

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(LABOUR DIVISION)  
AT DAR ES SALAAM**

**CONSOLIDATED APPLICATION FOR REVISION NO. 44 OF 2020**

**BETWEEN**

**NATIONAL BANK OF COMMERCE LTD. .... APPLICANT**

**VERSUS**

**SALIM RUPIA ..... RESPONDENT**

**AND**

**REVISION NO. 83 OF 2020**

**BETWEEN**

**SALIM RUPIA ..... APPLICANT**

**VERSUS**

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

**JUDGMENT**

**S.M. MAGHIMBI, J:**

This judgment is on consolidated Revisions No. 44 and 83 both of 2020. The parties were also parties at the Commission for Mediation and Arbitration for Ilala ("the CMA") in Labour Dispute No. CMA/DSM/ILA/R.609/17/67. For the sake of clarity and ease of reference, the parties will be addressed as the employer to mean the National Bank of

Commerce and the employee to mean Salim Seif Rupia. At the CMA, the employee was aggrieved by termination of his employment by the employee and lodged the dispute. The dispute ended in favor of the employee who was however not satisfied with the amount of compensation awarded hence the Revision No. 83/2020. On the other hand, the employer was not satisfied with the findings of the CMA that the termination was unfair and the subsequent compensation awarded thereto.

In their Revision No. 44/2020 the employee raised the following legal grounds:

1. That the Arbitrator erred in law and fact by proceeding to determine the matter while knowing the CMA had no jurisdictions which was properly raised by the Applicant at the Commission.
2. That the arbitrator immensely failed to reasonably cases the applicant's evidence in comparison with the respondent's evidence and erroneously concluded that the respondent was unfairly terminated in terms of reason and procedure.

3. That the Arbitrator erred in law and facts by holding that the Applicant failed to show the Respondent duties it was not an issue in dispute and reached an erroneous decision.
4. The Arbitrator erred in law and facts by holding that investigation was not completed and the Respondent was not interviewed have reached an erroneous decision.
5. The Arbitrator erred in law and facts by wrongly interpreting the court decision hence reached an erroneous decision.
6. The arbitrator erred in law and facts by bringing in extraneous/his own sentiments hence reached and erroneous decision.
7. The Arbitrator erred in law and facts in by failing to consider Applicant final written submissions which analyses both parties evidence law and facts hence reached an erroneous decision. Copy of the Applicant final written submission is attached and marked NBC – 2 and leave of this honourable Court is craved for it to be part of this affidavit.

On his part, the employee was aggrieved with the amount of damages awarded by the CMA and has lodged the Revision on the following grounds:

- (a) The Hon. Arbitrator erred in law and fact by his failure to order direct or constructive reinstatement of the Applicant having found that the termination was substantially unfair.
- (b) The Arbitration erred in law and in fact for failure to award the Applicant specific and general damages despite of the evidence tendered by the Applicant to substantiate the prayers,
- (c) That the Arbitrator erred in law and fact by holding that the relationship between the Applicant and the Respondent had broken down and there was not trust between the parties contrary to evidence on record.

In both the applications, the parties have moved the court under Sections 91(1) (a) and (b), S.91 (2) (b) & (c), 91(4)(a)(b) and 94(1)(b)(i) of Employment and Labour Relations Act, No. 6 of 2004 R.E 2019 ("ELRA) and Rule 24(1), 24(2) (a),(b),(c),(d), (e) and (f) and 24(3)(a),(b),(c) and (d), and Rule 28(1)(c)(d) and (e) of the Labour Court Rules, 2007. For the employee, the prayer is that:



- (1) This Honourable Court be pleased to reject the Application for revision of the Commission for Mediation and Arbitration Award in Labour Dispute No. CMA/DSM/ILA/R.609/17/67 dated 6<sup>th</sup> January, 2020 on the grounds set forth in the counter affidavit of SALIM SEIF RUPIA and submissions to be adduced during hearing of the application.
- (2) This Honourable Court after rejecting the Applicant's Application for revision be pleased to vary the CMA award in Labour Dispute No. CMA/DSM/ILA/R.609/17/67 by ordering reinstatement of the Respondent and payment of damages and compensation as prayed for in CMA Form No. 1
- (3) Costs of this Revision to be provide for and
- (4) Any other order(s) this Honourable Court may deem fit to grant.

As for the employer, she moved the court for the following:

- (1) That this honourable Court be pleased to call for records, revise and set aside part of the Award of the CMA on dispute No. CMA/DSM/ILA/R.609/17/67 by Hon. Mwakisopile I.E. dated 06<sup>th</sup> January, 2020, on the grounds set forth on the attached affidavit in support of this application.

- (2) That this honourable court be pleased to determine the dispute in the manner it considers appropriate.
- (3) That this honorable Court be pleased to give any other relief it deems fit and just to grant.

The brief background of the dispute is that the parties had an employer employee relationship from 23/03/1988 and was terminated on 23<sup>rd</sup> May, 2017 on ground of gross negligence resulting to loss to the employer's property estimated to be of a value over Tsh. 257,000,000/=. After termination, the employee was aggrieved and referred the matter to CMA challenging termination. The arbitrator decided in favor of the employee ordering the employer to compensate the applicant at the tune of Tshs. 46,751,012/-.

Both parties were aggrieved by the decision, the employee challenging the award as inadequate while the employer challenges the decision as a whole, hence the two Revision Applications which are now consolidated. In this court the employer was represented by Mr. Godfrey Ngasa and the employee was represented by Mr. Huruma Ntahema, learned advocate. The application was disposed by way of written

submissions. I appreciate the lengthy submissions lodged by both parties which I will consider in due course of this judgment.

Having considered the submissions by both parties, the issue that is burning for my determination is whether the termination of the employee was substantially and procedurally fair and whether the compensation awarded was inadequate. Beginning with the substance of the termination, I am in agreement with the CMA finding that the termination was substantively unfair. Looking at the records of the CMA, DW2 admitted that the employee did not commit the offence that caused a loss of the money to the bank, it was his subordinates. There is however no evidence that any of the wrong doers were either caught or subjected to any disciplinary action. Since all parties agreed that it was not the employee who committed the theft, then it was necessary to ensure that all those who did were brought to justice, let alone the fact that the alleged fraud/theft being persistent for sometimes including the time when the employer was not in Zanzibar Branch.

Further to that, the EXN2, the charge sheet which informed the respondent of the Disciplinary Hearing, provided for a comprehensive final warning as the expected outcome of the hearing. Owing to that, then



termination might not have been the best remedy to the employee under the circumstances. In all those observations, it is safe to conclude, as did the CMA, that the termination of the employee was substantively unfair.

As to the procedural fairness, I find that they were followed to a certain extent because the employee was informed of the charge against him and given time to prepare. The hearing was held and was eventually informed of the verdict. However, on appeal against the verdict, the employee was not afforded a right to be heard hence partly unfair to him. At this point, I find the employer's grounds of revision to be lacking merits. The revision No. 44/2020 is therefore dismissed in its entirety.

The remaining part is the employee's relief, he is challenging the amount of compensation that was awarded by the CMA. I am not in agreement with the employee's argument on reinstatement. Indeed as found by the CMA, the relationship between the parties had broken down, time had lapsed and reinstatement would not be the best remedy. However, since the termination is found to be substantively unfair, the respondent is entitled to the remedies available under Section 40(1) of the ELRA. The Section provides:



*40.-(1) Where 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.*


Since reinstatement has been found to be not the best remedy, the employer shall pay the employee compensation instead. I have considered the fact that the employee had worked for the employer for more than 28 years, and the unfairness of the reason for termination, actual perpetrators were not subjected to any disciplinary measures and the fact that he was not availed with the investigation report to have knowledge of what was actually against him given the fact that the allegation were not directly linked to him. In all those factors, I hereby order the employer to pay the employee a compensation equivalent to 40 months' salary calculated at 3,891,751/- X 40 = **Tshs. 155,670,040/-**.

Further to that, the employee is also entitled to severance pay as provided for under Rule 26(1) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No 42/2007 which is calculated at  $3,891,751/30 \times 7 \times 10 = \text{Tshs. } 9,080,752.33/-$ . The employee shall also be entitled to other terminal benefits which were not paid including repatriation allowance to his place of recruitment, subsistence allowance and certificate of service. These compensations are to be paid only if they were not already paid by the employer at the time of termination.

In total and having made the above findings, the revision No. 88/2020 is hereby allowed; the award of the CMA is revised to the extent explained. The employer shall pay the employee a total sum of **Tshs. 164,750,792/-** plus the other uncalculated benefits which are only to be paid if they have not already been paid by the employer.

Dated at Dar es Salaam this 10<sup>th</sup> day of December, 2021.



  
S.M. MAGHIMBI  
JUDGE