IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE SUB-REGISTRY OF MWANZA

AT MWANZA

LABOUR REVISION NO. 23 of 2023

[*From Labour Complaint No. CMA/MZA/NYAM/100/2022/30/2022*]

MWITA EVANCE MOKA ---------- APPLICANT

VERSUS

CRDB BANK PLC---------- RESPONDENT

JUDGEMENT

July 27th & Aug. 30th, 2023

Morris, J

The Court is being moved by Mwita Evance Moka (the applicant) through a notice of application, chamber summons and affidavit filed on 7th June 2023. He prays for this Court to call for and examine the records and proceedings of the Mwanza Commission for Mediation and Arbitration (elsewhere, CMA or Commission). The objective of his move is for the Court to satisfy correctness, rationality, legality, logic and propriety of the CMA decision dated 28th April 2023 (Hon. S. Msuwakollo, Arbitrator). Further, the

Court receives his invitation to revise and set aside the CMA award and thereafter determine the dispute on its merit.

Facts relevant to this application are that the applicant was an employee of the respondent on permanent and pensionable terms. His employment commenced in June 2011 and was terminated on 12/3/2022. The reason leading to such termination germinated from his appointment as Team Leader (Cash Centre) which culminated into his transfer from Bugando branch to Musoma branch. He was duly paid the transfer benefits of Tshs. 8,398,110.50/= in two instalments on 2nd and 7th August 2021. On 6/9/2021, he reported at his new post-branch.

A day after the second instalment of the transfer package was paid to him, he allegedly demanded to be transferred back to his former branch for health and medical attention reason. He, indeed, returned to Bugando branch but in his former position of Relationship Officer effective from 9/9/2021. He was thus, supposed to return the transfer money back to the employer. He did not heed.

By a letter dated 20/9/2023 (exhibit AB-10), the applicant was informed that his request to repay the transfer allowances in installments

was denied by the respondent's management. He was instead instructed to settle the whole amount (Tshs. 8,398,110.50/=) immediately upon receipt of that letter. Meanwhile, investigation was mounted by the respondent's forensic department. The investigation report exhibited that the applicant had committed fraud or dishonest offences contrary to category 3:3:13 of the respondent's ***Disciplinary Code*** read together with section 3.1 of ***the Anti-Corruption and Fraud Risk Policy***. By a letter dated 8/12/2021 (exhibit AB-17) he was required to answer the said charge against him.

On 6/1/2022, he was given notice to attend a disciplinary hearing a week later on 13/1/1022 at 10:00 hours at CRDB Bank House - Mikocheni, Dar es salaam (exhibit AB-19). The applicant failed to appear. The record (exhibit AB-14) reveals further that the meeting was postponed to 21/1/2022 at the same venue. However, the applicant again defaulted. He, instead, recommended that hearing should be conducted at Mwanza due to his health concerns. The respondent humbly complied. The committee members travelled to and scheduled the meeting at Mwanza on 25/1/2022. But the applicant communicated his non-appearance due to health issues. The meeting was lastly scheduled for 3/3/2022 but again he did not appear.

The hearing was, consequently, conducted in his absence. The findings of the committee led to a recommendation that the employment of the appellant be terminated (exhibit AB-20). Accordingly, the applicant was served with a letter of termination on account of **gross dishonest** dated 9/3/2022 (exhibit AB-21). The applicant lodged his appeal to Managing Director (exhibit-22). The appeal remained unanswered. He filed the dispute (subject of this revision) before the CMA challenging unfairness of his termination.

The CMA found the reason for termination to be valid and fair. But it held that there were procedural irregularities during or before such termination. Consequently, he was awarded Tshs. 16,536,951/- being compensation of six months' salary. Aggrieved by the award, the applicant filed this application. In his affidavit, the applicant alleges that: the Arbitrator failed to evaluate the evidence on record; there was insufficient reason for his termination; it was improper to confirm termination after faulting procedures for such termination; and the awarded reliefs were inapt.

I ordered the application be argued by way of written submissions; the schedule which was complied with. The applicant enjoyed services of

Mr. Juvenalis Motete, learned Advocate while Ms. Marina Mashimba, also learned Counsel, represented the respondent. I will consider both lawyers submissions in the course of answering the issues raised herein.

This being the second court to determine the matter at issue, I adopt the form of rehearing. This court enjoys the mandate to re-appraise, re-assess and re-analyse the evidence on the record. See, the cases of ***Paulina Samson Ndawavya v Theresia Thomasi Madaha***, Civil Appeal No. 45 of 2017; ***Makubi Dogani v Ngodongo Maganga***, Civil Appeal No. 78 of 2019; ***Mwenga Hydro Limited v Commissioner General Tanzania Revenue Authority***, Civil Appeal No. 356 of 2019; and ***Diamond Motors Limited v K-Group (T) Ltd,*** Civil Appeal No. 50 of 2019 (all unreported).

Submitting for the first ground of revision herein, Mr. Motete argued that parties summoned a total of 6 witnesses. The respondent paraded 5 witnesses with 24 exhibits while the applicant testified himself and tendered 1 exhibit. He also argued that evaluation of evidence by the Arbitrator is silent on evidence adduced during cross examination. That such testimony was only considered while determining the first issue. He further submitted that the closing submissions were also not considered by the Commission.

To him, had the Arbitrator evaluated the evidence on record, CMA would have discovered glaring inconsistences, contradictions and gaps that were apparent in the respondent's evidence. I was referred to ***Ramadhani Mtulia Mwega v Shaweji Salum Mndote and another***, Land Appeal No. 50 of 2019; and ***Matongo Mathayo @Mgori & Another v R***, Criminal Appeal No. 271 of 2021 (both unreported). Further, the applicant faulted the Arbitrator for not considering some exhibits without any disclosed reason. To Mr. Motete, the omissions highlighted above resulted into miscarriage of justice.

In reply it was submitted that the Arbitrator is not obliged to reproduce all evidence adduced by parties during hearing. Under rule 27 (3) (d) of ***the Labour Institution (Mediation and Arbitration Guidelines) Rules*** 2007, the award is supposed to just contain summary of parties' evidence and arguments. Also closing submissions were considered at pages 4, 19 and 26 of the award. Further, the respondent argued that the applicant's affidavit and submissions do not name any specific evidence that was left unattended by CMA. To her, authorities cited by the applicant hereof are distinguishable in this matter.

I have considered the submissions by both parties. The applicant argufies that the trial Arbitrator failed to evaluate and analyze the evidence and submissions of parties. However, as correctly submitted for the respondent, the applicant pointed at no evidence that was not evaluated by the Commission. In principle, rule 27 of ***the Mediation and Arbitration Guidelines*** (above) provides that, an award must contain details of the parties; the issue (s) in dispute; background information; summary of parties' evidence and arguments; reasons for the decision and the order (precise outcome of the arbitration). The award, thus, needs not be a replica of all evidence of parties and arguments made. I have taken liberty to and read the award of the CMA. It contains all attributes of an award in accordance with the law. It is adequately reasoned with authorities. Therefore, the first issue for determination lacks merit. I disallow it.

The applicant argued the second issue that according to the investigation report, the recommended charge against the applicant was concealment of material information that may constitute fraud (exhibit AB-13). However, he was charged of committing an act amounting to fraud or dishonest (exhibit AB-17). He was not charged with gross dishonest or

negligence. He, however, referred to page 22 of the award at which the trial Arbitrator mentioned the offence of negligence or gross dishonest. To him, literally the 1st framed issue was left unattended. Further, the issue of negligence and gross negligence, having been raised by the Arbitrator *suo-motu*, parties were to be afforded the right to be heard. As they were not, the Commission erred accordingly.

The applicant submitted further that, had the trial Commission considered the first issue and evaluated the evidence on record; it would have established that the offence for which the applicant was charged had already attracted sanctions. That is, the applicant had been penalized. That several punishments were imposed upon the applicant including demoting him to his previous position (relations officer); re-transferring him back to Bugando branch at his own costs; lowering his basic salary to previous scales; requiring him to pay back transfer benefits which he had already legally spent; nonpayment of salary from 1st September to 9th September under new position (team leader); and unlawful flagging the applicant's bank account.

Hence, to him, as the respondent had already punished the applicant (exhibit AB-10), the former was *functus officio* to re-open the matter without vacating his previous decision. He also argued that, the subsequent investigation and disciplinary hearing amounted to re-opening the matter.

In reply it was submitted that is not true that the trial Arbitrator's findings on the 1st issue was based on the offence of gross negligence as alleged. Reading the award as a whole, it is evident to the respondent that, the Arbitrator dealt with the first issue at pages 14 and 22. The Arbitrator discussed and based findings on the offence of gross dishonest. To the respondent, at the last paragraph of page 22 she mistakenly mentioned gross negligence. Therefore, no new issue for determination was raised at CMA. Further, the respondent objected the applicant's argument that there was double punishment herein. To her, exhibit AB-10 was the respondent's response to the applicant's letter - not a punishment howsoever.

After considering the submissions for both parties, I will now determine two limbs of this matter: whether the Arbitrator raised a new ground for determination; and whether she failed to consider the reason for termination as being invalid because the applicant had already been

punished. For the first limb, I have carefully read the award. From pages 14 to 22 the Commission considered whether or not there was a sufficient reason for termination. For instance, at page 14 - last paragraph, the Arbitrator records: "*…sababu ya za mlalamikaji kuachishwa kazi ni ukosefu wa uaminifu mkubwa (gross dishonest)* …". Further, the 4th paragraph of page 19, she documents that: "*...kwa kosa alilolifanya malalamikaji alivunja kifungu cha 3:3:13 cha disciplinary Code ya mwajiri …. ambapo alitenda kosa la kukosa uaminifu kulikopindukia (gross dishonest) …".*

Therefore, as correctly submitted by the applicant and admitted by the respondent, the Arbitrator only used the phrase "*tuhuma ya makosa ya uzembe wa hali ya juu*" (meaning gross negligence) at page 22 of the award. The respondent, however, argued that such anomaly was a mere mistake on the part of the Commission. I accept that proposition. I have the reasons. **One**, reading both proceedings and award, the offence of gross negligence does not feature except on the said page of the award. It is the principle of law that a judgement should not be read in isolation. It must be read as a whole. In the case of ***Tumaini Massaro v Tanzania Ports Authority***,

Civil Appeal No. 30 of 2018 (unreported) the Court of Appeal, at page 11, held that;

> *"It is cardinal principle that a reason in a judgement has to be read in as a whole in the context of the issue that was before the court to have its true meaning and logic."*

Two, the respondent never charged the applicant with the said offence. **Three**, if it were to be taken as an offence, for which the applicant denies to had been accorded the opportunity of being heard thereof; the cited paragraph indicates that the applicant **admitted to had committed** such offence. In the words of the Commission; *"na kwamba (mwajiriwa) alikiri makosa hayo na hata mbele ya Tume…*" **Four**, if the applicant's allegations in this regard are a matter to go by; so long as he is not disputing the CMA's conclusion of his admission (as discussed in three above); then he concedes that he was heard (afterthought).

Consequently, the applicant's argument that he was denied the right to be heard is forceful and not graspable. The mere mentioning of the stated phrase, in my view, does not vitiate the major findings of the CMA or causing the Commission to be inferred as having raised a new ground.

In the second and last limb, the applicant is faulting the CMA for not evaluating evidence on record. He maintains that he was double-punished. I have evaluated the evidence on record in line with this issue. It is undisputed that, the applicant was given Tshs 8,398,110.50/= being transfer benefits. The last instalment was paid on 7/9/2021. On 8/9/2021 he demanded to return to Bugando branch. The letter dated 20/9/2021 does not concern punishment imposed to the applicant. Instead, it was addressing his requests concerning the modality of returning to Bugando branch and repayment of the transfer benefit by instalments.

It was also alleged by the applicant that his account was flagged by the respondent. At page 107 of the proceedings, however, the applicant testified at CMA that he had filed respective labour disputes before the Commission concerning flagging his account and compensation for that action as complaints numbers CMA/MZA/NYAM/277/2021 and CMA/MZA/NYAM/278/2021. Hence, such proceedings are not a package of the present proceedings. I am thus loath to drag them here. If such incident, to the applicant, formed two separate courses of action, it certainly cannot

be used to argue this case. That is, the court should not be used to adjudicate unrelated matters where separating them is the most ideal approach. Such pudding-like approach, to me, would pose a significant challenge to the system of justice delivery.

Further, the offence for which the applicant was punished is not failure to return the transfer benefits. It was due to **gross dishonest**. Therefore, in my considered view, the applicant was not punished twice for the same mistake, as alleged. The latter offence was still valid and pursuable unconnectedly. Henceforth, the second issue lacks merit too.

Regarding the jointly argued 3rd and 4th issues, the applicant concurs with the trial Arbitrator that substantive unfair termination attracts a heavier penalty than procedural unfairness. However, he contends that a proper and complete evaluation of evidence on record would have led the Commission to conclude that termination herein was unfair both substantively and procedurally. Further, he referred to section 40 (1) of ***the Employment and Labour Relations Act*** Cap 366 R.E 2019 (**the Act**) to buttress his argument that the award of compensation should not be less than 12 months' remuneration.

Also, to him, rule 32 of ***the Mediation and Arbitration Rules*** GN. No. 64 of 2007 necessitates re-engagement of an employee. He, thus, concluded that the arbitrator was not guided by such relevant provisions of law in determining the amount of compensation and/or appropriate remedy. Reference was made to the case of ***Veneranda Maro & Another v Arusha International Conference Centre***, Civil Appeal No. 322 of 2020 (unreported) regarding circumstances under which the court may interfere with the discretion of lower court or tribunal. Such factors include, misdirection; acting on a matter it should not have acted upon; failure to take consideration of important matters and arrival to wrong conclusion. Therefore, I was invited to apply rule 32 (1), (2) and (5) of ***the Mediation and Arbitration Rules*** (*supra*) in this connection.

In reply, the respondent's counsel submitted that the termination was substantively fair as there were valid reasons for the same. She joined no issue with the applicant on the position that procedural unfairness attracts lesser compensation. She also cited the case of ***Felician Rutwaza v World Vision Tanzania***, Civil Appeal No. 213 of 2019 (unreported) to support that

the CMA award of 6 months' salary was fair in the circumstances of this matter.

The Court has considered the submissions by both sides. Again, the applicant is faulting the trial Arbitrator to had found that the reason for termination was valid irrespective of evidence on record. Nevertheless, as pointed out earlier, his submissions do not make reference to evidence which was left unevaluated in his favor. Therefore, in the interest of not repeating myself, I will not determine this contention further for want of specificity of details.

I now, instead thereof, confine myself to the issue of compensation. It is a settled law that, award of compensation herein is discretional. As correctly submitted by the applicant, it is also a cardinal principle of law that the court cannot interfere with the exercise of discretion by lower court unless it is satisfied that the decision by lower court/tribunal was clearly wrong; or that it misdirected itself; or because it acted on matters on which it should not have acted; and/or because it failed to take consideration of matters which it should have taken into consideration. See, for instance,

Mbogo and Another v Shah [1968] EA 93; and ***Magnus K. Laurean v Tanzania Breweries Limited***, Civil Appeal No. 25 of 2018 (unreported).

It is also a good law that, generally, where termination is adjudged as being unfair on procedural basis only, an Arbitrator or the High Court will award compensation under section 40 (1) (c) of ***the Act*** as opposed to reinstatement and re-engagement. See the case of ***Magnus K. Laurean v Tanzania Breweries Limited*** (*supra*).

On reaching the compensation of 6 months' salary herein, the Arbitrator was guided by the principle that the law abhors substantive unfairness more than procedural unfairness. She was further guided by decision of this Court in ***Ali Salim v National Bank of Commerce Ltd (NBC)*** Revision No. 538 of 2020 (unreported) which made reference to the case of ***Felician Rutwaza v World Vision Tanzania*** (*supra*). In the former case, basing on the fact that reason for termination was valid but the employer failed to follow appropriate procedures of terminating the employment; the court found compensation of 6 months correct. In the latter case, of the Court of Appeal affirmed the 3-month salary award.

Considering the fact that, in the matter at hand, the reason for termination was found to be valid; and that the respondent only erred in procedures, on the guidance of the above authorities; I am disinclined to interfere with the compensation award by the CMA. Thus, third and fourth issue are, too, determined in the applicant's disfavor.

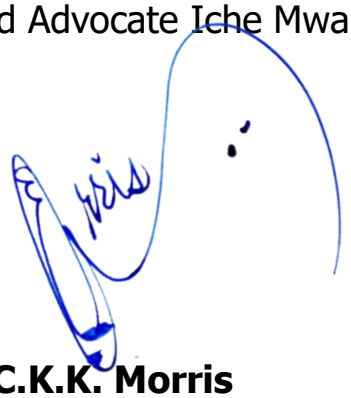
In fine, the whole application is found as lacking merit. It is accordingly dismissed. Parties to shoulder own costs. It is so ordered. Right of appeal is fully explained to parties.

C.K.K. Morris

Judge

August 31st, 2023

Judgement delivered this 30th day of August 2023 in the presence of Mwita Evance Moka, the applicant and Advocate Iche Mwakila for the respondent.



C.K.K. Morris

Judge

August 30th, 2023