

THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE ARUSHA DISTRICT REGISTRY

AT ARUSHA

LABOUR REVISION NUMBER 17 OF 2021

(Originating from Employment Dispute No. CMA/ARS/448/2019/ 44/2020)

AFRICAN BANKING CORPORATION. (T) LTD..... APPLICANT

VERSUS

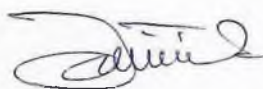
MBUCHE MAGAWA.....RESPONDENT

JUDGMENT

14th July & 18th August, 2022

TIGANGA, J.

In this revision, the applicant being dissatisfied with the award issued by the Commission for Mediation and Arbitration herein referred to as CMA lodged the revision with this Court. The revision is hinged on rules 24(1), (2)(a)(b)(c)(d)(e) and (f), (3)(a)(b)(c) and (d) and rule 28(1)(c)(d) and (e) of the Labour Court Rules GN. No. 106 of 2007. Also, Section 91(4)(a) and (b), Section 91(2)(c) and Section 94(1)(b)(i) of the Employment and Labour Relations Act, No. 6 of 2004 as amended by Section 14(b) of the Written Laws (Miscellaneous Amendment Act No. 3 of 2010. It is by a notice of application, notice of representation introducing eleven Advocates from Apex Attorneys Advocate, and the chamber summons supported by the affidavit sworn by Lilian Richard

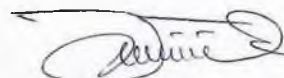
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Musingi, the Principal Officer of the applicant deposing the background of the labour dispute and grounds of the application.

In the chamber summons, this court was asked to call for the record of the proceedings and the award of the CMA in Labour Dispute No. CMA/ARS/448/2019/44/2020, revise and set aside the award of the CMA issued in respect of this dispute. The applicant also asked for costs and any other order it may deem fit and just to grant.

The grounds upon which these orders are sought as put forth in the affidavit filed in support of the application are that;

- a. That the CMA erred in law and fact by holding that Mr. Salehe Ramadhani (Head of Credit) was involved in the issuance of the disputed loan without evidence to justify the same.
- b. That the CMA erred in law and fact by holding that Mr. Salehe Ramadhani (Head of Credit) was not a proper person to chair the disciplinary committee meeting as was involved in the issuance of the loan as testified by the DW3
- c. That the CMA failed to analyse and consider evidence of DW1, DW2 and DW3 that the disputed loan was approved by the the



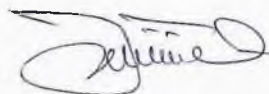
management credit Committee as a result lead to wrong conclusion that the applicant did not follow procedure.

- d. That the CMA erred in law and fact to award the compensation of twelve months' salary without justification.

Upon being served, the respondent, Mbuhe Magawa filed the notice of opposition and counter affidavit duly sworn by himself which opposed the application.

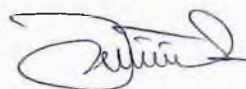
With leave of the court, this revision was argued by way of written submission. Mohamed Muya, Learned Counsel represented the applicant whereas, Kenedy Jeremia Mapima, Learned Counsel serviced the respondent.

Aptly, though briefly, I consider it proper to state the historical background of the matter which gave rise to the contention. Gleaned from the record, the applicant, a financial institution was the employer of the respondent. Their employment relationship was entered way back in 01/04/2015. After working for about two years and so, there happened misunderstanding between them which in turn resulted to termination of the respondent for negligence occasioning loss to the employer.



The respondent was the Branch manager of ABC Bank in Arusha. After conducting disciplinary hearing as per the law, the committee was satisfied that the offence and misconduct committed by the respondent was serious to the extent of terminating his employment contract. Thus, on 24/04/2017 the respondent was officially terminated via termination letter sent to the respondent through his personal email.

Aggrieved by the decision of the disciplinary committee, the respondent referred the dispute to the CMA. Mediation was conducted in vain and therefore, the matter was to exceed to Arbitration process. Upon full trial, the Arbitrator inferred that, though substantively the termination was fair, procedurally was unfair. The reason for being procedurally unfair is to the fact that the chairman of the disciplinary committee (Mr. Salehe Ramadhan) was also the head of credit office one of the departments of the applicant and who in fact his department is the one responsible with credits, the matters alleged to have been misconducted by the respondent. It is like that, the branch of the bank in Arusha issued the loan to two clients worthy three hundred thousand Million (300,000,000/=). Unfortunately, the amount loaned was not repaid to the lending bank. It is alleged, the creditors did not surrender collaterals and security for the loan. Henceforth, it was taken that the



respondent being a branch manager did not sufficiently supervise his subordinates clearly to the extent of gaping procedures normally conducted before issuing the loan. That, he misled the credit committee in the main office to endorse the requested loan which turned to be a gross loss to the applicant company.

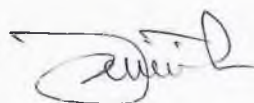
After its finding as said above, the CMA ordered the applicant to pay compensation of 12 months' salaries to the respondent which amounted to 62,400,000/=. This sum of money was quantified from 5,200,000/=, a monthly salary paid to the respondent.

Thus, the issues to be determined as raised by the applicant in his affidavit are **One**, whether Mr. Salehe Ramadhani (Head of Credit) was involved in the issuance of the disputed loan. **Two**, whether Mr. Salehe Ramadhani was not a proper person to chair the disciplinary committee meeting. **Three**, whether the arbitrator erroneously reached to the conclusion that there was unfair procedural termination. **Four**, whether the arbitrator erroneously awarded the compensation of twelve months' salaries to the respondent.

In his submission in chief, Mr. Muya adopted the affidavit sworn by the applicant. In his submission Mr. Muya argued issues one, two and three jointly whereas issue four was separately argued. He said, the head

of credit (Mr. Salehe Ramadahani) whose office is in Dar Es salaam was not a party to the process of finding data of the customers and bringing them before the managing committee in Dar Es salaam for approval. That, the organ which approved the loans was the management committee and not the head of credit just like what the arbitrator concluded. Mr. Muya went on saying that, the said management committee is comprised of six members to wit; The Managing Director, Head of Credit, Head of Finance, Head of Treasury, Head of Business and Head of Operations.

The Counsel went on submitting that, the decision of the Management Committee is approved by not less than three votes of the members. That there was no sufficient information that the head of credit was involved in the issuance of the loans to the defaulters as concluded by the arbitrator. To fortify his argument, the learned counsel cited the case of **NBC PLC and Ramadhani Monko**, Revision Application No. 540 of 2016 and **North Mara Gold Mine Ltd versus James Emmanuel Maha**, Labour Revision No. 19 of 2020 (Both unreported and of this Court). In all these two cases, it was decided that, there was no evidence of involvement of chairpersons in the disciplinary committees and their employment positions being



influencing the decisions, just to say least. On the bases of these arguments, he asked for application to be allowed.

On his part, Mr. Mapima when given a chance to reply on the submitted issues, he took most of the time clearing his client from being condemned of negligence which occasioned loss to the applicant rather than responding to the issues. He asked this court to disregard the cited cases because they are persuasive to this court and uphold the decision by CMA that the head of Credit was an impartial person because he was involved in the approval of the faulted loans.

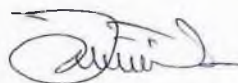
Passing through the above submissions it goes by saying, according to the submission made by Mr. Muya, it is very apparent that, the Head of Credit is among the six members of the applicant Company who seat in the Management committee to approve loans of various clients from various branches. Thus, by virtue of being a member thereto s/he knows everything about the requested approval of the said loan. That being the case, it is also crystal clear that Mr. Salehe Ramadhani was quite aware of what was going on about the defaulted loans payment and those alleged to have caused the loss.

In the circumstance of this nature, it is very difficult for him as the head of Credit and a member of the Management Committee to have a

reasonable decision when sitting as a chair in the disciplinary committee aiming at fairly adjudicating on the issue involving the respondent, his subordinate. Weighing out the reasons, in my view, any light-minded person is at great chance to conclude that, so long as Mr. Salehe Ramadhani is the Head of Credit, the unit which supervises all credits in the applicant bank and branches, the one in dispute inclusive and also that he seats in the Management committee to endorse applied loans is at greater focus being viewed as an interested person than never. His partiality in the decision likely to be given by his disciplinary committee is more questionable than him being impartial. In the old case of **Herman Milde** reported in 1 TLR.129 the court held that:

"It is not every apprehension which could be taken into consideration but that the oppression must be of a reasonable character and must be founded upon distinct incidents which would really give rise to a reasonable apprehension that there would not be a fair trial."

Like in our revision, it is quite unbecoming, for the Head of Credit whose role also is sitting in the Management Committee which approves loans expecting a different result when chairing the disciplinary committee discussing the matters of the employee occasioned loss to the company on credit and loans basis. In the circumstances therefore,

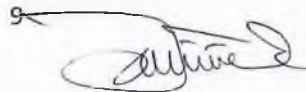
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those three issues lack merits and basis to remain firm. They are dismissed.

The last issue to be determined is short and straight forward. The applicant is complaining that, the compensation given to the respondent is huge. That, after the arbitrators' findings that substantively the respondent was fairly terminated, he cannot proceed to award 12 months' salaries for only on procedural unfair termination. To buttress this argument, he cited the case of **Puma Energy Tanzania Ltd versus Azayobob Lusingu and 2 Others**, Revision No. 697 of 2019. That in this case it was held that when the employer manages to prove fair reason but not procedure, the ward should be six months' compensation.

In is reply, Mr. Mapima despite the fact that conceded with the holding in the case of **Puma Energy Tanzania Ltd** (supra) still, had the view that, compensation is the discretion power given to the court and that, the above case law is not binding but persuasive. In the rejoinder, Mr. Muya reiterated his submission in chief, which for interest of time I am not going to repeat.

In my settled view, it is not convincing awarding the person who was found negligent and causing a gross loss as it happened like the

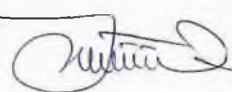
A handwritten signature in black ink, appearing to read "Muya", with a horizontal line extending to the left from the top of the signature.

one who was not. Finding the respondent with misconduct was enough to reduce his compensation owing to that, he was the one who caused the unexpected loss. Blessing the compensation given by the CMA is as equal as blessing evils aiming at pulling back the employer which is not the spirit of labour laws.

In the case of **Puma Energy Tanzania Ltd** (supra) my learned brother, Mwipopo J., when confronted with similar situation was persuaded by the decision in the Consolidated Revision No 430 of 2013 between **Saganga Mussa vs Institute of social work**, High Court of Tanzania Labour Division at Dar Es Salaam (unreported) which said:

"Where there is a valid reason for termination but the procedures have not been complied with, then the remedy cannot be similar as in the cases of where both the termination was unfairly done substantively and procedurally"

Not only that, but also in the recent case of **Edward Valentine vs Foundation for African Medicine**, Labour Revision No. 46 of 2021 HC Labour Division at Arusha decided on 21st July 2022 while guided by the decision of the Court of Appeal of Tanzania, in the case of **Felician Rutwaza vs World Vision Tanzania**, Civil Appeal No. 213 of 2019, CAT-Bukoba which quoted with approval the decision of Labour Court in



Sadetra SPRL Ltd vs Mezza & Another, Labour Revision No. 207 of 2008, (Rweyemamu, J) interpreted section 40(1)(c) of the Act that,

"...a reading of other sections of the Act gives a distinct impression that the law abhors substantive unfairness more than procedural unfairness, the remedy for the former attracts a heavier penalty than the later."

The court went on and held which accepting what the trial judge decided in that case and held *inter alia* that;

"Were respectively subscribe to the above interpretation, for we think it is founded on logic and common sense; it reflects a correct interpretation of the law. Under the circumstance since the leaned judge found the reasons for the appellant termination were valid and fair she was right in exercising her discretion in ordering lesser compensation than that awarded by the CMA. We sustain the award."

However, that unfairness in procedure can not invalidate good reasons for termination. Like this revision as said often times above, substantive termination was fair only procedural had vitiations, in the event therefore, the respondent cannot take advantage and receive the package as if he did not cause the loss. Doing so is compressing the mind of the employer with multiple jeopardy of which this court is not prepared to offer.


From the foregoing therefore, the revision is done to the extent explained, in terms of the authority in **Felician Rutwaza vs World Vision Tanzania**, (supra) the respondent deserves lesser than the one prescribed by section 40(1)(c) of the Act. Having assessed the circumstances of this case and the loss caused by the negligence of the respondent that is 300,000,000/=, it is my conviction that, the amount of compensation be reduced to four months' salaries. The applicant is ordered to pay the respondent the monetary compensation at the tune of 20,800,000/= calculated from a monthly salary of 5,200,000/=.

Given the nature of the matter no order as to costs is given.

Order accordingly.

DATED at **ARUSHA** this 18th day of August 2022




J. C. TIGANGA
JUDGE