

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION**

AT DAR ES SALAAM

REVISION APPLICATION NO. 429 OF 2019

**EXIM BANK (T) LTDAPPLICANT
VERSUS**

JACQUILINE A. KWEKA RESPONDENT

JUDGMENT

Date of last Order: 05/06/2020

Date of Judgment. 12/06/2020

Z.G.Muruke, J.

The applicant Exim Bank (T) Ltd, filed present application seeking for revision of the decision issued by Commission for Mediation and Arbitration, (herein to be referred as CMA) on 12th September, 2018, in Labour dispute no. CMA/DSM/ILA/806/12/39 by Hon. Mkombozi, Z.B Arbitrator which was in favour of the respondent. The application is based on the grounds stated in paragraph 18 (i-iv) of the affidavit supporting the application. Application is supported by affidavit of Shangwe Kapinga, the applicant's Principal Officer, challenging the application respondent filed her counter affidavit .

Hearing was by way of written submission, both parties adhered to the schedule hence this judgment. The applicant was represented by Mr. Benson Mphatso, Mr. Fredrick Mbise and Mr. Paschal Kihamba -Advocates from Amicus Attorneys. While the respondent was represented by Advocate Mr. Eliezer Kileo.

Briefly are the facts that led to this application, On 1st August,1997 the respondent was employed by the applicant as operations officer until 2012 where she was promoted to the position of Operations Manager at Hill Park branch. She worked with the applicant until 16th November, 2012 where she was terminated on gross negligence. It was alleged that, the respondent being the senior branch manager, instructed her subordinate the Assistant Bank Manager to debit matured deposit account of Hill Park and credited to Clock Tower contrary to the policy and guidelines of the bank, mislead the management by submitting a false monthly reconciliation report as sent on 17th March, 2012 and she instructed her subordinate to pass on entries without any document.

On 31st December 2011 account No.184000410 outward cheque for collection of Hill Park Branch, was debited with total amount of 77,000,000/= and the same amount was credited to Clock tower IBIT account number 184000410, seen to be imputed by Ms. Hellen and authorized by Ms. Regina Masenge who was Assistant Branch Manager at Hill Park Branch. Again on 9th February,2012 the matured deposit account number 215021010 of Hill Park, was debited with 58,000,000/= and the amount was credited at the same branch in account No. 184000410 outward cheque for the connection with narration of MasterCard payment imputed by Ms. Mwageni Chief Cashier, and authorized by Ms. Regina Masenge Assistant Branch Manager at Hill Park Branch. Being aggrieved with the termination, the respondent referred the dispute to the CMA where the decision was on her favour, Aggrieved with the award the applicant filed the present application.

Submitting on grounds (i and iv) of revision, the applicant counsel stated that, the termination of the applicant was substantively and procedurally fair as it was proved by DW1 and DW2. After investigation DW1 discovered that the respondent instructed her subordinates to authorize the transfer and withdraw the same as stipulated under page 7 and 8 of the award. That amounts to misconduct as the respondent failed to follow bank guideline on the transfer of the money. The arbitrator disregarded the evidence of DW1 and DW2. Complained applicant counsel. Further the Applicant's Counsel contended that, the procedure for termination were adhered as per Rule 13 of the Employment and Labour (Code of Good Practice) GN 42/2007. The procedure should not be followed in a checklist form what matters is adherence to the rules of fair hearing, citing the case of **NBC v. Justa Kyaruzi**, Rev.No.79/2009.

On ground (ii) it was submitted that the award was issued out of time prescribed by the law. The arbitrator have not stated any good reason regarding the delay, referring section 88(9) of the Employment and Labour Relations Act, Cap 366 RE 2019(herein to be referred as Cap 366 RE 2019) and the case of **Dar es salaam Yatch Club v Eliezer Mushama and James**, Rev No. 263 of 2008 as cited in the case of **Malaik K. Mwasungi Vs. Tanzanite One Mining Ltd**, Rev. No.108 of 2010.Once there is a good cause, the award can be issued beyond prescribed time referring the case of **Joas Mrutu nd 37 Others v Namnani Hotel**, Rev No. 268 of 2008.

On ground (iii), the applicant Counsel submitted that the arbitrator has the discretion to award compensation under section 40(1) (c) of Cap

366. This has been emphasized in the case of **Deus Wambura v Mtibwa Sugar Estates Ltd**, Rev. No. 3 of 2014 and Michael **Kirobe Mwita v AAA Drilling Manager**, Rev.No.194 of 2013. The arbitrator awarded the respondent 24 months' salary, a sum of 171,007,560/=as compensation referring page 22 and 23 of the award. The reasons for the same were not persuasive referring Rule 32(5) (a) to (f) of the GN No.67 of 2007.

In response to the applicant's contentions, the respondent counsel stated that, the applicant had no reasons for termination of the respondent's employment. During the Disciplinary Hearing and before CMA, the applicant failed to provide any evidence to show that the respondent instructed her subordinates to transact alleged dubious transactions as he alleged. At page 9 para 2 of the CMA award DW1 has admitted that there was no any document or email from the respondent to the subordinates instructing them on the same. Also the Disciplinary Hearing against the respondent was adjourned several times. The applicant neither had evidence to substantiate the offence against the respondent nor the reason for termination, referring Rule 13(1) of the Code and the case of **Happy Sausages Ltd v Revocatus Tarimo & Others** Rev. No. 112 of 2015.

He further added that the evidence adduced at CMA were hearsay, DW2 while testifying admitted that the information were obtained from the previous Human resource Officer. DW1 evidence before CMA was contradicting, his evidenced that USD 16, 562.42 were drawn by the respondent at the bank teller, while on his report exhibit EB1 shows that the said amount was deposited on the respondent's account.

Regarding procedure, Mr. Kileo argued that the procedure for termination were not adhered. The applicant was not afforded with a right to be heard since the investigation report were not brought at the Disciplinary Hearing contrary to Rule 13(5) of the Code. He cited the case of **Patrickson Ngowi & Others Vs. Tanzania Breweries Ltd**, Rev. No. 300 of 2014. The chairperson of the meeting was of the same rank of management with the respondent, the Senior Branch Manager contrary to Rule 13(4) of the Code. Even the minutes for the disciplinary meeting held on 12th October, 2012 were signed on 17th October, 2012 contrary rule 9 of the Guidelines for Disciplinary Hearing.

The issuing of the award out of the prescribed time is not of the respondent's fault. Nullifying the award for that course will be miscarriage of justice, and also the intention of the laws on the court to exercise speedy dispensation of justice will not be met. He referred the cases of International School Moshi V Alfred Joseph Salimi and another, Rev. No. 90 of 2007 at Arusha. Regarding the award, the respondent's counsel stated that at page 6 of the award the arbitrator advanced good reason for awarding the respondent among them is the termination was both substantively and procedurally unfair, long term of service as she worked 15 years with the applicant and she was a senior staff, citing the case of **Diamond Motors v Masumbuko Ndila**, Rev. No. 20 of 2015 at Mwanza.

Having considered the rival submissions of both parties, this is called upon to determine the following issues;

(i) Whether the applicant had valid reason for termination

(ii) **Whether the applicant complied with the procedure for termination under the law.**

(iii) **What are the reliefs of the parties?**

It is a principle of law that, termination of employment must be on valid and fair reasons and procedure. For termination to be considered fair, it should be based on **valid reasons** and **fair procedures**. There must be substantive and procedural fairness of termination of employment as provided for in **Section 37(2) of the Employment and Labour Relations Act, No. 6 of 2004** which states that:-

"Section 37 (2) A termination of employment by an employer is unfair if the employer fails to prove-

(a) that the **reason for the termination is valid;**

(b) that the **reason is a fair** reason-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer, and

(c) That the employment was **terminated in accordance with a fair procedure."**

In the case of **Tanzania Revenue Authority Vs. Andrew Mapunda**, Labour Rev. No. 104 of 2014, Aboud J. held that:-

"(i) It is the established principle that, for the termination of employment to be considered fair it should be based on valid reason and fair procedure. In other words there must be substantive fairness and procedural fairness of termination of employment, Section 37(2) of the Act.

(ii) I have no doubt that the intention of the legislature is to require employers to terminate employees only basing on valid reasons and not their will or whims.”

From records, I have come across exhibit EB8 termination letter, which shows that the reason for respondent’s employment termination was gross negligence contrary to Bank’s code of conduct and Rule 12(3) (d) of the Employment and Labour Relations(Code of good Practice) G.N 42 (herein to be referred as the Code.)

I find it wise to explain first what gross negligence means. Rweyemamu J (as she then was) in the case of **Twiga Bancorp(T) Ltd V David Kanyika** Labour Revision No. 346/2013 DSM Registry, defined Gross negligence to mean: **A serious carelessness, a person is gross negligent if he falls far below the ordinary standard of care that one can expect. It differs from ordinary negligence in terms of degree”.**

The general principles of law on negligence, liability arises where:-

- i. There is a duty of care, and a person breaches that duty as result of which the other person suffers loss or injury.
- ii. A person acts negligently, when he fails to exercise that degree of care which a reasonable man /person of ordinary prudence would exercise under the same circumstances.
- iii. Negligence is opposite of being careful or diligence.

In the case at hand, the applicant alleged that the respondent failed to follow bank’s guidelines on the transfer of money by instructing her

subordinates to authorize the transfer and withdrawal of money without following the procedure and cause loss the applicant. It is undisputed that both dubious transactions were authorised by Ms. Regina Masengi who was the Assistant Branch Manager.

I have cautiously gone through investigation report, I find that the respondent was said to have violated the bank procedures and guidelines by instructing her subordinates Ms Regina to debit matured deposit account of hill park and credit to Clock tower IBIT, which is strictly not allowed by bank operations and procedures. Again it was found that the respondent instructed her subordinates to pass entries without supporting documents. However, having gone through the records and the applicant's evidence, I find no any evidence proving that the respondent was the one who instructed the subordinates to conduct such fraudulent transactions. It is apparent that the Assistant General Manager and other subordinates who participated in those transactions are bound by the bank procedures and guidelines. They had a room of refusing to perform the illegal transaction or ought to have reported to the other senior management, than accepting to do the same so as to prevent the foreseeable loss.

The applicant alleged that from the circumstantial evidence, the respondent admitted to be responsible under collective responsibilities as Senior Branch Manager. I find it worth to produce the same;

"I have no any explanations of those transfers but under collective responsibilities as senior Branch Manager am responsible for the loss."

From that statement, above what I can see is the respondent spirit of accountability as the head of the branch.

The applicant had the burden of proving the validity of the reason for termination of the respondent as per Section 39 of Employment and Labour Relations Act, Cap 366 RE 2019 which provides that:-

"In any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair."

This was also held in the cases of **Muhimbili National Hospital vs. Constantine Victor John**, Civil Appl. No. 44/3013 and **DAWASCO Vs. Abdul Swamadu Rwegoshora**, Rev. No. 259 of 2008. In the case of **Abdul Karim Haji V. Raymond Nchimbi Alois and Joseph Sita Joseph** [2006] TLR 419, it was held that:-

"It is an elementary principle that he who alleges is the one responsible to prove his allegations."

Also in the case of **Masolele General Agencies Vs. African Inland Church Tanzania**, [1994] TLR 192 it was stated that:-

"But on our part, we are satisfied that the trial Judges view on the burden of proof were correct. Once a claim for specific item is made, that claim must be strictly proved..."

As the burden of proof is expected to be more than on balance of probabilities, the applicant's evidence not sufficient to prove the allegations against the respondent. However respondent admission that, **"I have no any explanations of those transfers, but under collective**

responsibilities as Senior Branch Manager I am responsible.” I thus, fault arbitrators finding in this aspect, in that there was good reason for termination.

On the Second issue regarding procedure for termination, Rule 13 of the Code, provides for procedure for termination of an employees. There are various court decisions which decided that, the procedure for termination need not to be complied in a checklist form, what is important is adherence to the rules of natural justice i.e, right to be heard and to defend from the allegations. From the records, it is obvious that during the disciplinary hearing, the respondent was not availed with the documents including the vouchers or any other document that connects her with the allegations. The applicant neither produced the same nor brought witnesses like DW1 who conducted investigation, the subordinates employees who performed the transactions in question.

Rule 13(5) (supra) provides;

“The Evidence in support of allegations against the employee shall be presented at the hearing. The employee shall be given a proper opportunity at the hearing to respond to the allegations, question any witness called by the employer and to call witness called by the employer and call witnesses if necessary.”

In the case of **NBC Ltd Mwanza v. Justa B. Kiyaruzi Revision No. 79/2009 HC Labour Division Mwanza Sub registry (Unreported)** where she held that;

“Ingredients of fair hearing are the right to be made aware of the charge, and given reasonable time to prepare and be heard in defense; an opportunity to cross examine employers witness (he accusers) and in the context of the act, the right to be assisted at the hearing by a union representative or a friend what is important is not an application of the code in the checklist fashion, rather to ensure the process used to adhere to basics of fair hearing in the Labour Content depending on the circumstances of the parties, so as to ensure the act to terminate is not reached arbitrarily”

The applicant denied the respondent her right to fair hearing since the respondent was not afforded with an opportunity to cross examine the witnesses and the evidence. From records the disciplinary hearing were adjourned due to failure of the applicant to observe fair hearing procedures. The respondent was right to claim to be availed with the documents that establish her offence, considering the fact that it is true she was out of the office for four good months after being suspended. Together with the investigation, still the applicant failed to adduce the evidence during the Disciplinary Hearing ending up terminating the respondent. In view of the above I find that the respondent was not afforded with a fair hearing, hence I uphold the arbitrator’s finding on the procedure for termination.

Regarding the relief of the parties, it is clearly divulged from exhibit EB8 that, upon her termination the respondent was not afforded with her terminal benefits as they were withheld as part of security for recovery of the loss incurred by the applicant. CMA awarded the respondent with 24

months' salary for being unfairly terminated both substantively and procedurally.

It is the finding of this court that, the respondent was terminated with good cause only procedure were not followed then the award of 24 months is unjustified. I reduce the same to 12 month compensations. I therefore uphold the arbitrator's award, with the above variation. In view of the above, revision application is partly allowed to the extent shown.



Z. G. Muruke
JUDGE
12/06/2020

Judgment delivered in the presence of Pascal Kihamba, Advocate for the applicant and Mr. Elieza Kileo for the respondent.



Z. G . Muruke
JUDGE
12/06/2020