

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

LABOUR DIVISION

AT MWANZA

LABOUR REVISION NO. 63 OF 2020

(Originating from CMA/MUS/128/2019)

NMB BANK PLC.....APPLICANT

VERSUS

DEOGRATIUS SHISHO.....RESPONDENT

JUDGMENT

Date of Last Order: 31/08/2021

Date of Judgment: 22/09/2021

This is a judgment in respect of a labour dispute referred to this Court by way of a revision from a decision of the Commission for Mediation and Arbitration (CMA) for Mwanza in CMA/MUS/128/2019 delivered by Hon. Nnembuka, Arbitrator, on 13/07/2020.

The application was filed by way of a chamber summons supported with an affidavit sworn by Consolatha Resto. It is resisted by the Respondent by a counter affidavit affirmed by Akram Adam.

The background of the dispute is that the Respondent filed a labour dispute with the CMA for Mwanza which on 13/07/2020 decided in his favour.

The Respondent was employed by the Applicant NMB Bank PLC on 12/04/2008 as a Bank Teller. On 15/6/2010 was re-categorized into a Loan Officer until when he was terminated from employment on 02/03/2019. He was found guilty with four disciplinary Offences by the Discipline Committee. Hence referred the dispute to the CMA which directed him to be re-instituted. The Applicant is aggrieved by that award, hence the instant revision.

The Applicant has raised five (5) issues namely:-

- (a) Whether the Applicant is entitled to the award in Labour Dispute No. CMA/MW/128/2019.
- (b) Whether the trial arbitrator erred in law and fact by holding that the Applicant had no valid reason to terminate the Respondent while there were ample evidence to the contrary.
- (c) Whether the arbitrator erred in law and fact by failing to evaluate the evidence tendered before him which strongly proved the valid reasons to terminate the Respondent.
- (d) Whether the arbitrator erred in law and facts by refusing to admit material evidence during trial and without assigning any reasons.

- (e) Whether the trial arbitrator erred in law and facts by not determining the counter claim raised by the Applicant.

Hearing of this revision, with leave of the Court, was conducted by way of written submission, which was complied. The submissions for the Applicant were drawn and filed by Antipas Lakam, learned Advocate, and those for the Respondent were drawn and filed by Akram Adam, learned Advocate.

Mr. Lakam, supporting the application submitted joining grounds 1 and 2 that the reasons for termination of the Respondents employment are justifiable under Rule 12(1) of the Employment and Labour Relations (Code of Good Practice) G. N. No. 42 of 2007. The said Rule requires Arbitrators or Judges to consider, when determining labour disputes in termination for misconduct, whether there is a rule or standard violated.

To consider further if such a rule or misconduct violated is reasonable, is clear and unambiguous and awareness of its existence to employees, usage consistence and appropriateness of termination as a sanction. It was the

views of the Counsel that the Respondent contravened the established rules or standards under the H. R Policy and MSE Manual.

The Counsel also submitted that the Respondent been a loan Officer was responsible of preparing loan documents and verifying collaterals and advising approval of the loan, was therefore supposed to act honestly and with trust of the highest standard.

It was the argument of the Counsel that the Respondent failed to act as such, hence leading to a loss of Tsh 120,000,000/= as a result of unrecoverable loans. The Respondent occasioned the loss to the bank as a result of breaching his duty of evaluating properly the collaterals according to the MSE Manual.

Further, the Respondent was responsible with feeding data in the Cregora Computer System, he confessed to have fed wrong information in the system.

It was the views of the Counsel that the Respondent was negligent and acted as such. He relied on the authority in the case of **NMB vs Rose**

Laiser, Lab Rev. No. 107/2013 LCD 107/2013 where negligence was defined as follows: -

"The Court held that a person acts negligently when he fails to exercise that degree of care which a reasonable man or person of ordinary prudence would exercise the same circumstances, negligent is opposite of diligence or being careful."

On the point he also cited the cases of **NMB Bank PLC vs Andrew Aloyce** (LCCD 84, 2013) **Carter vs Value Truck Rental (Pty)Ltd and Rowena De Leone Cruiz vs Bank of the Philipine Island**, both quoted in **NMB Bank PLC vs David Bernard Haule**, (LCCD 92014) 48.

As regard to proof of loss, the Counsel argued that the same was proved through Exhibit D-12 and admission by the Respondent. The loss lead to the Respondent to be given a stop lending order.

Further, the Counsel argued that the disciplinary offence of unsatisfactory management of credit port folio resulting in loss to the bank, the same was proved. Through the testimony of DW2. Together with the Respondent's admission. He cited the case of **Nickson Alex vs Plan International**, Lab Rev. No. 22 of 2014 (unreported) in which the applicant

admitted the disciplinary offence, the Court said that the employer would not have conducted disciplinary hearing.

The Counsel also argued on the finding of the CMA that the fourth offence, was non existent in the H. R Policy. He stated that that the said offence, according to the testimony of DW1, the 4th offence was written by mistake and it was a typing error. The disciplinary committee did neither charge him with such offence nor receive evidence to prove against it. It was wrong for the CMA to act on it.

On the other hand, Mr. Akram, Counsel for the Respondent submitted opposing the application. He too combined grounds 1 and 2. However before starting his arguments he raised a legal issue that the application is incompetent before this Court for want of notice of application as required by Rule 24(1) and (2) of the Labour Court Rules, GN. No. 106 of 2007.

This issue was replied by the Counsel for the Applicant in rejoinder that the notice of application was filed according the provisions of GN. No. 106 of 2007, Rule 24(1) and (2) in particular.

This Court visited the record and found that a notice of Application was duly filed by the Applicant on 25/8/2020 together with the Pagination Index, chamber summons, Affidavit and a Notice of Representation.

I am of firm opinion that the application is properly before this Court as it followed the said procedures. The objection is hereby overruled, for lack of merits.

In respect of the arguments in ground 1 and 2, the Counsel for the Respondent argued that the CMA was correct to hold that the Applicant had no reasons for terminating of the Respondent's employment. He supported the holding that since the Respondent was not the final insurer of loan, he was just dealing with preparations, then he was not liable. He pointed the relevant parts in the testimony of PW1 which is to the effect that the Respondent followed all the procedures. He received applications, scrutinized the same and verified, outdoors, the collaterals and fed the date into the Cregora Computer system. That the Branch Manager issued the loan after confirming or approving the same. Where the Manager was dissatisfied was at liberty to reject.

The Counsel maintained that there is nowhere in the evidence adduced in the CMA indicate that the Respondent was negligent. He followed all the procedures. He contended that the mere fact that the Respondent was incharge of loan application verifications and responsible with follow up of loan recovery does not make him liable for negligence because he acted in accordance with laid down rules under the MSE Manual.

As regard to the case authorities, the Counsel distinguished one after another with the circumstances of this matter as follows:-

- i. **NMB vs Rose Laiser (supra)** in this case no duty of care was established as was stated in that case that for negligence to be proved, there must be duty of care.
- ii. **NMB Bank PLC vs Andrew Aloyce (supra)** in this case the Respondent never pleaded dishonesty and the same has not been proved as it was in that case.
- iii. **NMB Bank PLC vs Davis Bernard Haulo (supra)** there has not been any proof of breach of trust in this case as it was in that case.

As regard to the offence of negligence, the Counsel submitted that the loss resulting from the alleged negligence was never proved because the Applicant didn't produce a bank statement for the disbursed loan. The disciplinary committee was wrong to convict him while loss was not proved.

In respect of the unsatisfactory portfolio management offence, the Counsel submitted that it was not proved. That a mere fact that there was a stop lending order is in itself not proof that there was loss. The Respondent followed all the procedures when handling loan applications by Rose Marwa Gweso. The Counsel added further that the Respondent admitted committing mistakes, not negligence and it was not admission of guilt.

As regard to the non existing offence, the Counsel submitted that one cannot be punished for violation of a none existing law.

Let me determine the controversy in grounds 1 and 2 because both concern analysis of evidence.

Starting with the duty of the Respondent; it is undisputed that he was employed by the Applicant, at the time the dispute arose, as a Relation

Officer, charged with duties of receiving loan applications, preparation of loan documents, verification of collaterals.

This fact is not disputed by the Respondent. Equally the procedures for loan processing according to the undisputed evidence is that once applications were received the same were sent to the Respondent where loan documents were prepared. Then the Respondent went out of the Office and verified the collaterals. It was an act which made him visit sites where they were located. The verification involved obtaining ownership documents and scrutinizing the same and conducting inquiry with local leaders, in case the collaterals, which mostly are landed properties, were unregistered.

After verification, the Respondent returned to Office and posted the data in the Cregora Computer System. Then the Respondent submitted the information to his Line Manager Mr. Kelvin D. Mwangosi. The latter approved the loan application and the loan disbursement was made.

The dispute is that, the Applicant's evidence is to the effect that the Respondent acted negligently, a result of which some loans were not properly scrutinized, their collaterals were not properly verified and the

reports posted in the Cregora System were not correct. That, these acts were done by the Respondent negligently leading to unrecoverable loan disbursement.

On the other hand, the Respondents evidence is to the effect that he discharged his duties diligently, and that what happened was not due to his negligence but were common mistakes at work which are excusable, the same could not lead to termination of his employment. That, since disbursement of loan was a process involving many others including the Line Manager who was only given a warning, it was wrong for the Applicant to terminate his employment; he ought to have warned him too.

As it can be seen the controversy revolves around the issue, whether the Respondent acted negligently or not. The Applicant maintain that he acted negligently while the Respondent contends that the acts were not negligence. In order to resolve this controversy, I have to visit the evidence.

The Counsel for the Applicant raised a legal issue that the typed proceedings as recorded by the chairperson of the CMA are being incomprehensive and unorganized as such it is difficult to apprehend.

I have compared the typed proceedings and the handwritten proceedings and found slight differences between the two versions. There are some words skipped in the typed version which are in the handwritten version, in other words the typed proceedings were not well proof read.

For instance, when DW1, Joel Uswege, the Human Resources Officer of the Applicant, started his testimony in the typed version stated as follows;-

*"S. Majukumu yako ni yapi
J. Nafanyakazi H/R wa Kanda Lake Zone,
Majukumu yangu ni kuajiri"*

In the handwritten version DW1 testimony at the start was recorded as follows:-

*"S. Majukumu yako ni yapi
J. Nafanyakazi H/R wa Kanda Lake Zone,
Majukumu yangu ni kuajiri, ku-train, kusimamia nidhamu"*

As it can be gleaned, the last three (3) words in the handwritten version are missing in the typed version. The gap is even huge as one goes on with the proceedings. For instance, what is contained at page 7/54 of

the typed proceedings is by far different from what was recorded by hand.

The typed proceedings at page 7/54 reads as follows: -

"S. Nini kilitokea

J. Baada ya kuwa relationship officer majukumu yake ni kutafuta wateja wa mkopo na kufanya kabla ya kukopesha na akatoa mkopo sehemu sio sahihi

S. Baada ya charge sheet alifahamu vipi kikao cha nidhamu

J. Tuiimpa baraua ya kikao cha nidhamu kielelezo D-5"

The corresponding proceedings in handwritten version reads as follows: -

"S. Nini kilitokea

J. Baada ya kuwa relationship Officer, majukumu yake ni kutafuta wateja wa mikopo na kufanya mauzo ya bidhaa mbalimbali na kuleta deposit. Pia kutoa mikopo kwa mujibu wa taratibu na anapaswa kufahamu. Shisho alikiuka taratibu za utoaji mikopo, hakufuata taratibu

S. Taratibu zipi

J. Mteja anapaswa kuwa na biashara inayokubalika, leseni, TIN number, dhamana kwa mujibu wa MSE Manual- Kielelezo D-1

The above extracts of the two corresponding version as reproduced above suffice to demonstrate the fact that the typed proceedings version is not identical to the handwritten proceedings version; they differ. While the typed version is not as detailed as the handwritten version, the typed version is more incomprehensible than the handwritten version.

I have pondered whether this defect has affected the submissions by the Counsel. The Applicant's Counsel submitted that the defect must have prejudiced the Applicant but didn't point out how. On the other hand the Counsel for the Respondent didn't even mention about this ailment, let alone responding to this complaint.

In my view, this defect did not prejudice the Applicant for three (3) reasons. One, the Counsel are the same who represented the parties in the CMA, therefore both of them and their clients are well informed of what happened in the CMA. Two, since the handwritten version of the proceedings is available in the Court file and the same is readily available for perusal, the Counsel were at liberty to inspect the same in case they experienced any difficulty in apprehending the typed version of the proceedings. Three, the Counsel for the Applicant did not point out how the Applicant was prejudiced.

Now, let me turn back to the evidence. In this matter, according to the testimony of DW1 Joel Mwenge, the Human Resources Officer of the Applicant, the Respondent acted negligently in the discharge of duties thereby caused issuance of loans without collaterals as a result caused loss to the Bank.

DW1 stated that the Respondent did not follow the procedure as provided in the MSE Manual where a borrower is required to present Business Licence, TIN number and collateral. The Respondent didn't verify the collaterals as a result some collaterals were used to secure two loans on the same collateral. Others were not owned by the borrowers. As a result the disbursed loans were unrecoverable hence caused a loss to the Bank. After investigation, the Respondent was charged before a Disciplinary Committee. He was given rights of defending. He called his witness. He admitted committing the offences. The witness stated:-

" S. Alijitetea vipi?

J. Alikiri kufanya makossa kwa kutokufuata taratibu, alidanganywa na wateja."

The witness went on stating:-

"S. Upi ulikuwa utetezi wa mwajiri wa

J. Alikiri kosa lakini hakukusudia na hivyo asamehewe."

DW1 testified further that the Disciplinary Committee found him guilty. It convicted him and recommended him to be terminated from employment. He was given his right of appeal which he unsuccessfully utilized as the appeal was also dismissed. He was paid all of his terminal benefits.

The testimony of DW2, Lutiko Jackson, the Forensic Officer of the Applicant was to the effect that the Respondent responsibilities were to create and monitor loan compliance procedures before and after loan disbursement.

DW2 investigated the allegations during which he discovered that the Respondent didn't conduct proper verification of collateral properties to identify true owners but he cheated by entering wrong value of the collateral properties.

He named the loans that were unrecoverable due to false information which the Respondent furnished through Cregora System as been loan to Lilian Mwita Mwanko, Evelyn Mrugo Mkama, Rose Gweso and Leonard Makongwe.

DW2 testified further that the Respondent over trusted the customers, he only acted on local leaders letters without conducting physical verification. That the Respondent over valued the collateral property for a loan to Evelyne Mrugo from the actual value of TSH 60,000,000/= to nugatory value of Tsh 120,000,000/=. All this wrong information was fed in the Cregora System which made his Line Manager to act on it and approve the loan. DW2 further testified stating that the Respondent admitted the difference between information in the bank files and in the Cregora System.

In his defence PW1, Deogratius Nicholas Shisho stated as follows as far as his duties are concerned.

"S. Mfumo wa utoaji mkopo upoje

J. Moja ya kazi kubwa ni kutafuta wateja wa mikopo unapokea barua halafu unaangalia zinazokidhi mahitaji ambayo ni leseni, TIN number, Tax clearance certificate (kwa mikopo ya biashara). Baadaye tunafanya department committee na kila mmoja anashiriki kwa branch kuna manager, loan officer"

S. Majukumu ni yepi kwako

J. mimi ni advisory na mimi ndio naandaa na kumshauri ni sehemu yangu ya kazi."

It was the testimony of the Respondent, PW1, that he was responsible of receiving loan application forms, scrutinize the same, verify the collaterals property owners from where they are located and verify the relevant information from local leaders for unregistered landed property then record the information in bank files and post the same information in the Cregora System.

When cross examined, he admitted that the information in the bank file and the one he posted in the Cregora System, which was ultimately acted upon by his line Manager, differed.

As regard to the mistakes PW1 testified stating as follows:-

"S. Mikopo hiyo ni repeated loans

J. siyo yote

S. Mikopo inayolalamikiwa ilikuwa approved by line Manager

J. Ndiyo

S. kama kuna makossa yalionekana kwenye uchunguzi

J. Kama ilikuwa na makosa wote tunamakosa ni branch nzima siyo yangu tu

S. Waligundua mikopo yako inashida gani

J. Ni mikopo ambayo hailipiki."

In cross examination PW1 admitted that his responsibility was to advice his boss on loans. He admitted to have adviced a loan to Rose who had another outstanding loan from FINCA. Also he admitted to inflate the value of collateral property from Tsh 60,000,000/= to Tsh 120,000,000/= he admitted to apologize for all these mistakes and asked for pardon. PW1 stated as follows:-

"S. Ni kweli uliomba msamaha kwa makossa yaliyofanyika

J. Ni kweli, kulingana na utetezi alionipa yalitokea kwa sababu nilitaka kumeeet target."

As regard to stop lending order the Respondent admitted in cross examination stating that the loans were unrecoverable. He also admitted to feed wrong information in Cregora System by stating as follows:-

S. We ndio uliingiza taarifa kwenye Cregora

J. Ndiyo

S. Kabla hujaingiza ulikuwa na document

J. Ndiyo

S. Kwa hiyo taarifa zinafana

J. Ndiyo lakini faili ilipitia mikono mingi."

As regard to verification of collaterals the Respondent stated in cross examination that he was mislead by the applicants but he didn't verify from the local leaders he stated as follows: -

S. Ulishiriki process ya verifiacation

J. Ndiyo

S. Lengo kuidentify true owners

J. Ndiyo

S. Ulifanya verification kuna makossa

J. Nimedanganywa

S. Ulipaswa kufanya nini kuepuka

J. Lazina kuona viongozi

S. Chairman lazima

J. Siyo lazima as per MSE Manual.

To this end it can be vividly be seen how the Respondent discharged his duties.

A question that comes now is whether the Respondent acted negligently as argued by the Applicant. Before I answer, let us see what negligence entails.

The word negligence is defined in the **Black's Law Dictionary**, 8th Edition by Bryan A. Garner at page 1061 to mean.

"The failure to exercise the standard of care that a reasonable prudent person would have exercised in a similar situation.

It is lack of ordinary diligence or the failure to use ordinary care.

In this matter as seen above, the Respondent was charged with a very vital role of processing loan application which were approved basing on the information he supplied.

In my considered opinion such a duty is so sensitive that he ought to discharge his duties with high diligence. Did the Respondent discharge his duty to the required standards? The answer is in negative. I say so because the evidence as summarized above makes it clear that the Respondent failed to exercise diligence in discharge of his duties. He did not well conduct the verification of collateral properties to identify the proper owners; he did not visit sites but acted on papers submitted to him, he did not consult local leaders in unregistered landed properties but acted on letters only. As a result he caused unrecoverable loans, which is a loss to the Applicant. The

Respondent also posted wrong information in the bank files and the Cregora System, as a result the bank acted in peril as a result of his conducts.

I am satisfied that the Respondent acted with negligence. In the case of **NMB vs Rose Laisser (supra)** the Court held that: -

"a person acts negligently when he fails to exercise that degree of care which is reasonable man/person of ordinary prudence would exercise under the same circumstances".

And in the case of **NMB Bank PLC vs Andrew Aloyce (supra)** this Court stated that honest is a very important aspect in the banking industry. Its opposite is also true that dishonest and negligence conduct is one of the most intolerable in the banking industry. This Court (Hon. Rweyemamu, J, as she then was stated as follows:-

"The applicant is a banking industry where honesty by its employee is the key stock in trade, without it, its business would collapse with dire consequences not only to the employer but also to its employee and the economy at large. It is true therefore that the nature of the bank demands a unique degree of honesty from its employees, such that any show of dishonesty amounts to grave misconduct and may be

sanctioned more severely than if it is committed in any less honesty sensitive industry.”

The trial CMA in its analysis at page 12 rightly found that the Respondent was responsible with loan processing before approval, he was liable for any defect. On page 14 the CMA found that the Respondent was liable of satisfying himself that the information he fed in the Cregora System was correct.

However, the CMA held that there was no proof of negligence of duty resulting into loss. As explained above, there is evidence that the Applicant suffered loss as a result of negligent conducts of the Respondent. The CMA also held the act of the Respondent to confess and beg apology was not confession to the charge of negligence.

Under our Labour laws termination of employment is unfair if the employer fails to prove that the reason for termination is valid. See section 37(2)(a) of the **Employment and Labour Relations Act**, No. 06 of 2004, [Cap. 366 R. E. 2019].

Reasons which may justify termination by the employer are provided under regulation 9(4) of the **Employment and Labour Relations Regulations**, GN. No. 42 of 2007 which reads:-

9(4) The reasons in (a) which, may justify termination by the employer are as follows: -

(a) Conduct;

(b) Capacity

(c) Compatibility and

(d) Employer's operational requirement.

In the matter at hand, it is the conduct reason in (a) which as stated above, was unsatisfactory in that the Respondent failed to exercise due diligence in the discharge of his duty which needed high honesty due to its sensitivity in banking industry.

Moreover, the CMA rightly directed itself as to the principle of law governing the appropriateness or otherwise of termination of employment as provided under regulation 12(4)(a) and (b) of GN No. 42 of 2007. The factors to be taken under consideration include seriousness of the misconduct in the light of the nature of the job and the circumstances under which it occurred.

However, the CMA underated the seriousness and held that the misconducts by the Respondent was not serious and mere first offences, thus excusable. This Court has found as elaborated above that owing to the nature of the job, a banking industry which demands high honesty, the misconducts by the Respondent were serious one deserving termination, regardless whether it was a first offence. The CMA was not correct in treating the same as minor misconducts.

In the result I find that the first and second grounds have merit.

As regard to the issue of remedies, the CMA found reinstatement as appropriate remedy after holding that termination was unfair because the reasons for termination were not valid. However, it is a finding of this Court that the reasons were valid.

Moreover, in this matter, the procedures, as rightly observed by the CMA were also fair.

In the upshot and on reasons stated, this Court makes a finding that termination of the Respondent's employment is backed up with valid

reasons. The CMA decision was in error of the law. Having so found, the question of counter claim does not arise.

Consequently, in the exercise of the revisionary powers of this Court, I do hereby make the following orders:-

1. I do revise, quash and set aside the award by the CMA as been founded against the law.
2. The termination of the Respondent was with valid reasons and therefore fair termination.

It is so ordered.




F. K. MANYANDA
JUDGE
22/09/2021