

IN THE HIGH COURT OF TANZANIA

AT TABORA

LABOUR REVISION NO. 17 OF 2020

BETWEEN

NATIONAL MICROFINANCE BANK PLC..... APPLICANT

VERSUS

KULWA SHOTTO.....RESPONDENT

RULING

Date of Last Order: 4/11/2022

Date of Delivery: 13/12/2022

AMOUR S. KHAMIS, J:

The respondent was employed by the applicant on 11/9/2008 in the position of Loan Officer. It was alleged following gross misconduct of the respondent which occurred in the course of his employment were made intolerable to the employee hence he terminated the contract on 15/8/2017.

The respondent alleged that there was unfair termination hence he referred the labour dispute to the Commission for Mediation and Arbitration (herein after referred to as CMA) for necessary relief. The CMA Arbitrator through a labour dispute No.

CMA/TAB/TRB-MJN/MISC/11/2019 pronounced an award on 22/6/2020 in favour of the respondent.

The award moved the applicant to file this application for Revision under section 91 (1) (a), (b), section 91 (2) (b) and (c), section 94 (1) (b) (i) of the Employment and Labour Relations Act, No. 6 of 2004, as amended by section 14 of the Miscellaneous Amendment Act No. 3 of 2010, Rule 24 (1), Rule 24 (2), (a) (b), (c), (d), (e), (f) Rule 24 (3) (a), (b), (c) (d), Rule 24 (11) and Rule 28 (1) (c), (d) and (e) of the Labour Courts Rules, G. N NO. 106 of 2007 seeking the following orders;-

1. That this Court be pleased to call for records and examine the proceedings of the Commission for Mediation and Arbitration (CMA) Award in Labour dispute No. **CMA/TAB/TRB-MJN/MISC/11/2019** delivered on 22/6/2020 by Hon. Kayungwa. H, the Arbitrator in view of satisfying itself as to the legality, propriety, rationality and correctness thereof.
2. That this Court be pleased to revise and set aside the Commission for Mediation and Arbitration (CMA) Award in Labour dispute No. **CMA/TAB/TRB-**

MJN/MISC/11/2019 delivered on 22/6/2020 by Hon.
Kayungwa. H.

The application was supported by an affidavit dully sworn by Lilian Komwihangiro, authorised officer of the applicant. In the affidavit she listed the following grounds;

1. That the Arbitrator erred in law and facts for entertaining the matter that was time barred.
2. That the Arbitrator erred in law and facts entertaining the matter which the Commission for Mediation and Arbitration at Tabora had no jurisdiction.
3. That the trial Arbitrator erred in law aholding that the Applicant had no valid reason to terminate the respondent.
4. That the Arbitrator erred in law and facts for entertaining the matter which was time barred.

The applicant was represented by Mr. Pascal Kamala, Advocate and the Respondent was represented by Mr. Lucas Ndanga.

The applicant submitted in respect of the first ground that the Arbitrator in determine the issue of time barred he was of opinion that the applicant during trial raised the issue of time

barred with ill motive after passage of mediation period and since the respondent testified that have received the termination letter on 11/5/2018 and the labour dispute was filed on 28/5/2018 hence the dispute was timely filed.

He argued that the record shows that the respondent during trial acknowledged to have been terminated on 15/8/2017 and appealed to the applicant's committee of the respondent whereby the decision of appealed was received and signed by him on 15/1/2018.

It is argued that the respondent chooses to mislead the Commission by indicating that the last termination occurred on 11/5/2018 while the actual fact applicant maintained a copy of proof or having served the respondent termination letter on 15/1/2018 by having him sign the decision of the applicant at appeal level.

It is further argued that the trial Arbitrator ignored documentary evidence on record and chose to rely on the oral evidence adduced by the respondent which goes against the well-established principle of the law that oral evidence cannot be admissible to contradict the content of document when the

document is showing the accuracy as to existence of facts as provided by the Evidence Act Cap 6 R.E. 2019 under section 103.

The applicant counsel was of the view that from the date of both letters and the time the respondent referred the dispute to the commission thirty days had elapsed. Since the respondent has condoned the lapse of time to entitle him to sue as provided under Rule 11 of GN NO. 2007 hence the dispute is time barred and liable to be dismissed by this commission and this court. To cement his argument, he cited the case of numerous cases on time limitation.

In arguing the second ground, counsel for the Applicant contended that the trial Arbitrator was wrong to entertain the matter which the Commission had no Jurisdiction. He contended that the respondent was employee of the applicant and at the time of termination he was working at Kasulu District Kigoma Region. That form no. 1 the respondent indicated that the cause of action arose at Kasulu District Kigoma Region. He cited the case of **Bulyanhulu Gold Mine Ltd Vs Gasto Myovel / (2013) LCCD 13** held that:-

I have checked the relevant law rule 22 (1) of the Labour Institution (mediation and Arbitration) Rule GN 64/2007 which

was made by CMA under powers conferred to it by section 15(1)(e) (ii) and (iii) of the Labour Institution Act 7/2004.

In view of that clear provision of the law, it is my decision that the caused of action in this case rose in Shinyanga where the respondent was working and was terminated. The only way the Dar es salaam office could have had jurisdiction, would have been if the applicant has sought CAM permission to allow the referee to be made in Dar es salaam the preferred place instead of Shinyanga.

Under the law the only CMA office with jurisdiction in a labour dispute is the office responsible for the area where the dispute arose, unless permitted otherwise by CAM, consequently I find that in case, the Dar es salaam CAM office had no jurisdiction to arbitrate the dispute.....”

Basing on the above provision of the law, the applicant's counsel argued that Honourable Arbitrator had no mandate to apply any discretion as to the place of suing. Hence the obligation of applicant to indicate how it prejudice the interest of justice does not arise. It is argued that it was wrong for the arbitrator to hold that the dispute was properly filed because the respondent resides

at Tabora while the respondent had not followed proper procedure to transfer dispute from CMA Kigoma to CMA Tabora.

The applicant counsel argued that applicant had reason to terminate the respondent because the record shows that the respondent was found to have breached the employment policy and instruction of the employee by negligence of duty resulting to loss, unsatisfactory management of mandate files resulting to loss, providing false information to the bank and concealing information intent to mislead the bank of the banks among others as charged by in the disciplinary committee.

It the applicant's submission that the trial Arbitrator did not analyse the evidence on record rather jumped to erroneous conclusion that the evidence of the applicant was too general and doubtful with assign any reason to such conclusion.

He argued that the trial Arbitrator was also wrong to hold that it was important for all customers of the bank to be called as witness in disciplinary process without considering the fact that the bank officers including DW2 had investigated the claim and presented enough evidence to prove the misconduct and the respondent admitted the misconduct in question.

RULE 12(1) OF THE G.N. NO. 42 OF 2007 was referred to support the argument of the applicant. He therefore argued that the respondent breached the rules regulating conduct relating to the employment relationship. Counsel for the applicant cited the case of **Nickson Alex Vs. Plan International Revision No. 22 of 2014 High Court of Tanzania Labour Division at Mwanza (Unreported)**. He argued that the core value of the banking industry is integrity, trust and confidence. Since the respondent was in financial institution such lack of integrity and dishonest could not be tolerated in banking industry. He cited different cases which discussed the issue of trust of employees of financial institution.

Arguing on the fourth ground, the applicant contended that all the procedure were properly followed by the applicant before terminating the respondent. He stated that the respondent was informed and required to show cause as to why disciplinary action should not be taken against him. The respondent was informed about the date of disciplinary hearing accorded chance to come with representative of his choice and the disciplinary committee was set as per the Human Resources Policies of 2015. The

respondent was availed with details of the investigation report via the charge sheet given to him.

It is submitted that the trial Arbitrator faulted the as procedure aspect on ground that he investigation report was not availed to the respondent. He submitted that the conclusion of trial arbitrator is unfounded since the record indicates early all particulars of investigation report were given to the respondent via charge sheet and this aspect was well addressed by DW1 as reflected in hearing conducted on 19/2/2019.

He therefore contended that the termination was substantively and procedurally fair hence the respondent's claims should be dismissed.

The applicant argued further that the commission should make an order for payment of Tshs. 24,605,606.09 being a loan taken by the respondent since the respondent never denied to take the loan.

By way of reply, the respondent counsel strongly disputed the applicant submission and argued that the dispute was within time because the respondent was terminated on 15/8/2017he receive the letter of unfair termination on 11/5/2018 and filed his dispute on 28/5/2018.

Arguing on the second ground, counsel for the respondent contended that the submission on jurisdiction over the dispute is uncalled for since the CMA decision was quite right in deciding the matter at Tabora. Because the Rule 22(1) of the Labour Institution (Mediation and Arbitration) Rules 2007 GN. No. 64 of 2007 Provides that:-

“A dispute shall be mediated or arbitrated by the Commission at its Office having Responsibility for the area in which the cause of action arose, unless the commission directs otherwise.”

He also cited the case of **Nyanza Road Works Limited Vs. Juma Abdallah, Labour Revision No. 50. Of 2020 at Mwanza,**

As to the third ground, the respondent's counsel argued that it was unfair to punish the respondent over dispute whose decision on disbursing the loan is a process which involves a panel and not only one person, the respondent instead it involves a big Committee which includes the Manager (the Approver) credit Committee, head Office of NMB(Disbursement) with drawal valuer, Loan Officer (which is the respondent), the teller and a visit to the scene of event.

He argued that this procedure was not followed in this case. he was of the view that the process of issuing loans by NMB Bank

and like any other Bank is normally governed by Committees and not by a loan officer alone, under the premises, the respondent has no overlapping hand in the power of approving, issuing monitoring and disbursing loans, hence the applicant has no truff of powers to corner the respondent over this dispute.

Responding to the last ground the respondent's counsel insisted that the procedure for termination was not properly followed. The respondent was not given a chance to question some of the key witnesses in the dispute and did not use properly the internal disciplinary committee and the panel which deal with loan was noy properly used.

He also disputes to the allegation that the commission has to order the respondent to pay his debt. It is the respondent's submission that the statement is washout since the dispute does not concern the debt of the respondent.

He therefore prayed for the application be dismissed.

In rejoinder, the applicant's counsel reiterated his submission in chief and argued that the respondent has failed to respond to the argument on issue of lack of jurisdiction because the cited case was not supplied to the applicant to enable the applicant to respond to the authority purported to be relied upon

It is also argued that the respondent's counsel has failed to grasp the nature of the disciplinary charges laid against the respondent. He was of the view that the charge was never with the offence to disburse loan. He added that the respondent was charged with an offence which was committed by him personally and not by ground of employees and the charge s does not hold liable the respondent because of disbursement.

Having gone through the facts of this application and the submissions by both parties together with the CMA award. In determining the merit of this application, I will start with the issue whether Labour dispute No. **CMA/TAB/TRB-MJN/MISC/11/2019** delivered on 22/6/2020 was time barred.

As per the submission of parties, it appears that the time of the respondent employment is the main debate in this matter. The applicant argued that the respondent was terminated on 15/8/2017 and that on 15/1/2018 the respondent received decision of appeal committee and filed his dispute at CMA on 28/5/2018. He therefore argued that the dispute was time barred. On the side the respondent argued that the dispute was within time as it was filed on 28/5/2018 while the termination was on 11/5/2018 so he was within the prescribed time.

Looking at the record it is quite clear that the respondent's claim was time barred before the Commission for Mediation and Arbitration. It is very clear from the evidence that the claim was instituted after the lapse of 133 days from the date when the termination of the applicant employment occurred, that was on 15/1/2018 and the date which the claim was instituted before the Commission was on 28/5/2018.

This is contrary to rule 10 of the Labour Institutions (Mediation and Arbitration) Rules GN. 64 of 2007 which provides time limit for other disputes be referred to CMA within thirty (30) days. Therefore, this delay goes to a fundamental issue of jurisdiction as was also decided in the case of **TANZANIA ONE MINING LTD. VERSUS ANDRE VENTER LABOUR REVISION NO. 276 OF 2009** (unreported).

Rule 10 (1) of the Labour Institutions (Mediation and Arbitration) Rules 2007 (GN. 64 of 2007) provides as quoted hereunder: -

"The Disputes about the fairness of an employee's termination of Employment must be referred to the Commission within thirty days from the date of termination or the date that the

employer made a final decision to terminate or uphold the decision to terminate.”

From the above provision, deadline for lodging the labour dispute in the CMA counting 30 days from the 15/1/2018 falls on 15/2/2018. The Labour dispute was lodged on 28/5/2018 which is beyond time limit. Therefore, the Labour Dispute No. CMA/DSM/ KIN/ 190/ 2020 was filed out of time.

In the circumstance, I am incline with the submission of the counsel for the applicant that the trial Arbitrator was wrong to entertain the dispute which was filed out of time.

The record shows that the issue of time limitation was raised during trial but the trial Arbitrator was wrong to entertain the matter which was out of time while the record clearly shows that the respondent's claim was barred by time.

Despite the fact the dispute was time barred, the trial Arbitrator also went further and assumed jurisdiction which was not vested to. The record reveals that the cause of action arose at Kasulu Kigoma but the respondent filed his dispute at Tabora.

It is requirement of the law that labour dispute is filed at the place where the dispute arose. This is per Rule 22(1) of the Labour Institution (mediation and Arbitration) Rule GN 64 of 2007. In this

the cause of action arose at Kasulu Kigoma therefore the Commission for Mediation and Arbitration for Tabora had no jurisdiction to entertain this matter as it ought to be filed at Kigoma.

In the circumstances, I find the 1st and 2nd grounds have disposed the matter therefore I do not wish to proceed to determine the remaining grounds in this application.

In the premises, the award of the Commission for Mediation and Arbitration is hereby quashed and set aside. The application is allowed.



AMOUR S. KHAMIS.

JUDGE

13/12/2022

ORDER

Ruling delivered in Chambers in presence of Mr. Lucas Ndanga, learned advocate for the respondent and in absence of the applicant.

Right of Appeal is explained.



AMOUR S. KHAMIS.

JUDGE

13/12/2022