

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

REVISION NO.11 OF 2017

(C/f MCA Application No.MOS/CMA/M/230/2011)

ELISAMEHE MSHANA APPLICANT

VERSUS

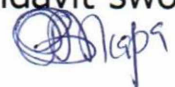
MWANGA COMMUNITY BANK RESPONDENT

10th June, 2020 & 17th July, 2020

RULING

MKAPA, J:

This Ruling relates to an application by the applicant, Elisamehe Mshana, seeking a revision of the decision in Application No. MOS/CMA/M/230/2011 by the Commission for Mediation and Arbitration (CMA) at Moshi dated 4th April, 2012. The application is brought under Rule 24(1), 24 (2) (a), (b), (c) (d) (e) (f), 24(3) (a) (b) (c) (d), 28 (1) (a), (b) (c) and (e) of the Labour Court Rules GN 106 OF 2007 (Labour Court Rules) and section 91 (1) (a), 91(2) (b) and 94 (1) (b) (i) of the Employment and Labour Relation Act No.6 of 2004 (the ELRA). The application is supported by a sworn affidavit of the applicant. However, it was opposed by the respondent who filed a counter affidavit sworn through Ms. Lilian Komwihangiro.



The background leading to the present application is as follows;
The applicant was employed by the respondent as a loan officer since 11th September, 2013. It is alleged that he was terminated for serious misconduct involving stealing of client's money. He lodged his complaints to the Commission and the decision was in favour of the respondent. Aggrieved, he filed this revision challenging the Commission's Award on the following grounds:-

1. That, CMA erred in law and fact in failing to consider evidence on record as testified by the applicant.
2. That, the CMA erred in law and fact in failing to consider the exhibits tendered during trial.
3. That, the CMA erred in law and fact in considering matters which were not part of proceedings.
4. That, the CMA erred in law and fact in holding that the reasons for termination were valid and fair.
5. That, the CMA erred in law and fact in holding that termination procedures were fair.
6. That, the CMA Award has occasioned miscarriage of justice to the applicant.


At hearing of the application, it was agreed by both parties that the application be disposed of by way of written submissions. The applicant was represented by Mr. Jamael Ngowo a personal

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representative while the respondent was represented by Mr. Gwakisa Sambo learned advocate.

Submitting in support of the application Mr. Ngowo opted to combine the 1st 2nd and 3rd grounds and argued them together the fact that, in the CMA proceeding the Arbitrator had noted RW1, Regina Ndosanjo had received information from the Human Resource Officer that the applicant was terminated on allegations that he had misappropriated client's funds amounting forty five thousand shillings (45,000/=) and colluded with court brokers in misappropriating shillings one million two hundred and nine thousand 1,209,000/= pretending to have deposited the same in client's bank account while it was not true. A letter from court brokers and deposit slips were admitted as exhibit RE1, RE2 and RE3. Mr. Ngowo went on explaining that CMA had solely relied on the said evidence while there were no proof that he was fairly terminated thus the reasons for termination was unfair and contrary to **section 37 (1) and (2) of the ELRA.**

He argued further that, reasons which justifies termination by the employer are misconduct, incapacity, incompatibility and operational requirements. It was his further contention that respondent's testimony was mostly hearsay and did not prove any of the above element hence the applicant was terminated for unjustifiable reasons.



Furthering his argument Mr. Ngowo submitted that, at the CMA the Arbitrator erred by concluding that the reasons for termination were fair while the respondent never proved the charges against him. To support his contention he cited the decision in the case of **Tanzania Railways Limited V Mwinjuma Said Semkiwa** Lab. Div., Revision No. 239 of 2014 LCCD 2015 where **Aboud J.** Held that;

"It is established principle that for the termination of employment to be considered fair it should be based on valid reasons and fair procedure. In other words there must be substantive fairness and procedural fairness of termination of employment, See Section 37 (2) of Employment and Labour Relations Act, No. 6 of 2004"

Mr. Ngowo contended further that Rule 12 (2) of the Employment and Labour Relation (Code of Good Practice) GN No. 42 of 2007 states that;

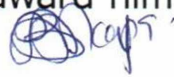
"first offence doesn't justify termination unless it is proved that the misconduct is so serious that it makes a continued employment intolerable"

Relying on the above legal position Mr. Ngowo averred that during 17 years of his employment the applicant was never warned or subjected to disciplinary hearing for any misconduct

thus the respondent ought to have been lenient instead of terminating applicant's employment.

Arguing in support of 4th ground and 5th grounds Mr. Ngowo went on submitting that it was not stated anywhere in the respondents submissions or testimonies that the applicant was terminated for reasons of misconduct but Arbitrator jumped into conclusion thus prejudiced the applicant's rights. It was Mr. Ngowo's further argument that, the procedure used to terminate the applicant was unfair contrary to **Rule 9 (1) of the Code** which provides that;

"An employer shall follow a fair procedure before terminating an employee's employment which may depend to some extent on the kind of reasons given for such termination."

It was Mr. Ngowo further contention that, the Arbitrator did not analyse whether termination procedure was adhered to, as per the requirement under Rule 13 of the Code. He finally submitted that, the evidence available raises doubt as to whether the applicant's misconduct was grave enough to warrant termination. He therefore prayed for the CMA's Award to be quashed and set aside and this Court be pleased to award him reliefs as claimed in CMA F1. 

Opposing the revision Mr. Sambo submitted that the applicant was fairly terminated as per RW2's evidence that the applicant received thirty thousand shillings (30,000/=) from a client for loan recovery to be deposited into the bank account but he did not deposit. It was Mr. Sambo's view that the applicant was dishonest and unfaithful to his principal which warranted his termination as per **section 37 (1) and (2) of ELRA**.

Mr. Sambo went on submitting that, the reasons and procedure for termination were fair as stipulated under section 39 of ELRA. He lastly prayed for the revision to be dismissed with costs. In his brief rejoinder Mr. Ngowo reiterated his detailed submission in chief and maintained his stance that the applicant was unfairly terminated.

Having gone through parties' submissions and CMA records the main reason for this application is the fact that the reasons and procedure for termination were unfair. Therefore the issue for determination is whether the termination was fair both procedurally and substantively . The applicant averred that the procedure was not adhered to as required under Rule 13 of the Code. However he did not elaborate how the said rule was contravened to the extent of prejudicing his rights.

Rule 13 (1) to 13 (10) of the Code provides for disciplinary committee hearing. Rule 13(2) requires employee to be notified



on the allegations in advance. The reasonable time prescribed is 48 hours as per Rule 13(3), while rule 13(5) requires the employee, during the hearing, to be given an opportunity to respond to the allegations and rule 13(8) requires the decision to be properly communicated to the employee. While Rule 13(4) requires the disciplinary committee meeting to be chaired by a sufficiently senior management representative not involved in the circumstances giving rise to the case.

Furthermore, the law requires the outcome to be stated in the hearing form as filled by the chairperson of the disciplinary committee. Also if the employee is dissatisfied is given room for appeal. My perusal of the CMA's record has revealed that, all the above mentioned procedures were adhered to by the respondent and the CMA judiciously held so. Thus, as far as the fairness of the procedure is concerned, I am of the considered opinion that the requirements stipulated under Rule 13 of the Code were adhered to.

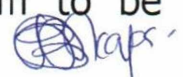
Regarding the reasons for termination, it is a matter of principle that, what binds the employee and employer especially in the financial sector is honest, trustworthy and faithfulness. As rightly argued by the Mr. Sambo, the applicant has demonstrated a high degree of dishonest by misappropriating clients' money and conceal such information until when he was confronted. His

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misconduct were revealed by the testimonies of RW1 and RW2 whose accounts were supposed to be deposited. The testimonies of RW1 and RW2 further revealed that on 06/10/2015 one Godfrey Stephen Lyimo deposited into his account the sum of shillings fifteen thousand (15,000/=) and was issued with a receipt but the applicant never deposited the same until when the client claimed the same to the management. When he was confronted by the respondent, the applicant admitted and deposited the same amount in the same account with a receipt issued on 26th November, 2015. I therefore find no reason to depart from the Commission's findings in holding that the applicant was fairly terminated as per **Rule 12(1) of the Code** which provides that:-

"Rule 12 (2) First offence of an employer shall not justify termination unless it is proved that the misconduct is so serious that it makes a continued employment relationship intolerable"

Though it is not on record the fact that the applicant had any previous allegations on the said misconduct, I am of the view that there was a valid reason for termination of which the working relationship became intolerable. Since the respondent paid the applicant all his benefits he cannot claim to be reinstated. Those benefits included;

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- a. One month salary in lieu of termination notice
- b. Remuneration for work done before the termination
- c. Payment of annual leave accrued and
- d. Certificate of service.

In **Bulyankulu Gold Mine LTD V Chama Stansalaus Ngeleja** (Unreported) Labour Revision No. 12 of 2011 the court held that:-

"If the respondent has received the said payments then the matter should end at this juncture as one cannot be reinstated after having been paid his terminal benefits"

For the reasons discussed, I uphold the CMA Award in finding the termination was fair substantively and procedurally. Consequently, I dismiss the application with no orders as to costs.

It is so ordered.

Dated and delivered at Moshi this 17th day of July, 2020




S.B. MKAPA

JUDGE

17/07/2019