

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

**REVISION NO. 461 OF 2019**

**BETWEEN**

**ONAEI MOSES MPEKU..... APPLICANT**

**VERSUS**

**NATIONAL BANK OF COMMERCE LIMITED..... RESPONDENT**

**JUDGMENT**

*Date of Last Order: 03/04/2020*

*Date of Judgment: 15/05/2020*

**S.A.N. Wambura, J.**

The applicant **ONAEI MOSES MPEKU** has filed the present application seeking to revise an Award of the Commission for Mediation and Arbitration [herein after to be referred to as CMA] which was delivered on 05<sup>th</sup> March, 2019, on the following grounds:-

- (1) *That the Honorable Court be pleased to call for the records of the proceeding of the Labour Dispute No. CMA/DSM/ILA/R.407/17/674 delivered by Hon. Makanyaga A.A.*

*on 05<sup>th</sup> March, 2019. Revise it and set aside the said decision on the ground that there has been material irregularity.*

*(2) Any other necessary orders this Honourable Court deems fit and proper to grant.*

The application was supported by affidavit of Onael Moses Mpeku filed by Mr. Sylvester Sebastian applicant's learned counsel.

The respondent **NATIONAL BANK OF COMMERCE LIMITED** filed a counter affidavit of Sweetbert Mapolu respondent's Employees Relation Manager challenging the application.

In a nutshell the dispute arose out of the following context. The applicant was an employee of the respondent. He had worked in various positions since 06<sup>th</sup> October, 1988 up to 13<sup>th</sup> July, 2016 when he was terminated. By then he was a Branch Operations Manager. He was charged with the offence of insubordination and found guilty, thus terminated. Aggrieved the decision, the applicant referred the matter to CMA.

CMA determined the matter in favour of the respondent. Dissatisfied with CMA's award the applicant has now knocked at the doors of this Court, hence this application.

With leave of this court application was disposed of by way of written submissions. I thank both parties for adhering to the schedule and for their submissions.

Arguing in support of the application Mr. Sylvester Sebastian prayed to adopt the affidavit of one Onael Moses Mpeku to form part of his submissions. The application was based on four legal issues:-

On first issue Mr. Sebastian submitted that the Hon. Arbitrator erred in law by deciding that the applicant committed the offence of gross insubordination to the respondent. In order to establish the misconduct of gross insubordination there are ingredients which must be proved. To support his submission he referred to various cases including the case of **Yohana Kalanja vs. Mbeya City Council**, Lab. Div., MBY Revision No. 10 of 2014. He further argued that the fact and evidence which were before the Hon. Arbitrator reveal that the ingredients mentioned in the above case were not established.

Mr. Sebastian further submitted that the Hon. Arbitrator was wrong in deciding that the act of the applicant of refusing to sign Performance Improvement Plan (PIP) and to respond to letters given to him by his Line Manager (Branch Manager) constitute gross insubordination. He argued

that such letters which were tendered as Exhibit NBC 4, are apparently in a series of a planned mission, on the ground that they did not state under which Rule they mandated the Branch Manager to issue such Performance Improvement Plan (PIP). That since the Branch was full of other staff including the Branch Manager therefore it was unfair to only demand the applicant to give an explanation on such poor performance.

He further submitted that according to Exhibit NBC7 (Disciplinary, Capability and Grievance Policy), at page 8 of NBC Policy, investigations on allegations of poor performance could not be conducted with a Manager who was directly involved. Therefore the purported refused instructions were not in compliance with the rule of the employer, hence could not be declared as insubordination.

On second issue as to whether termination was the proper sanction for the applicant, Mr. Sebastian submitted that, Rule 12(2) of GN 42 of 2007 provides that, a first offence of an employee shall not justify termination unless it is proved that the misconduct is so serious that it makes continuation of employment relationship intolerable. This was contrary to

misconduct was said to have taken place. That if the misconduct was serious the respondent would have acted promptly.

Mr. Sebastian submitted that according to respondent's policy (Exhibit NBC7), termination is a last resort and in very peculiar circumstances as provided under Item 3.1.4 of the Policy, but the Arbitrator did not consider the provision of law in that regard.

On third legal issue Mr. Sebastian submitted that the Hon. Arbitrator erred in law and fact by deciding that the respondent followed fair procedure during the termination of the applicant. His submission based on the fact that the disciplinary action in respect of the alleged misconduct was conducted before investigations were conducted which was contrary to Rule 13(1) of GN 42 of 2007. This procedure is mandatory on the ground that investigation is one of the procedure which establishes the grounds for hearing. He further argued that the act was not only contrary to the law and principle of natural justice but also it was against the employer's Policy in regard to disciplinary issues.

Mr. Sebastian submitted that the Disciplinary Hearing Committee was comprised of two members, Branch Manager and the Chairman of the committee (Geoffrey Ndosya). He stated that it is doubtful for the entity

like NBC Limited to have a Disciplinary Hearing Committee of two members who proceeded to terminate the employment of a senior employee who worked for 28 years.

Mr. Sebastian submitted that the proceedings were prepared before the disciplinary hearing. When adducing his testimony, DW1 as referred in the award stated that the notification for disciplinary hearing was issued on 09<sup>th</sup> July, 2016 and the meeting was held between 12<sup>th</sup> and 13<sup>th</sup> July, 2016. He further argued that the Chairman of Disciplinary Committee issued the termination letter. This is against the rule of impartiality on the ground that the role of Disciplinary Committee is to recommend and not to impose the sanction. Therefore the act of the Chairman to proceed to terminate the applicant tainted all disciplinary proceedings.

On the last issue, Mr. Sebastian submitted that an employee who has been unfairly terminated his entitlements are provided for under Section 40(1) of the Employment and Labour Relation Act, [Cap 366 RE 2019], He argued that termination in the instant matter had no valid and fair reason. Therefore the sanction imposed by the employer was against the law, and the relief granted by the Hon. Arbitrator was unfair and contrary to the requirement of the law.

He thus prayed for the application to be granted.

In reply to these submissions, Mr. Mushi prayed to adopt the counter affidavit of Sweetbert Mapolu to form part of his submissions.

On the first legal issue, Mr. Mushi submitted that the applicant was requested to sign the Performance Improvement Plan (PIP) by his Line Manger and Regional Managers but he failed to sign it. His refusal to respect such instructions from his superior amounted to gross insubordination as per NBC Disciplinary, Capability and Grievance Policy. To support his argument he referred to the case of **Vedastus S. Ntulanyeka & 6 Others vs. Mohamed Trans Ltd**, Revision No. 4 of 2004.

Mr. Mushi further submitted that during the disciplinary hearing it was admitted by the applicant that he refused to respond to the said letters without any reason. He argued that there was undisputed evidence that the applicant's action amounted to gross misconduct and the evidence proved the same on the required standard.

On second issue Mr. Mushi argued that the submissions of the applicant that termination was not a proper sanction lacks merit as Rule 12(3) of GN 42 of 2007 provides acts which may justify termination. Since

gross insubordination is among the acts which justify termination and in this case there was serious repetitions of the same misconduct including refusing to sign the Performance Improvement Plan Forms (PIP), documents requested by Zonal Manager, to give explanation on various operational issues on different dates and as he refused to acknowledge or respond to the demand notes from the Branch and the Zonal Managers, therefore termination was a proper sanction for the applicant.

On third ground regarding the procedure, Mr. Mushi submitted that there was no evidence of violation of basic procedure in dealing with the complainant's disciplinary process. It is on record that during the hearing process of the matter at CMA, the respondent adhered to all procedures. The applicant was provided with notice to attend the disciplinary hearing, was notified of the offences charged, the date and place of hearing. He further submitted that after the disciplinary hearing was conducted the applicant was informed of his right to appeal at the time he received the letter to inform him the outcome.

On the last legal issue relating to the applicant's remedies, Mr. Mushi submitted that the application of Section 40(1) of the Employment and Labour Relation Act Cap. 366 RE. 2019, is limited to unfair termination, He



argued that since in this matter the applicant was fairly terminated, he could not be covered by such provision. Therefore the relief granted by the Hon. Arbitrator was just, fair and legally procured.

He thus prayed for the application to be dismissed.

Having heard the parties submissions and upon perusal of the record, I believe there are three issues which this Court is called upon to determine, being:-

- (i) Whether the respondent had valid reasons for terminating the applicant.
- (ii) Whether the respondent adhered to the procedures in terminating the applicant.
- (iii) The reliefs which each party is entitled to.

**1. Did the respondent have a valid reason for terminating the applicant?**

Section 37 of ELRA provides that:-

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

- (a) That the reasons for 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 in line with Article 4 of the ILO Convention No. 158 which provides that:-

**"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 operational requirements of the undertaking establishment or service."**

Onus of proof is on the employer as per Section 39 of ELRA and is on a balance of probabilities.

It is on record that the applicant who was a Branch Operational Manager was charged for insubordination and found guilty for that offence as per Exhibit NBC2 (termination letter). This was on the basis of an allegation of repetition of the misconduct conducted by the applicant.

Since the present matter relates to termination due to a misconduct, the relevant provision is Rule 12(1) of the Employment and Labour Relations (Code of Good Practice) GN No. 42/2007 which provides as here quoted:-

*“Rule 12 (1) Any employer, arbitrator or judge who is require to decide as to termination for misconduct is unfair shall consider;*

*(a) **Whether or not the employee contravened a rule or standard regulating conduct relating to employment***

*(b) If **the rule or standard contravened**, whether or not;*

*(i) **It is reasonable***

*(ii) **It is clear and unambiguous***

*(iii) **The employee was aware of it***

(v) **Termination is appropriate sanction** for  
*contravening the rule.*

(2) **First offence of an employee shall not justify termination unless it is proved that the termination is so serious that it makes a continued employment relationship intolerable.**

(3) *The acts which may justify termination are-*

**(f) gross insubordination**

(4) *In determining whether or not termination is the appropriate sanction, the employer should consider-*

a) **the seriousness of the misconduct.....**

b) **the circumstance of the employee's such as employment record, length of service, previous disciplinary record....."**

*[Emphasis is mine].*

In the present matter the respondent tendered a number of exhibits before CMA, including Exhibit NBC9 (letter of explanation), Exhibit NBC5 (document relating to PIP) and exhibit OM4 (applicant's reply to the Zonal Manager) which was proof that the applicant refused to obey the lawful

orders from his superior officer (Branch Manager) which relates with NBC Policy. Such refusal including the signing of the Performance Improvement Plan (PIP) which was very essential for the institution to meet its target, is clearly evidenced by Exhibit NBC6 (A letter from Zonal Manager) requesting the applicant to reply to all letters addressed to him by his Branch Manager and Exhibit NBC11 (the letter from Regional Branch Manager) which shows that there was a problem of rectifying 250 accounts where by the applicant performed below target as he only rectified 2% of what he was supposed to deriver contrary to the standard of NBC and the law.

The applicant's allegation that he refused to sign the same on the ground that he was served contrary to NBC's rules and there was misunderstanding with the Branch Manager lacks legal basis.

It is my belief that as a Senior Officer, the applicant was obviously in service for a long time and knew the banks policies very well. Thus refusing the directives or instructions given by the Branch Manager who is the Incharge of the Branch amounted to gross insubordination even if he believed he did not have the mandate to question him.

I have taken note that the applicant was a first offender and taking into account the length of his service, termination ought not to be the

proper sanction. However for an offence of insubordination which the applicant was charged and found guilty of the sanction is provided for under Rule 12(2) and (3) (f) of Employment and Labour Relations (Code of Good Practice) Rules GN 42 of 2007. Therefore there was a valid reason for termination as per Rule 12(3) (f) of Employment and Labour Relations (Code of Good Practice) Rules GN 42 of 2007. If they were any personal problems between the applicant and the Branch Manager the same could have been resolved administratively but not by refusing to abide to his directives.

## **2. Did the respondent adhere to the laid down procedures in terminating the applicant?**

Fair procedures for termination are outlined under Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules GN 42/2007 which amongst others requires:-

*(i) The investigation to be carried out.*

*(ii) Employee to be given a reasonable time to prepare for the hearing.*

*(iii) Right of representation by either Trade Union or by fellow employee of own choice.*

***(iv) Hearing to be conducted and finalized within a reasonable time and***

***(v) Hearing to be chaired by a sufficiently senior management representative who shall not have been involved in the circumstances giving rise to the case.***

*(vi) In case the disciplinary hearing committee finds employee guilty of misconduct employee shall give his mitigation factor, and employer may make its decision and reasons for its decisions thereto, including explaining right of appeal to an employee.*

Having gone through the record, I found that the provisions of Rule 13(iv), (v) and (vi) of GN 42/2007 were not complied with. Thus the procedures were unfair on the applicant. According to Exhibit NBC6 the committee composed of the Chairman and the complainant and that the Branch Manager who was the complainant attend the hearing as a member of the committee and not as a witness, which was wrong. One cannot be a judge of his own cause. The applicant being a Senior Officer the Committee had to be established by members out of his Station.

Again the Chairperson of Disciplinary Committee signed the letter of termination as per Exhibit NBC2 contrary to the above cited rules.

Though in the case of **NBC Ltd Mwanza vs. Justa B. Kyaruzi**, Rev. No. 79/2009, it was held that the procedures should not be of a checklist fashion, but the act of the Branch Manager sitting in the Disciplinary Committee, and the signing of the letter of termination by the Chairperson vitiated the whole proceedings.

### **3. What are the reliefs entitled to the parties?**

The applicant prayed for reinstatement. CMA found that the respondent had a valid reason to terminate the applicant and the procedures were adhered to, so he could not be reinstated. However, I find that the procedures which are not only supposed to be fair but seen to be fair were not.

In the cases of **Salum Omary Mavunyira Vs. Director General of NHC** 2014(2) LCCD No. 107; **Mohamed R. Mwenda & 5 Others Vs. Ultimate Security Ltd**, Rev. No. 440/2013, **Deus Wambura Vs. Mtibwa Sugar Estates**, Rev. No. 03/2014 and Consolidated Revision No. 370 and 430 of 2013 between **Saganga Mussa Vs. Institute of Social**



**Work** the Court held that where there is a valid reason for termination but the procedures have not been complied with, then the remedy cannot be similar as in cases where both the termination was unfairly done substantively and procedurally.

The prayer for reinstatement which was prayed for in CMA Form No. 1 cannot be granted as I have found that the respondent had a valid reason for terminating the applicant.

In the circumstances I award the applicant six (6) months' salary as compensation. It's on the record that the applicant was earning a salary of Tshs. 1,542,378/= per month x 6= Tshs. 9,254,268/=.

He also ought to be paid his terminal benefits if he had not been paid as Ordered at CMA.

Application is granted to that extent only.

S.A.N. Wambura  
**JUDGE**  
15/05/2020

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**REVISION NO. 461 OF 2019**

**BETWEEN**

**ON AEL MOSES MPEKU ..... APPLICANT**

**VERSUS**

**NATIONAL BANK OF COMMERCE LIMITED ..... RESPONDENT**

**Date: 15/05/2020**

Coram: Hon. S.R. Ding'ohi, Deputy Registrar

Applicant:

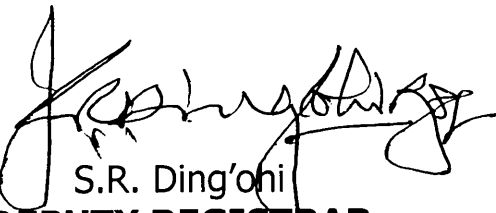
For Applicant: Mr. Sylvester Sebastian Advocate

Respondent:

For Respondent: Mr. Adolf Temba Personal Representative

CC: Lwiza

**COURT:** Judgment delivered this 15<sup>th</sup> day of May, 2020.



S.R. Ding'ohi  
**DEPUTY REGISTRAR**

15/05/2020