UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT IRINGA

LABOUR REVISION NO. 07 OF 2023

(Originating from Labour Dispute No. CMA/IR/68/2018 in the Commission for Mediation and Arbitration at Iringa)

BETWEEN

BARCLAYS BANK TANZANIA LIMITED.....APPLICANT

AND

ADAM MHAGAMA.....1ST RESPONDENT

FELICHISIMO KALANGA.....2ND RESPONDENT

SULEIMAN JUMA.....3RD RESPONDENT

JULIUS NGWILA.....4TH RESPONDENT

MAXIMILIAN MSOVELA.....5TH RESPONDENT

RULING

Date of the Last Order: **06.10.2023**

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A.E. Mwipopo, J.

Adam Mhagama, Felichisimo, Suleiman Juma, Julius Ngwila and Maximilian Msovela, respondents herein, were employed by Barclays Bank Tanzania Limited, the applicant, on diverse dates and in different positions. Their working station was the Iringa Branch. On 24.08.2018, the applicant terminated their employment contract for misconduct following an

investigation and disciplinary hearing, which found them guilty of disciplinary offences. Respondents were aggrieved with the employer's decision and referred the dispute for unfair termination to the Commission for Mediation and Arbitration at Iringa (CMA). Upon hearing the evidence from both sides, the Commission found the termination was unfair procedurally. It awarded all respondents twelve (12) months' salary compensation for unfair termination.

The applicant was unsatisfied with the CMA award and filed the present application for revision. The revision is filed by Notice of Application, Chamber Summons supported by the affidavit of the applicant's principal officer, Dotto Kahabi. Respondents opposed the application for revision through a counter affidavit affirmed by their advocate, Omary Khatibu. The applicant has raised six (6) legal issues, as found in the affidavit supporting the application. The said grounds for revision are as follows:-

1. *That, the Hon. Arbitrator erred in law and facts by awarding twelve (12) months compensation and severance pay to the respondent who did not appear before the Commission for Mediation and Arbitration to testify in support of his case, taking into account the case was not a representative one.*
2. *That, the Hon. Arbitrator erred in law and facts by holding that the applicant did not follow the procedure for termination because the applicant failed to issue the investigation report to the respondents while the investigation report was prepared out of the respondent's*

admission of the Commission of the misconduct and that the respondents never requested for the investigation report from the applicant.

3. *That, the Hon. Arbitrator erred in law and facts by awarding twelve (12) months' salary compensation despite finding the reason for termination was justified and valid.*
4. *That, the Hon. Arbitrator erred in law and facts by holding that the respondents were not given the right to appeal against the decision of the disciplinary hearing committee because there were not issued with the outcome of the disciplinary hearing despite the facts that the applicant issued the outcome of the disciplinary hearing which gave the respondents right to appeal, but the respondents never appealed.*
5. *That, the Hon. Arbitrator erred in law and facts by holding that the applicant did not call witnesses to prove the allegations against the respondents before the disciplinary hearing committee despite the facts the respondents themselves admitted to committing the misconduct.*
6. *That, the Hon. Arbitrator erred in law and facts by awarding twelve (12) months of compensation and severance pay to the respondent who did not appear before the Commission for Mediation and Arbitration to testify in support of his case.*

At the hearing, the applicant was represented by advocate Emmanuel Godson Miage, whereas advocate Omar Khatibu represented all respondents. The hearing of the revision proceeded through oral submissions.

The counsel for the applicant submitted on the 1st legal issue independently, abandoned the 6th legal issue as it is the repetition of the 1st legal issue, and submitted on the 2nd, 3rd, 4th and 5th legal issues jointly. He

said on the 1st legal issue that, during the hearing before the CMA, Maximilian Msovela (5th respondent), Julius Ngwila (4th respondent) and Suleiman Juma (3rd respondent) gave evidence in support of their claims. Felichimo Kalanga (2nd respondent) did not testify or provide evidence in the CMA. However, in its award, the CMA also awarded the 2nd respondent with twelve (12) months' salary as compensation for unfair termination. Each respondent filed their application at the CMA independently, and there was no application for representative suit filed by respondents. Each respondent was supposed to present their case at the CMA. In **Peter Jacob Weroma and 11 Others vs. Ako Group Ltd**, Civil Appeal No. 172 OF 2021, Court of Appeal at Musoma (unreported), the Court held on pages 6 and 7 of the judgment that the failure of the CMA to afford the witness right to give evidence is contrary to rules 19(2) and 25(1) of G.N. No. 67 of 2007 and Article 13(6) (a) of the Constitution of the United Republic of Tanzania, 1977. Failure to afford some of the parties' right to be heard is irregularity, which is the remedy to quash the whole proceedings, decision, and order for retrial. The counsel prayed for the Court to quash and set aside the CMA decision and award and to order for retrial.

The applicant's submission on the remaining grounds of revision is that after finding that the termination was not fair procedurally, the trial CMA ordered all employees to be awarded twelve (12) months' salary

compensation. It is a settled principle that where the termination is unfair procedurally, the compensation has to be less than twelve (12) months' salary compensation. The Court of Appeal in **Felician Rutwaza vs. World Vision Tanzania**, Civil Appeal No. 213 of 2019, Court of Appeal of Tanzania at Bukoba (unreported), stated the position. The decision of the CMA went contrary to the settled position of the law. Although the CMA did find that the reason for termination was fair, the Arbitrator erred not to consider that the respondents confessed to disciplinary offence and, as said, the employer was not supposed to follow the procedure for termination.

One of the Arbitrator's reasons for holding that the procedure was unfair was a failure to provide the respondents with an investigation report. However, the act of respondents to admit to the disciplinary offence means the employer was supposed to proceed with taking disciplinary action against them. In **Adam Maulid Matumla vs. Mobisol UK Limited**, Labour Revision Application No. 79 of 2020, High Court Labour Division at Arusha, (unreported), this Court held that it was proper for the CMA not to award the employee with compensation after he confessed to disciplinary offence. The proceedings of the CMA show the 1st respondent admitted to signing the forged certificate. Also 5th respondent admitted to preparing a forged certificate. The 4th respondent admitted to giving an account to a client, Alatunosa Chaula, without depositing her money in the account as per the

employer's procedures. The 3rd respondent admitted to withdrawing the money from the client's account contrary to bank procedures. Thus, all respondents have no right to compensation as they admitted to committing the disciplinary offence. The investigation report was tendered as an exhibit before CMA. The investigation report is vital because the employee denied committing the disciplinary offence. Failure to avail the respondents with an investigation report does not prejudice them as they admit to committing the offence.

In his reply, Mr Omar Khatibu, advocate, said that in labour disputes for termination of employment, the labour courts have to determine if the reason for termination was fair and if the procedure for termination was followed as per section 37 of the Employment and Labour Relations Act. The employer must prove that the reasons and procedure for termination were fair under section 37(2) of the Employment and Labour Relations Act.

Regarding the issue that the 2nd respondent did not give evidence of his claims, the counsel for respondents said that the CMA found the applicant did not follow procedures for termination. It is evident that the remedy for unfair termination under section 40(1) (c) of Cap. 366 R.E. 2019 is compensation for up to 12 months. Thus, CMA correctly ordered the 2nd respondent to be paid salary compensation for procedural unfair termination. Each respondent instituted a labour dispute at CMA. But, during mediation,

the CMA merged all disputes into one labour dispute. As the 2nd respondent was part of the merged dispute, he has the right to compensation.

On the issue of respondents admitting to committing the disciplinary offence, the counsel said it is true that the respondents admitted during the disciplinary hearing to commit the disciplinary offence. However, they were not served with an investigative report until they appeared on the disciplinary committee. The investigation report is the document initiating charges to the employee. The law provides that the investigation report must be availed to the employee as per rule 13(1) and (5) of the G.N. No. 42 of 2007. The applicant failed to provide the respondents with an investigation report contrary to the law. The decision of the CMA has to remain as it is for being made according to the law. The revision be dismissed for want of merits.

In his rejoinder, advocate Emmanuel Miaga said the fact that the employer has to prove that the termination was fair does not remove the employee's duty to show that the termination was not fair. The case was consolidated to avoid multiplicity of the cases before CMA. It was not a merger. Their claims were not similar; hence, each had to prove his claims. The CMA erred in awarding compensation to the 2nd respondent. This was the end of submissions for both parties.

While composing the judgment, I encountered fatal irregularities in the Commission's proceedings. The CMA typed proceedings have the signatures

of the Arbitrator, but the CMA handwritten proceedings do not contain any signature of the Arbitrator. As the CMA typed proceedings have the signatures of the Arbitrator, it means the typed proceedings are the approved CMA proceedings. However, the typed proceedings of 15/11/2019, 05/05/2019 and 09/05/2019 were signed by the Arbitrator on 08/10/2020. The Arbitrator did not sign the proceedings of each hearing date after the completion of recording it.

Another observed irregularity is the failure of the Arbitrator to append a signature at the end of the testimony of each witness. The omission raises questions over the authenticity of the evidence of the witnesses in the record. Further, the typed record had no signature of the Arbitrator at the end of each hearing date. The hearing dates in the CMA proceedings not appended signature of the Arbitrator at the end of the hearing date are those of 03/12/2018, 25/09/2018, 15/11/2019, 22/01/2022, and 02/05/2019. Some of the coram of proceedings do not show hearing dates, which means the said hearing dates of the coram are unknown, as seen on pages 19 and 32 of the typed proceedings.

Moreover, the proceedings of the CMA are confusing since the hearing dates are mixed up. The proceedings show that the matter came before the CMA on 28/09/2018, 03/12/2018, 11/07/2019, 13/09/2019, 15/11/2019 and 22/01/2020. The next coram shows the hearing dates were on 02/05/2019

and 09/05/2019, which is a mix-up as the coram was recorded in the ascending order of the dates up to 22.01.2020. There were two unknown dates after the Corum of 09/05.2019. Due to the mix-up in the proceedings, it is impossible to follow up on the dispute before the CMA, especially from page No.1 to page No. 32.

On the date of judgment, I requested both parties to address the Court on the pointed irregularities. The counsel for the respondent, Advocate Omary Khatibu, was present in Court. He also held a brief for Advocate Emmanuel Miaga, representing all respondents. Advocate Khatibu said he has instructions to address the Court of irregularities pointed out on behalf of the counsel for respondents. He said he is addressing the Court on the anomaly on behalf of the counsel for respondents and on his behalf. He said they agree that the defects are vital as they affect the authenticity of the CMA record and witnesses' evidence. This Court can't read and understand the CMA record to compose and deliver its judgment. The irregularities have caused injustice to both parties. He prayed for the Court to do justice to both parties and see how to correct the defects.

As I stated earlier, the trial Commission's arbitration proceedings have some defects I discovered while composing the judgment. The Arbitrator signed the typed proceedings. However, the date signed by the Arbitrator in the typed proceedings differs from the date in the coram of the respective

date of the proceedings. The error is found in the proceedings dated 15.11.2019 on pages 6 and 10 of the typed proceedings, proceedings dated 02.05.2019 on page 12, and proceedings dated 09.05.2019 on pages 19 and 22. In all these mentioned hearing dates, the typed proceedings show that the Arbitrator signed it on 08.10.2020 and not on the respective hearing date. Further, the typed record had no signature of the Arbitrator at the end of each hearing date. The hearing dates in the CMA proceedings not appended signature of the Arbitrator at the end of the hearing date are those of 03/12/2018, 25/09/2018, 15/11/2019, 22/01/2022, and 02/05/2019. Some of the coram of proceedings do not show hearing dates, which means the said hearing dates of the coram are unknown. This is seen on pages 19 and 32 of the typed proceedings.

Another observed irregularity is the failure of the Arbitrator to append a signature at the end of the testimony of each witness in both handwritten and typed proceedings. This raises questions about the authenticity of the evidence of the witnesses in the record. Failure to append a signature at the end of the testimony of each witness is a fatal omission. The Court of Appeal encountered a similar situation in the case of **Iringa International School vs. Elizabeth post,** Civil Application No. 155 of 2019, Court of Appeal of Tanzania at Iringa (unreported), where it held on page 6 of the judgment that:-

"Although the laws governing proceedings before the CMA happen to be silent on the requirement of the evidence being signed, it is still a considered view of the court that to vouch for the authenticity, correctness and providing safeguards of the proceedings, the evidence of each witness need to be signed by the arbitrator".

The Court of Appeal, in arriving at the decision, was inspired by Order XVIII rule 5 of the Civil Procedure Code, which made it mandatory for the trial Court to record the evidence of each witness in writing in a narrative form and the judge or magistrate shall sign the same. The rationale for appending the signature by the judge or a magistrate at the end of the testimony of every witness was stated by the Court of Appeal in **Yohana Mussa Makubi & Another vs. Republic**, Criminal Appeal 55 of 2015, Court of Appeal of Tanzania at Mwanza, (unreported), where it was held at page 12 of the judgment that:-

*"...in the absence of the signature of the trial [Judge] at the end of the testimony of every witness; **firstly,** it is impossible to authenticate who took down such evidence; secondly, if the maker is unknown, then, the authenticity of such evidence is put to questions as raised by the appellant's counsel, **thirdly,** if the authenticity is questionable, the genuineness of such proceedings is not established and thus; **fourthly,** such evidence does not constitute part of the record of trial and the record before us".*

In the present case, the trial Arbitrators did not append a signature at the end of the testimony of every witness. The omissions vitiate the

proceedings of the CMA since the authenticity of the evidence and the person who recorded the evidence are questionable. Also, the proceedings of the CMA are doubtful, and as a result, the evidence of witnesses does not constitute the record of the CMA.

Moreover, the proceedings of the CMA are confusing since the hearing dates are mixed up. The proceedings show that the matter came before the CMA on 28/09/2018, 03/12/2018, 11/07/2019, 13/09/2019, 15/11/2019 and 22/01/2020. The next coram shows the hearing dates were on 02/05/2019 and 09/05/2019, which is a mix-up as the coram was recorded in the ascending order of the dates up to 22.01.2020. There were two unknown dates after the Corum of 09/05.2019. Due to the mix-up in the proceedings, it is impossible to follow up the dispute before the CMA, especially from page No.1 to page No. 32. Besides, the typed proceedings and handwritten proceedings differ if the witnesses testified on oath or not.

The pointed-out irregularities in the proceedings are fatal and have vitiated the proceedings of CMA. The Court of Appeal in **Yohana Mussa Makubi & Another vs. Republic** (supra) quashed and set aside the Commission proceedings and ordered trial de novo. A similar position was taken by this Court in **Mohamed K. Dady and 27 Others vs. Bakhresa Food Products Limited,** Revision No. 482 of 202, High Court Labour

Division at Dar Es Salaam, (unreported). Thus, this Court has to take similar steps.

Therefore, I quash the proceedings of the CMA and set aside the award thereof. I order the file to be reverted to the Commission for Mediation and Arbitration and the arbitration hearing to start afresh before another Arbitrator. As this is a labour matter, each party shall bear its own cost of the suit. It is so ordered accordingly.

A. E. MWIPOPO

JUDGE

06/10/2023