

**IN THE HIGH COURT OF TANZANIA**  
**LABOUR DIVISION**  
**AT DAR ES SALAAM**

**REVISION NO. 280 OF 2019**

**BETWEEN**

**NMB BANK PLC..... APPLICANT**

**VERSUS**

**ANTHONY HAULE..... RESPONDENT**

**JUDGMENT**

*Date of Last Order: 19/10/2020*

*Date of Judgment: 30/11/2020*

**Z.G.Muruke, J.**

Aggrieved by the Award of Commission for Mediation and Arbitration [herein after to be referred to as CMA] in the labour dispute No. CMA/PWN/MAF/679/2016 delivered on 25<sup>th</sup> January, 2019 the applicant NMB BANK PLC has filed this application under the provisions of Section 91 (1) (a), (2) (b) and (c), Section 94 (1) (b) (i) of the Employment and Labour Relations Act, Cap.366 RE 2019 (herein Cap.366 RE 2019), Rules 24 (1), (2) (a) (b) (c) (d) (e) and (f), (3) (a) (b) (c) and (d) and 28 (1) (c) (d) and (e) of Labour Court Rules, GN No. 106 of 2007 praying for the Court to examine the proceedings of the CMA, revise and set aside the whole CMA award. The application was supported by the affidavit sworn

by Consolatha Resto, the applicant's Principal Officer. In challenging the application the respondent filed a counter affidavit.

Briefly here are the facts, on 5<sup>th</sup> December, 1989 the respondent was employed by the applicant. He worked with the applicant on various positions until 23<sup>rd</sup> November, 2015 when he was terminated. The reasons for his termination was said to be gross misconduct and negligence. It was alleged that on 2014 and 2015 while holding the positions of Customer Service Manager and Acting Manager of NMB Mafia Branch, the respondent while performing his daily activities failed to adhere to the procedure and policies which guides the daily conduct of the office. The respondent approved various payment purchase which were fictitious like, purchasing of stationaries from a local vendor purporting the same were used in the office while the same were not bought, misappropriated the office funds by exceeding the approved budget, also he approved the purchase exceeding the price/inflation.

Being resentful with termination the respondent referred the matter to the CMA where decision was on his favour. The applicant was dissatisfied with the award he thus filed the present application hence the present judgment. With leave of the Court the application was disposed of by way of written submissions. I appreciate both parties for adhering to the schedule and for their submissions. Both parties were represented. Whereby Advocates Paschal Kamala, Alex Felician, and Antipas Lekamu represented the applicant, while the respondent was represented by Hemed Omari, Personal Representative.

Submitting in support of the application, on substantive part the applicant's counsel submitted that the arbitrator failed to consider the evidence adduced by the applicant which proved that they had valid reason for terminating the respondent. Even the arbitrator in his reasoning at page 8 of the award admitted that the respondent is guilty as he stated; **"for sure the complainant in this case is not clean, but not dirt to the extent stated by the respondent and for the reasons solely caused by him."** Mr. Kamala further stated according to the evidence adduced by DW1, DW2 and DW3 proved the reason on the required balance of probability. DW1 who was the investigation officer testified that misappropriation was on three areas; the complainant exceeded the approved budget for the said financial year, fake expenses and there was an issue of inflated figures, where as in all General Ledgers he has exceeded the approved budget of 2014/2015. According to **Exhibit R1** the approved budget was 11,39,760/= for maintenance land and building but according to **Exhibit R2** it was discovered that the respondent exceeded the expenditure for the same year for about 7 million as the expenditure was 17,418,980/= Learned counsel further stated that DW1 testified that on the stationary ledger the budget for stationary was 16,855,494/=. According to GL3 (General ledger for stationary) expenditure for the said year was 23,839,393.43/= that, for the year 2015 the budget was 14,602,400 but when he was investigating he found they have used 12,133,039.22/= only 2 million remained. In cleaning area the budget for 2014 was 4,701,120/= they used 5,916,200/= while for 2015 the budget was 5,263,440/= until July, 2015 they have used 5,187,500/= In that ledger he discovered that

they have purchased cleaning equipment while there was a company namely Jitegemee Group which had the tender of cleaning and was paid by the bank per month. And the said money was supposed to pass through the company's account and not otherwise. The respondent transferred the money from the Company and transferred to another account of a customer Daud R. Wachiro (DW2) who testified that he was paid 340,000/= per month and the same was used to buy the equipment. One day he was sick and the respondent came and asked for an ATM card and a password so that they could withdraw 260,000/= which was deposited into his account and they went with his wife who was given 10,000/=.

Additionally the applicant's counsel submitted that the first offence employee shall not justify termination unless it is proved the misconduct is so serious that it makes a continued employment intolerable as per Rule 12(3)(d) of the Employment and Labour Relations (Code of Good Practice) herein GN.42/2007, citing the case **Edna Robert v Tanzania Revenue Authority** Rev.No.282/2009.

That the core value of banking industry is integrity, trust and confidence. The employees are expected to exercise a highest degree of honesty, integrity and trust. In this case the applicant as employer has lost trust with the respondent because he was aware of the procedure governing his day to day activities but opted not to follow them, he referred various cases including the case of **NMB Bank v Andrew Aloyce**, Rev. No.1/2013 at Musoma (unreported)



In regard to the procedure for termination, the applicant's counsel submitted that, the applicant followed all the procedure required for termination. As testified by DW4 in his testimony before CMA. Also the arbitrator in determining the 2<sup>nd</sup> issue on suo motto raised the issue that the disciplinary Committee coram was improper, hearing of the appeal and the applicant's charge sheet was not in conformity with Section 135 of Criminal Procedure Act, without considering that the CPA is only applicable in criminal matters. The parties were not given a right to be heard on the issues he raised suomoto, referring the case of **Jestina George Mwakyoma v Mbeya – Rukwa Auto Parts** [2003] TLR 251

Concerning the relief of the parties the applicant's counsel argued that since termination was fair both substantively and procedurally, the award of reinstatement without loss of remuneration from the date of termination to the date of retirement was against the law under Section 40(1) (c) of the Employment and Labour Relations Act Cap 366 RE 2019 (herein Cap 366 RE 2019) which require the employer to pay the employee the remuneration from the date of unfair termination to the date of final payment. He thus prayed for application be granted.

Responding to the applicant's submission, the respondent's representative started his submission by challenging the applicant's affidavit in support of the application sworn by Consolatha Festo. He stated that in their submission the applicant prayed to adopt the affidavit sworn by Lilian Kamihangiro while is not the deponent of the affidavit in support of the Revision application No.280/2019. He thus prayed for this

court to disregard the applicant's submission. On the 1<sup>st</sup> ground Mr. Hemed submitted that, the termination of the respondent was substantively and procedurally unfair. The applicant had failed to establish the reasons for termination. Learned counsel continued with elaborating the criminal offences of stealing by agent and conspiracy, which I will not labour into summarizing the same as they are not reflecting the charges which were set against the respondent in exhibit R16 (the charge) and R16 (the termination letter).

On the 2<sup>nd</sup> issue respondent's representative argued that the termination was procedurally unfair because the disciplinary committee was conducted on 24<sup>th</sup> November, 2015 and the termination letter was issued to the respondent was signed on 23/11/2015. That means, the respondent was terminated before the hearing. Further it was submitted that, the termination was signed by a chairman of the Disciplinary Committee. After termination, the applicant filed his appeal but he was not heard on the same, but on 28<sup>th</sup> January, 2016 he received the decision of appeal upholding the decision of the committee. He referred Rule 13(1)-(12) of GN.42/2007 and the case of **Leopard Tours v Rashid Juma & 1 another**, Rev.No.55/2013.

In regard to the reliefs, the respondent's representative submitted that the applicant has to pay the respondent compensation for unfair termination from the date of termination to the date of retirement. He cited the case of **Isaac Sultan v North Mara Gold mines Limited**, consolidated Rev. No.16 and 17 of 2018. The respondent counsel prayed

for dismissal of the application for lack of merit. In rejoinder, learned counsel submitted that the issue of affidavit requested to be adopted by the applicant, is just a human error and can be rectified because it was made in good faith and prayed this court to be guided by the decision of Kambona **Charles (As administrator of the estate of late Charles Pangani) v Elizabeth Charles**, Civil Application No.529/17 of 2019

On validity of a reason for termination the applicant's counsel submitted that the respondent's representative arguments is unfounded because as per exhibit R12 (Charge sheet), the applicant was charged with gross misconduct and negligence to wit he was accused for misappropriation and misuse of funds, exceeding the approved budget, ghost expenses, exceeding the price/inflation. Therefore, they have failed to understand the gist of the respondent's submission hence should be disregarded. Further, he argued that the respondent was terminated with a proper authority and the employee was timely served with the termination. Also the as per exhibit R17 and R 18 the appeal determined, hence the respondent's arguments are baseless. Learned Counsel insisted on the applicant's prayers in submission in chief.

Having carefully considered the parties submissions, records and the applicable laws, here are the issues for determination;

- i. Whether the applicant had valid reason for termination
- ii. Whether the procedure for termination were adhered
- iii. To what relief parties are entitled to.

Prior determination of the issues, I must address the objection which was raised by the respondent's representative in regard to the affidavit in support of the application. He stated that the applicant in their submissions they prayed to adopt an affidavit of Lilian Komwihangiro who is not the deponent of the affidavit on records. The applicant conceded the said defect and stated that it was just a human error which was accidentally made, and prayed for correction of the same by inserting the deponent's name.

As submitted by the respondent's representative that the applicant's submission contained the said defect as the affidavit in support of the application was sworn by one Consolatha Resto. This court is of the view that, since the deponent in the supporting affidavit was not contested by the respondent in his counter affidavit, then the said error in the applicant's submission can be clarified by referring the name of the deponent in the adopted affidavit. This is so done for the expeditious dispensation of justice.

Concerning the 1<sup>st</sup> issue for determination, it is a tenet 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, Cap 366 RE 2019** 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."**

[Emphasis is mine].

This was also emphasized in Article 4 of Convention 158 which provides that:-

"Article 4: **The employment of a worker shall not be terminated unless there is a valid reason for such termination** connected with the capacity or conduct of the worker or based on the operation requirements of the undertaking, establishment or services."

[Emphasis added].

In the matter at hand, the respondent was terminated on grounds of the applicant was charged with gross misconduct and negligence to wit he was accused for misappropriation and misuse of funds, exceeding the approved budget, ghost expenses, exceeding the price/inflation which exposed the applicant to a greater financial risk. It was the arbitrator's finding that the applicant had no valid reason for termination.

I have cautiously gone through exhibits, R1 to R 12, as admitted before CMA, I have noted that as testified by DW1 the respondent exceeded the budget which was set per year 2014 and 2015, failed to follow the internal procedure for purchasing and purchased the ghost goods and great embezzlement of the applicant's funds for his own benefit.

I find worth to reproduce a peace of the respondent's testimony before CMA. When he was responding to the cross examination questions at page 62, 63 and 66;

**Page:62-63**

Qn: Wastan wa matumizi ya Mafia Branch ya karatasi ni rim ngapi?

Ans;Rim Mbili mpaka tatu

Qn;Tarehe 1/6/2015 uliagiza rim 30 za A4 lakini baada ya siku 4 uliagiza Rim 30,ndani ya siku 4 ulitumia rim ngapi?

Ans;Rim 2

Qn; Kwene kikao cha nidhamu ulijibu nini matumizi ni rimu 2? Zilikuwa zinaisha rimu 30?

Ans;Hapana

Qn; Vitu vinaagizwa kabla ya kuisha au vikiisha,ni kweli?

Ans;Kweli

Qn; Baada ya siku 4 rim zilikuwa zimeisha aus kukaribia kuisha?

Ans; zilikaribia kuisha

Qn: Rim 30-8

Ans;22

Qn Kwa 22 zinakuwa zinakaribia kuisha?

Ans; Nina maelezo yake kama ukitaka nitayatoa.

Qn. Rim zinaagizwa kwa local supplier kweli na si Head office?

Ans;Ndio

Qn; Lakini taratibu za kibank zataka kuagiza toka head office?

Ans; Ndio

Qn;Kwenye A/C ilionekana umezidisha kwa kiasi gani?

Ans; siwezi ona mpaka nisome ushahid husika

Qn; Lakini ulizidisha? "approved budget" kweli?

Ans; Ndio

**Page 66**

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Qn; Kwa kawaida ukizidisha kiwango cha fedha kilichopo from approved budget ni lazima uombe kibali cha zone ,ni kweli?

Ans; Ndio,kweli

Qn; Wewe unakielelezo kinachoonysa ulikubaliwa nyongeza husika?

Ans;Kwa maandishi sina

Qn;Ni kweli kiwango kilizidi

Ans; Ndio

From the respondent's evidence as clearly seen above it is apparent that, he admits to have gone contrary to the procedure and policy guiding the affairs of the applicant in his performance. The respondent as the

Senior officer of the bank is aware of the policy and procedures and had a duty to adhere to them in course of his performance of his daily activities, but he negligently decided to diverge from them for his personal interest and gain as a result caused financial risk to the applicant. 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.

On that basis this court finds the applicant had executed his duty of proving the validity of the reason for termination as required under Section 39 of Cap 366 RE 2018. The applicant had valid reason for terminating the respondent. I therefore fault the arbitrator's finding that the applicant had no valid reason for termination.

In regard to the 2<sup>nd</sup> issue, the respondent alleged that the disciplinary hearing was conducted on 24<sup>th</sup> November, 2015 whereas the termination letter was signed on 23<sup>rd</sup> November, 2015. That, the decision



for termination was made prior the hearing. Also the termination letter was signed by the Chairperson of the disciplinary Committee. From records it is apparent that the applicant adhered to the procedure of terminating the respondent by issuing a charge the respondent, issuing notice, conducted disciplinary hearing and timely issued the outcome of the disciplinary hearing committee. However, I have gone through the termination letter exhibit R.16, as stated by the respondent's representative the same has been prepared and signed by the Chairperson and his secretary on 23<sup>rd</sup> November, 2015. In his argument, the applicant's counsel just stated that the allegation are baseless as he was timely served with a termination letter.

From that aspect this court is of the view that, since the termination letter has been signed before the hearing of the disciplinary Committee, it is presumed that the decision to terminate the applicant was already made prior the hearing. Therefore the said hearing was just like a rubber stamp to a termination letter. And the same was done just to meet requirement of the law that, they afforded the respondent with a right to be heard while the deep truth is there was no fair trial under that circumstances. On such basis the applicant failed to comply with the procedure required on terminating the respondent. On relief of the parties, the respondent prayed for reinstatement and the same was granted by CMA without loss of remuneration.

Now, this court having found that termination was procedurally unfair, do hereby quash and set aside the arbitrator's order of

reinstatement and order payment of six (6) months' salary as compensation for being unfairly terminated.

I thus allow the application to that extent shown. Ordered accordingly.



Z.G.Muruke

**JUDGE**

30/11/2020

Labour Court TZ.

**IN THE HIGH COURT OF TANZANIA  
LABOUR DIVISION  
AT DAR ES SALAAM**

**REVISION NO. 280 OF 2019**

**NMB BANK PLC ..... APPLICANT**

**VERSUS**

**ANTHONY HAULE ..... RESPONDENT**

**Date: 30/11/2020**

Coram: Hon. S.R. Ding'ohi, DR.

Applicant:

For Applicant:

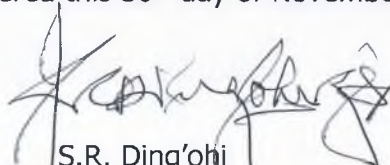
Mr. Alex Felician, Advocate

Respondent: Present

For Respondent: Mr. Hemedi Omary, Personal Representative

CC: Halima

**Court:** Judgment delivered this 30<sup>th</sup> day of November, 2020.

  
S.R. Ding'ohi  
**DEPUTY REGISTRAR**  
30/11/2020