. This was by awarding the loan to the persons while aware that they are not the lawful owners of the purported properties presented as collateral.

Upon such revelation while in Biharamulo the respondent charged the applicant who was issued with a charge sheet and later summoned to appear before disciplinary committee whereas he was found guilty and suspended from his duties pending appeal which applicant preferred before Appellate committee, appeal failed and committee upheld the findings of the disciplinary committee and subsequently his termination from the employment was effected.

The applicant unsuccessfully challenged the termination of his employment in the Commission for Mediation and Arbitration at Mwanza under dispute No. CMA/MZ/ILEM/612-154/2018 hence challenged the said award by seeking revision before this court on the grounds stated in the notice of application. When this case came for hearing applicant appeared in person whereas the respondent was represented by Mr. Pascal Kamara learned advocate. The applicant submitted that the arbitrator recorded in the judgment that:

1. He was employed in April 2018 and terminated in July 2018 something which is not true since he was employed in 11/4/2008 and terminated on 17/7/2018.
2. The arbitrator recorded that the applicant did steal drill roads which was not part of his employment contract hence the judgment was not his.
3. The Arbitrator denied him to call the witnesses to testify that they no longer indebted by the bank but rather they had repayed the loan.
4. The human resource manager who was his employer was allowed to testify against him and his advocated disputed the evidence of one John Mwakaja since it was hearsay evidence.
5. He was faithful employee who served as bank teller and loan officer but surprisingly terminated unjustly contrary to his contract.
6. The statement of defence was not his and he disputed the document.

When responding to the applicants points of revision, the advocate for respondent made the following response in that regard;

1. he conceded that about the question of date it was just a slip of the pen and he is in agreement with the applicant as far as the dates of employment. He further stated that, the same cannot lead to

injustice, since it was not an issue before the commission. He went ahead and submitted that the applicant is at liberty to apply to the CMA for rectification of a clerical error, and can do that as per rule 27 of the labour court rules that allows such rectification.

2. Concerning drill roads, the learned advocate argued that it did not form any part of decision and the reasons for the termination were stated as acting contrary to the employer's directives.
3. The applicant was heard and made his defence and was given opportunity to bring his witnesses but he failed two times and the commission closed the hearing after such failure hence he cannot claim to have been denied that right.

The learned advocate for respondent added that it is the duty of the employer to prove that there was fair termination. Therefore the evidence adduced by one John Mwakaja was of great importance since he is the one who took the matter to the disciplinary committee he was duty bound to prove that there was violation of the conditions and terms of employment by the respondent.

Having heard the parties submissions after going through the commissions record, the first ground does not need much attention since

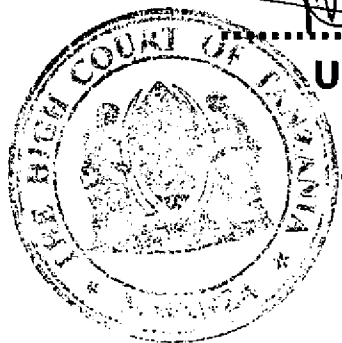
the respondent conceded and concur with the applicant by stating that what applicant said is the correct position it was just a clerical error which is curable, therefore no much can be said about it as long as it did not affect the outcome of the award.

Concerning the second point about the drill road 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 of the employment by the Applicant. However it is undeniable that theft is one of the conditions which form part of every employment contract as there is no any employer who would encourage that. 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 un procedural award of loan?. Perhaps this might be the reason for decision since it form part of the violation of the terms of the contract of which if proved, results to immediate termination. In the first ground the, this court agreed with the submission of learned advocate that it was just a clerical error that resulted to the repetition of the year 2018 as of employment and the same as of termination, and the concede went further to state the remedy, now why

did this appear in the award and what is the remedy for that? 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 look down at since it is incurable error.

Having observed so, there is no reason of going further with other grounds as long as this court is satisfied that the award was not correctly reached at. I hereby nullify the proceedings and decision of the Commission for Mediation and Arbitration and order that the dispute be heard by another competent Arbitrator. Trial de-novel. Order accordingly.

DATED and **DELIVERED** at **MWANZA** this 27Th day of February 2020.



A handwritten signature in black ink, appearing to read "U. E. MADEHA", is written over a dotted line.

U. E. MADEHA
Judge
27/2/2020