

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LABOUR DIVISION)**

AT ARUSHA

REVISION NO. 99 OF 2021

(Arising from Dispute No. ARS/19/20/129/20)

NATIONAL BANK OF COMMERCE (NBC).....APPLICANT

VERSUS

RIZIKI MSAMI.....RESPONDENT

Date: 3/10/2022 & 07/10/2022

BARTHY, J.

JUDGMENT

This application for revision is brought at the instance of National Bank of Commerce (NMB) the applicant, under Sections 91 (1),(a)(b) and 91(2), (a),(b), 94(1)(b),(i) of the Employment and Labour Relations Act, [Cap 366 R.E 2019], (herein ELRA) read together with Rules 24 (1), (2)(a)(b) (c),(d),(e) and (f), 24 (3) (a),(b),(c) and (d), Rule 24 (11)(b) and 28 (1)(c) and Rule 55(1) and (2) of the Labour Court Rules, Government Notice No. 106 of 2007.

The application is supported by the affidavit sworn by Ms. Joyce Mbago, the Principal Officer of the applicant.

The applicant prays to this court to call and examine the records of the proceedings of the Commission for Mediation and Arbitration of Arusha at Arusha (herein CMA) in Labour Dispute No. ARS/19/20/129/20, revise it and set aside the said award which was delivered by Hon. O. Mwebuga, (Arbitrator) dated 17/09/2020 on the ground that there has been material



irregularity and errors of law and facts on the face of records by declaring the termination to be substantively unfair.

In opposing the application, the respondent, Riziki Msami filed a counter affidavit sworn by herself.

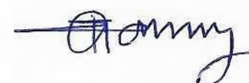
For a better understanding of the crux of this application I find it pertinent to briefly narrate the facts of this matter. It is on record that, the respondent was employed by the applicant on 12th day of October 2010 as a Clerk Credit until 8th day of November 2019 when she was terminated for the offence of gross dishonest.

It was alleged that she uploaded on the *Sybrin* system a forged document which bear a forged signature of the customer.

Aggrieved, she filed a complaint against the applicant at the CMA alleging unfair termination. She further sought for relief of reinstatement without loss of remuneration. After the hearing, the CMA decided that the respondent's termination was substantively unfair and awarded her 12 months' salary compensation.

Being dissatisfied, the applicant filed this application seeking revision of the award on the following grounds;

- 1. Whether the arbitrator erred in law and fact for declaring termination to be substantive unfair.*
- 2. Whether the Arbitrator failed to evaluate evidence adduced by the Applicant in proving fairness of the reason.*
- 3. Whether the Arbitrator was correct to award compensation while declaring the respondent to be negligent at her work.*



4. Whether the Arbitrator erred at law to award a relief not prayed for by the respondent.

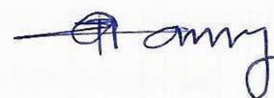
The hearing of the application proceeded orally, Ms. Comfort Millicent Opuku, the learned counsel appeared for the applicant whereas Mr. Macmillan Festo Makawia, learned counsel appeared for the respondent.

Supporting the application, Ms. Opuku adopted their affidavit supporting the application to be part of her submission. Regarding the first ground she argued that, Rule 12 (1) of the Employment and Labour Relation of Good Conduct, provided that in order to prove the offence of gross negligence, the following reasons must be proved;

- a) whether or not the employee contravened a rule or standard regulating the employment.*
- b) If the rule or standard was contravened whether or not the employee was aware of it and could reasonably be expected to be aware of it.*

She submitted further that the evidence at the Commission revealed that the respondent uploaded a document which bear a forged signature to the system and submitted the same to the board resolution. The act which reflects a gross misconduct and justify for her termination.

She added that, the respondent was working in the Bank Industry it needs trust, honest and confidence which are paramount importance. The case of **Charles Mwita Siaga Vs NBC**, Civil Appeal No. 112/2017 (CAT-Unreported) was cited to buttress her arguments.



Opposing what was submitted by the counsel for the applicant, Mr Makawia informed the court that there were no valid reasons for termination of the respondent's employment due to the following reasons.

First, the offence was alleged to have occurred in year 2015 and the disciplinary hearing was conducted in the year 2020. Second, the person whose signature was said to have been forged was never called to testify before the disciplinary hearing and at CMA to prove if the signature was his or not.

The conduct of the respondent was contrary to Section 47 of the Evidence Act, Cap 6 R.E 2019 and Rule 25 (1) (b) of the Labour Institutions (Mediation and Arbitration) Rules of 2007. To buttress her point, Ms. Opuku cited the case of **Said Mohamed Abdallah vs Stanbic Bank of Tanzania and 4 Others**, Misc. Commercial No. 267 of 2018 (HC Unreported). It was her submission that the termination was unfair.

On the second ground, Ms. Opuku submitted that, the act done by the respondent affected the reputation of the Company and the said act was a personal conduct as per Section 37 (2) (b) (i) of the ELRA. Thus, the applicant proved she had a good reason for terminating the respondent as reflected on page 3 paragraph 1 of the CMA proceedings and the letter of the complainant, exhibit D4.

As for the third issue, Ms. Opuku submitted that, the Arbitrator erred to award the respondent compensation of 12 months salaries while he had already declared she was negligent in her work. More to that the respondent was expected to have certain standard despite the fact that the issue of forgery was never proved.



Responding to this ground, Mr Makawia said to the court that the trial commission records reveal that the applicant failed to prove her case at the disciplinary hearing due to failure to cross examine the witnesses and there were no valid reasons for terminating the applicant.

On the last issue, it was the submission of the counsel for the applicant that the trial Commission granted the relief which was never prayed by the respondent. In her CMA F1, the respondent prayed to be reinstated without loss of remuneration, however the Commission gave her 12-month compensation which it was not prayed for.

Responding to this ground, Mr Makawia argued that Section 40 (1) of ELRA provides that if the termination is unfair the court or the arbitrator may order re-instatement, re-engage or compensation of not more than 12 years. Therefore, the award was correctly awarded. His argument was supported with the case of **NBC Bank Plc vs Leila Mringo and 2 Others**, Civil Appeal No. 30 of 2018 (CAT – Unreported).

Having considered submissions from both parties and examined records of this matter, this court is called upon to determine two issues namely;

- I. Whether there was valid reason for termination of respondent employment.
- II. Whether the compensation award was justified.

To begin with the first issue, it is apparent from the records that the reason for termination of the respondent's employment as reflected in exhibit D8 was gross misconduct following the act of uploading in the system a document which bears the forged signature as complained by the customer as per exhibit D4.

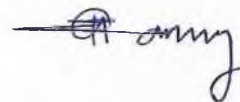


Gross dishonesty is among the serious misconduct, when proved may justify termination according to Rule 12 (1), (a) (b) and (3) (a) of **the Employment and Labour Relations (Code of Good Practice) Rules**, G.N. No. 42 of 2007. It provides;

1. *"Any employer, arbitrator or judge who is required to decide as to termination for misconduct is unfair shall consider-*
 - (a) *whether or not the employee contravened a rule or standard regulating conduct relating to employment;*
 - (b) *if the rule or standard that was contravened, whether or not-*
 - (i) *it is reasonable;*
2. (ii) *it is clear and unambiguous; the employee was aware of it, or could reasonably be expected to have been aware of it;*
3. (iii) *it has been consistently applied by the employer; and*
4. (iv) *Termination is an appropriate sanction for contravening it.*
5. (3) *The acts which may justify termination are-*
 - (a) *gross dishonesty, "*

Having examined how the CMA analysed the reasons for termination, semantics aside, this Court agrees with the conclusion reached by the CMA that the respondent's termination was substantively unfair due to the reasons to follows.

The respondent was terminated on the allegation of a forging signature of Enock Lyimo which was found in one of the documents uploaded by her in a bank system.

A handwritten signature in blue ink, appearing to read 'Enock Lyimo', with a horizontal line drawn through the middle of the signature.

Moreover, according to the applicant's submissions these allegations were backed up by the letters written by the applicant's customers one Enock Lyimo and Rashid Ally.

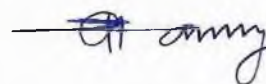
The applicants have made reference to the letters written to the applicant which were collectively admitted at the CMA and marked as exhibits D4. However, in my carefully perusal of the said letters, they reveal that none of those documents has the forged signature of the said Lyimo. But rather they are internal affairs of the directors of Raly E.A Ltd.

As much as the offence of forgery is of criminal nature then it ought to have first been proved that the said signature had been forged before holding the respondent liable for the misconduct of gross dishonest.

Moreover, this court has also observed that the said Enock Lyimo whose signature is alleged to have been forged being a key witness was neither called at the disciplinary hearing nor at the CMA. Fair procedures during disciplinary hearing include among others the right to cross examine employer's witnesses and to be supplied with investigation report to help the employee defend himself.

Failure to call material witness who was the core of the disciplinary matter vitiated the right to fair hearing. **Paschal Bandiho v. Arusha Urban Water Supply & Sewerage Authority (Auwsa)**, Civil Appeal No. 4 Of 2020, Commission of Appeal at Arusha (unreported) the court echoed that Rule 13 of the Code of Good Practice, requires employers to afford employees a fair chance and nothing more.

Under Rule 12 (3) of the Employment and Labour relations (Code of Good Practice) Rules, 2007, list down serious misconduct and gross dishonesty



is listed as one of the serious allegations that leads to employment termination.

The allegation of forgery falls into one of those serious allegations. This court in the case of **Said Mohamed Abdallah (Administrator of the Estate) vs. Stanbic Bank (T) and 4 others**, Misc. Commercial Application No. 267 of 2018, High Court of Tanzania, at Dar es salaam, held that;

"Whenever a question as to whether someone has committed a crime which is raised in civil proceedings that allegation need be established on a higher degree of probability than which is required in ordinary civil case."

In the event, this court holds the same view as that of the Commission. The respondent's termination was based on unfair reasons, there was no sufficient evidence to justify the applicant terminate her employment on the reason of gross dishonest. Therefore, the termination was unfair.

As for the second issue, Ms. Opuku the counsel for the applicant had submitted that, the Arbitrator erred to award the respondent compensation of 12 months salaries while he had already declared she was negligent in her work. The trial Commission granted the relief which was never prayed by the respondent

Responding to this ground, Mr Makawia for the respondent argued that Section 40 (1) of ELRA provides that if the termination is unfair the court or the arbitrator may order re-instatement, re-engage or compensation of not more than 12 years.

The provision of section 40 (1) (a) – (c) of ELRA provides that:



"If an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer –

(a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or

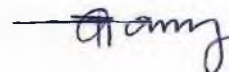
(b) to re-engage the employee on any terms that the arbitrator or Court may decide; or

(c) to pay compensation to the employee of not less than twelve months remuneration."

It is undisputed fact that under CMA F1 the respondent prayed for reinstatement without loss of remuneration while the Commission gave an order for 12 month's compensation. The cited provision gives the discretion to the Commission or Labour Court to issue the orders of either reinstatement, re engagement or compensation of twelve months salary where it is satisfied that the termination is unfair.

Moreover, this discretion dependants with the facts of each case, in particular where the employment relationship of the parties appears to have deteriorated it is very unhealthy for the court to give order of reinstatement of an employee even though the same was sought by the employee. This court (**Muruke, J**) in the case of **National Bank of Commerce vs Mwinyishehe Mussa**, Labour Revision No. 393 of 2019 was faced with similar situation and had the following to say;

"Applicant is financial institution doing banking business, as submitted by the applicant counsel. The nature of the applicant work, trust worth is very vital. Once, there is mistrust whatever



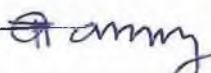
little it might be, it is not health for the bank (employer) to continue with such an employee."

In the event this court finds that to meet the end of justice, the order of twelve months compensation was justified. Consequently, I find this application is devoid of merit and is hereby dismissed. The decision of the CMA is left undisturbed.

Ordered Accordingly.

DATED at **ARUSHA** this 7th day of October, 2022.




G. N. BARTHY
JUDGE
07/10/2022