

**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION NO 153 OF 2020**

**BETWEEN**

**NATIONAL BANK OF COMMERCE (NBC) LTD..... APPLICANT**

**VERSUS**

**JACQUILINE S. SHIJA..... RESPONDENT**

**JUDGMENT**

Date of Last Order 11/02/2021

Date of Judgment 05/03/2021

**A.E. MWIPOPO, J.**

National Bank of Commerce (NBC), the applicant herein, has filled this Revision application calling upon the court to examine and revise the Commission for Mediation and Arbitration (herein referred as the CMA) award in labour dispute no. CMA/DSM/ILA/620/2015/183/2016 dated 24/08/2018 delivered by Hon. Kokusima, L., Arbitrator.

The Respondent namely Jacqueline Shija was employed by the Applicant as Bank Clerk on 12/12/1990 and was terminated on 18/09/2015 for misconduct following disciplinary proceedings. At the time of termination the Respondent was Bank Custodian. Aggrieved by the decision of the Applicant, the Respondent referred the dispute to the Commission for Mediation and Arbitration which decided the dispute in

her favour. The Applicant was not satisfied with the Commission decision and filed the present application for revision.

The Application is supported by the Applicant's Affidavit which contains three legal issues for determination in paragraph 21. The legal issues are as follows:

1. Whether the CMA Temeke office had jurisdiction to entertain the labour dispute.
2. Whether the Arbitrator properly considered the Applicant evidence in reaching her decision.
3. Whether the Arbitrator correctly awarded the proper relief.

Both parties to the Revision Application were represented. Mr. Godfrey Ngasa, Advocate, represented the Applicant, whereas Erick Rweyemamu, Advocate, represented the Respondent. The hearing of the Application proceeded by way of written submissions following the Court order.

Submitting in support of the application, the Counsel for the Applicant commenced his submission by ground No. 2 of the revision. He submitted that the Arbitrator erred in law for failure to evaluate the evidence adduced by the Applicant who proved the fairness of the respondent termination on the balance of probability. The evidence of DW1 proved that the bank has various measures to ensure that the money

are counted, verified, packed and transported safely according to procedures. The money were counted by computer whereby each and every note is tracked its serial number, the value, total number of the counted notes and the total value. At the end of the counting the computer produced a duplicate of casting rode and receipts which shows the details of the money counted. The casting rode was used to tie the money bundle as proof that the money was counted and its value. Then the money was put into a tamper bag together with a receipt before the bag is handled to the person responsible for transferring it. When the tamper bag was opened a total of US Dollar 20,000/= was not seen and DW 1 traced and found that the money did lost in the hands of the Respondent.

Mr. Godfrey Ngasa averred that DW 1 testified before the CMA that the Respondent did not produce her copy of casting rode and receipt to prove that the money transferred was counted. Also, the CCTV cameras was not the only measure of ensuring safety of the transferred money hence the Arbitrator erred to base his findings on the premise that the CCTV cameras did not show that the respondent did take the money. It was the duty of the Respondent to prove that the money was actually counted and handled for transfer in full amount. The Arbitrator relied on the Respondent words that she went to cash centre where the transferred

money was counted and she find the money had already been opened and casting rode were not there.

The Applicant counsel submitted that another ground for revision is that the Arbitrator erred in law and in holding that the procedures for termination of the respondent were not followed without stating the respective procedures which were not followed. This is against rule 27(3) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, G.N. 64 of 2007 which requires for the award to contain among other things reason for decision and order. The fairness of the procedure for termination was among the issues for determination before the Commission. It was the duty of the Arbitrator to analyze and determine each issue before reaching decision. The award shows in page 19 that the Arbitrator did not determine the issue of fairness of the procedure.

Then, the Counsel for the Applicant submitted on the first issue that the Arbitrator erred in law and facts by transferring the labour dispute from CMA Ilala District to CMA Temeke District without following the proper procedure. He averred that the Arbitrator transferred the dispute without following the proper procedures, without reason and without consent of the parties. According to rule 22(1) of the G.N. No. 64 of 2007, the disputes must be mediated or arbitrated by the Commission at its office having responsibility for the area in which the cause of action arose unless the Commission direct otherwise. The present dispute arose at NBC

Cooperate Branch which is situated at Ilala District which means it was supposed to be arbitrated at CMA Ilala District but this matter was transferred to CMA Temeke District.

The Applicant submitted in respect of the last legal issue that the Arbitrator erred not to consider appropriate relief to the respondent if at all the termination was unfair depending on the nature of dispute and the time of dispute has taken. In the present matter the Arbitrator ordered the Applicant to reinstate the Respondent to her position without loss of remuneration. Under rule 32(2) of G.N. No. 64 of 2007 reinstatement or re-engagement shall not be ordered where circumstances surrounding the termination are such that a continued employment relationship would be intolerable. Due to the nature of banking business which requires the highest degree of honesty and integrity in dealing with the money, the employment relationship between the Applicant and Respondent is intolerable. To support the position he cited the case of **Twiga Bancorp (T) LTD vs. Assumpta Kimwaga**, Revision No. 151 and 167 of 2016, High Court Labour Division, at Dar Es Salaam, (Unreported); and **NBC LTD Mwanza vs. Just B. Kyaruzi**, Revision No. 79 of 2009, High Court Labour Division, at Mwanza, (Unreported). Then, the Applicant prayed for the CMA award be revised and set aside.

In reply, the Respondent Counsel submitted in respect of the first issue as submitted by the Applicant that the Arbitrator considered the

evidence of both parties during trial and came up with reasonable and logical decision. The Applicant failed to prove that there was valid reason for termination. According to section 37(2) (a) of the Employment and Labour Relations Act, Cap. 366, the employer was required to prove that the reason for termination was valid and fair. The Applicant failed to prove the disciplinary charge of gross negligence she was charged with. The Applicant failed to prove that the Respondent due to gross negligence caused the loss of US dollars 20,000/= during counting and packing of the respective money. DW1 testified that the loss was discovered when the money was not in their custody and the CCTV did not show the Respondent taking the money. Thus, there was no evidence to prove that there was valid reason for termination.

The Respondent submitted on the second ground of revision as submitted by the Applicant that the Arbitrator rightly decided not to determine the issue of procedure for termination since the Commission already found that the reason for termination was not fair. As the reason of termination was held by the Commission to be unfair there was no need at all to determine the procedure for termination since by finding the reason for termination was not fair the termination of the employee automatically becomes unfair.

Regarding the Applicant submission that the labour dispute was transferred from Ilala District to Temeke District without following the

requirements of the law the Respondent submitted that the dispute was not transferred at CMA Temeke District. The dispute was registered at CMA Ilala District as Labour Dispute No. CMA/DSM/ILA/620/2015/183/2016, it was mediated and arbitrated at CMA Ilala District. It was due to typing error in the award that this Court ordered for the correction of the award in the Revision No. 595 of 2018 between the parties. The Commission corrected the on 27<sup>th</sup> March, 2020. The Respondent distinguished the case of **Coca Cola Kwanza Ltd vs. Paul Kingu and Others**, Revision No. 13 of 2017, High Court Labour Division at Dodoma, (Unreported), cited by the Applicant that in **Coca Cola Kwanza Ltd case** the cause of action arose in different jurisdiction while in the present case the cause of action arose in the same jurisdiction of the CMA office which determined the dispute.

The Respondent submitted regarding the Applicant's submission that the remedy awarded by the Arbitrator was no appropriate that the Arbitrator has discretion to award reinstatement as the appropriate relief since the Respondent prayed for the same. Cases of **Twiga Bancorp (T) Ltd vs. Assumpta Kimwaga**, (Supra); **Twiga Bancorp (T) Ltd vs. David Kanyika**, (Supra); and **NBC Ltd Mwanza vs. Justa B. Kyarusi**, (Supra), cited by the Applicant are distinguished since there were fair termination in those cases but in the present case the termination was unfair. As the Respondent worked for more than 21 years with the

Applicant without any disciplinary record hence the relationship between them was still tolerable. Thus the relief of reinstatement is appropriate. The Respondent counsel prayed for the application be dismissed and the CMA Award be upheld.

In rejoinder submission the Applicant's Counsel retaliate his submission in chief and emphasized that there were other mechanism of finding the loss of money apart from CCTV footage which proved that the money lost in the hands of respondent due to negligence. The Arbitrator was supposed to determine fairness of the procedure for termination the thing which he did not do.

The counsel argued that the Arbitrator transferred the CMA dispute to the CMA Temeke after his transfer to Temeke. The matter was heard and determined at CMA Temeke which had no jurisdiction. The cited case on the issue of jurisdiction of the CMA is relevant to the case. The rectification of the CMA Award does not change the fact that the dispute was transferred illegally from CMA Ilala to CMA Temeke without consent of the parties as the Award shows. Also, the Arbitrator was not supposed to order reinstatement as the circumstances was not tolerable.

From the submissions, there are four issues for determination. The issues are as follows:



- i. Whether the dispute before the CMA Ilala District office was unlawfully transferred, heard and determined at CMA Temeke office without consent of the parties.
- ii. If the answer to the first issue is negative, Whether the applicant have a valid reason for terminating the respondent employment;
- iii. Whether the procedure for termination was fair; and
- iv. Whether the remedy awarded by Arbitrator to the Respondent was appropriate.

To start with the first issue, the relevant law regarding the territorial jurisdiction of the CMA is rule 22(1) of the Labour Institution (Mediation and Arbitration) Rules, GN. No. 64 of 2007. The rule provides that, I quote;-

"22. - (1) A dispute shall be mediated or arbitrated by the Commission at its office having responsibility for the area which the cause of action arose, unless the Commission directs otherwise."

From the above cited rule the dispute shall be mediated at CMA office having territorial jurisdiction for the area which the cause of action arose. In the application at hand the Applicant's Counsel submitted that the Cause of action did arise at NBC Corporate Branch situated at Ilala District. The matter was referred to the CMA Ilala Office which is the office having responsibility for the Ilala District. The matter was instituted and mediated at CMA Ilala before being transferred during arbitration proceedings to CMA Temeke Office. In opposition the Respondent submitted that there

was no transfer of dispute from CMA Ilala Office to CMA Temeke Office but what happened was there was a typing error in the CMA award which shows that the Award was delivered at Temeke. The Award was corrected by the Commission on 27/04/2020 following the Court order.

As submitted by both parties, the cause of action did arise at NBC Corporate Branch which is situated at Ilala district. The CMA office responsible for the dispute arising in Ilala District is CMA Ilala Office. This dispute was referred at CMA Ilala Office and was registered as CMA/DSM/ILA/620/2015/183/2016. The dispute was mediated and arbitrated at CMA Ilala Office and the CMA award was delivered. It was during the hearing of Revision No. 595 of 2018 before this Court where the Court discovered that the CMA award shows in page 20 of the award that the award was delivered at Temeke. The Respondent prayed for the Court to allow for the correction of the award with leave to file a fresh application thereafter the prayer which was not objected by the Applicant. The Respondent filed application for correction before the Commission which was granted and the award was corrected by showing that the award was delivered at Ilala.

The Applicant allegation that the Arbitrator unlawfully and without parties consent transferred the dispute to CMA Temeke Office are not supported by any evidence. The CMA proceedings shows that the dispute was mediated and arbitrated at Ilala Office. The Applicant said nothing

during arbitration proceedings and during the hearing of Revision No. 595 of 2018 about the transfer of the dispute to CMA Temeke Office. The issue was raised for the first time by the Applicant during the application for correction of the award at the CMA but the Arbitrator rejected it. If there was a transfer of the dispute to CMA Temeke Office I expected the Applicant to raise the issue earlier during arbitration or when the Revision No. 595 of 2018 was before this Court. For that reason, I find the Applicant's failed to prove that there was transfer of the dispute from CMA Ilala Office to CMA Temeke office as alleged. Thus, the answer to the first issue is negative.

Turning to the second issue whether the applicant have a valid reason for terminating the respondent employment, the relevant law providing for the fairness of reason for termination is section 37(2) (a) and (b) of the Employment and Labour Relations Act, 2004. The section reads as follows:-

"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

The above section requires employers to terminate employees on valid reason. From the above legal position, it is well established principle of law that once there is issue of unfair termination the duty to prove the reason for termination was valid and fair lies to employer and not otherwise. (See. **Tiscant Limited vs Revocatus Simba**, Revision No. 8 of 2009, High Court Labour Division, at Dar Es Salaam)

In the present matter the Applicant averred that the evidence in record proved the reason for termination was fair. He stated that the evidence of DW1 proved that the USD 20,000/= did lost in the hands of the Respondent.

The evidence available in record shows that the bank has various measures to ensure safety of the transferred money. The measures includes the counting of the money, verification, packing and safe transportation according to procedures. Both parties testified that the money were counted by computer and casting rode was tied to the money bundle and the receipt was issued to show details of the each and every note counted, the value, total number of the counted notes and the total value. Then the money was put into a tamper bag together with a receipt before the bag is handled to the security person responsible for transferring it. When the tamper bag was opened at Cash Center a total of US Dollar 20,000/= was missing.

The tamper bags containing the transferred money was opened in the absence of the Respondent. DW 1 testified that the money did not get into the hands of the Respondent for the reason that she did not produce her copy of casting rod and receipt to prove that the money transferred was counted. But, DW1 testified before the Commission that at cash center the tamper bag and casting rod were opened and the money was counted. This proves that the casting rod was tied to the money bundle. The Respondent in her testimonies stated that she tied casting rod to the bundle and the receipt was put in the tamper bag. The Respondent also testified that she visited the cash center after she was informed that some money transferred were missing and found that the casting rod has already been opened and there was no casting rod or receipt at the cash center. This evidence shows that there is possibility of the money to be lost in the hands of another person.

The Applicant submitted that the CCTV cameras was not the only measure of ensuring safety of the transferred money hence the Arbitrator erred to base his findings on the premise that the CCTV cameras did not show that the respondent did take the money. I agree with this submission that the bank has other safety measures apart from the CCTV cameras, however CCTV is part of the safety measures available. The CCTV Camera as part of the safety measures failed to show the Respondent taking the missing money. There is no evidence in the record

that prove the missing money did lost in Respondent hands. It is not known where exactly the allegedly money was lost. The DW1 alleged that possibly the Respondent left the lost money in the strong room, but there is no evidence to that. The testimony of DW1 based on suspicions, and suspicion however strong does not prove the offence.

It is my finding that there is no evidence to prove that the money was lost in the hands of the Respondent hence the disciplinary offence of gross negligence which the Respondent was charged with in disciplinary hearing was no proved. Thus, there was no valid and fair reason for terminating the respondent.

The third issue is whether the procedure for termination was fair. The Applicant submitted that the Arbitrator erred to hold that after finding out that the reason for termination was unfair, there was no need to determine the issue of fairness of termination procedures. The Respondent Counsel supported the holding of the Arbitrator that there was no need to determine the issue of fairness of termination procedures after findings that the reason for termination was not fair. I'm of the same position that after the Commission made findings that the reason for termination of Respondent employment was found to be unfair, the termination becomes unfair. The determination of fairness of the procedure for termination is relevant but even without determination of the fairness of the procedures, it won't change the unfairness of the

termination. Thus, I find this issue have no merits after the findings that the reason for termination was not fair.

The last issue is whether the remedy awarded by Arbitrator to the Respondent was appropriate. The Respondent in CMA form number 1 prayed to the Commission for reinstatement. The Commission in its award ordered the applicant to reinstate the respondent without a loss of remuneration for the whole time she was terminated. The Arbitrate stated further that the Applicant to pay a total of shillings 72,977,975/= being 35 month's salaries for the months the Respondent was out of work and other benefits which she deserves as employee. The Applicant argued that the remedies awarded to the Respondent were not appropriate due to the nature of dispute and the time the dispute has taken. Under rule 32(2) of G.N. No. 64 of 2007 reinstatement shall not be ordered where circumstances surrounding the termination are such that a continued employment relationship would be intolerable. The nature of banking business requires the highest degree of honesty and integrity in dealing with the money. The employment relationship between the Applicant and Respondent is intolerable. The Applicant submission relied in the case of **Twiga Bancorp (T) LTD vs. Assumpta Kimwaga**, (Supra) and **NBC LTD Mwanza vs. Just B. Kyaruzi**, (Supra).

In opposition, the Respondent submitted that the remedy awarded by the Arbitrator was appropriate that the Arbitrator has discretion to award reinstatement as the appropriate relief since the Respondent prayed for the same. She distinguished the cited cases that there were fair termination in those cases but in the present case the termination was unfair. She added that the Respondent worked for more than 21 years with the Applicant without any disciplinary record hence the relationship between them was still tolerable. Thus, the relief of reinstatement is appropriate.

The Employment and Labour Relations Act, 2004 provides in section 40 the remedies available upon finding of unfair termination. The section reads as follows, I quote: -

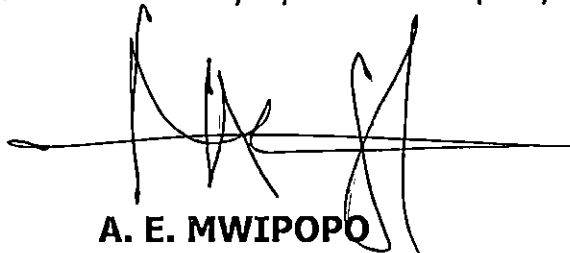
- “40 (1) if an Arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer-
- (a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination;
  - or
  - (b) to re-engage the employee on any terms that the arbitrator or Court may decide; or
  - (c) to pay compensation to the employee of not less than twelve months’ remuneration”.

In the present case the respondent was unfairly terminated substantively. Under the circumstances, I’m of the opinion that she was entitled to be reinstated without loss of remuneration as it was held by



the Commission. The evidence available shows that reinstatement was among Respondent's prayers sought in CMA Form No. 1 and the Respondent worked with the Applicant for 21 years without any disciplinary record. Despite the presence of this dispute which shows that the relationship between the Applicant and the Respondent has deteriorated, the same is not to the extent of being intolerable. The cited cases of **Twiga Bancorp (T) LTD vs. Assumpta Kimwaga**, (Supra) and **NBC LTD Mwanza vs. Just B. Kyaruzi**, (Supra), are distinguished to the present case since the disciplinary offence the employee was charged with in those cases was gross dishonesty while in the present case it is gross negligence and the respective disciplinary offence against the Respondent was not proved.

Therefore, I find the application has no merits and I dismissed it in its totality. The CMA award is hereby upheld. Each party to take care of its own cost.

A handwritten signature in black ink, appearing to read 'A. E. MWIPOPO', is written over a horizontal line. The signature is stylized and somewhat cursive.

**A. E. MWIPOPO**  
**JUDGE**  
**05/03/2021**