

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

REVISION APPLICATION NO. 963 OF 2019

(Originating from Labour Dispute No. CMA/DSM/ILALA/R.1336/17/281)

BETWEEN

JOSEPH GADAU.....APPLICANT

VERSUS

TPB BANK PLC..... RESPONDENT

JUDGMENT

Date of Last Order: 30/09/2021

Date of Judgment: 15/12/2021

I. Arufani, J.

The applicant, Joseph Gadau filed the present application in this court urging the court to call for record of proceedings and award from the Commission for Mediation and Arbitration (herein referred as the Commission) in Labour Dispute Number CMA/DSM/ILALA/R.1336/17/281 dated 30th October, 2019.

The application is made under section 91 (1) (a) and (b), 91 (2) (c), 94 (1) (b) (i) of the Employment and Labour Relations Act of 2004 (hereinafter referred as the ELRA), Rule 24 (1), (2) (a), (b), (c), (d), (e), (f), (3) (a), (b), (c) and (d) and Rule 28 (1) (c), (d) and (e) of the Labour Court Rules, GN. No. 106 of 2007 (herein after referred

as the Rules). The application is supported by an affidavit sworn by the applicant and is opposed by a counter affidavit sworn by Mr. Godfrey Tesha, advocate for the respondent.

The application is rooted from the facts that, the applicant was employed by the respondent as a Credit Officer II, the post he held until 30th November, 2017 when he was terminated from his employment on grounds of gross misconduct, negligence occasioning loss to his employer (the respondent) and non-observance of the employer's Code of Ethics and Conduct, 2016. It was alleged the applicant approved seven fraudulently loans to customers without verifying if the customers had applied for the loan and caused a loss of Tshs. 20,500,000/= to the respondent.

After being terminated from his employment the applicant referred the dispute to the Commission on ground of unfair termination and claimed for reinstatement to the employment without loss of remuneration, severance pay to the tune of Tshs. 1,431,979.50, compensation for breach of contract of the employment and loss of earnings up to 30 months equals to Tshs. 36,822,330.00, general damages to the tune of Tshs. 50,000,000.00, payment of bank outstanding salaries loan amount to Tshs.

7,263,838.70, certificate of good employment service and any other reliefs may be due to him.

After hearing the evidence from both sides, the Commission found termination of employment of the applicant was made on fair reason and procedure for termination of his employment was substantially complied with. The Commission ordered the respondent to pay the applicant one month salary in lieu of notice for termination of his employment and unpaid leave which in total were Tshs. 4,076,757.96 and ordered the applicant be issued with certificate of good service. The rest of the claims of the applicant were dismissed. The applicant was aggrieved by the award issued by the Commission and filed the present application for revision in this court. The issues the applicant wish to be determined by this court are listed at paragraphs 5.0, 6.0 and 7.0 of the affidavit supporting the application as follows:-

- 1. Whether there was evidence on record showing that the signatures in the loan forms were differing with signatures in the alleged system.*
- 2. Whether there was any withdraw voucher tendered in the Commission as proof that the applicant real caused loss as alleged.*

3. Whether there was evidence to prove the position which the applicant was holding.

The application was argued by way of written submission. The applicant argued in relation to the first issue that, although the respondent's witness stated in the hearing of the matter that he fraudulently participated in approving the loan to seven groups as one of the members of the credit committee and caused loss of Tshs. 20,500,000/= to the respondent but no evidence was adduced before the Commission to prove the signatures of the customers alleged were given the loans were differing with their signatures in the respondent's system.

He argued that, the said allegations were proved by mere words without any loan form or police report from forensic department tendered before the Commission. He stated that, the internal audit report tendered before the Commission was not supported by external audit report. He submitted that, since there is no documentary evidence adduced before the Commission to support the allegation, the allegation was not proved.

He argued in relation to the second issue relating to withdraw vouchers that, the charge laid against him shows he was charged with the offence of approving the loan forms fraudulently and caused the loss of Tshs. 20,500,000/= to the respondent. He argued that, there is no withdraw voucher tendered as an exhibit during hearing of the matter at the Commission and admitted in the matter as evidence. He submitted that shows the disciplinary committee had no basis of proposing for termination of his employment and the decision to terminate his employment was made unfairly.

He argued in relation to the third ground of revision that, the position he held at the respondent's bank was Credit Officer with duty of dealing with individual loans. He argued he has never been appointed in a position of a member of group loan lending committee which is different post from the one he was holding. He argued that, there is no evidence adduced before the Commission being letter of appointment or any instrument showing his job description was to sit as the branch a member of the credit committee to approve the loan. He submitted that, being a Credit Officer was not an automatic ticket that you are a member of the branch lending committee.

He went on arguing that, the applicant raised the said issue in the disciplinary committee but it was not determined by the committee. He argued that, the group lending policy of the respondent which is part of the proceedings of the Commission shows the Branch Manager and Director of Business Development were required to visit at least thirty percent of group before disbursement of the loan. He stated that, if there was any fraud detected the Branch Manager and the responsible officer from the Directorate of Business Development would have taken step of directing the same to be corrected. He denied to have signed the contract dated 4th July, 2016.

In his reply the counsel for the respondent prayed to adopt their counter affidavit and stated that, they are in agreement with the finding of the arbitrator that termination of the applicant was both substantively and procedurally fair because the respondent successfully managed to prove the case through oral and documentary evidence. He argued that, during disciplinary hearing the applicant admitted his offence of signing the loan application forms and stated there was no violation of any procedure during the

termination of employment of the applicant that denied him his right of been heard.

The counsel for the respondent stated in relation to the first issue relating to the signature of the applicant to be on the loan forms that, the issue was neither raised during disciplinary hearing nor during hearing of the matter before the Commission. He stated there is no dispute that the signatures on the loan forms differ with the signatures in the system. He argued that, the applicant was charged and terminated on a clear offence of misconduct to wit negligence occasioning loss to the respondent, non-observance of the required procedures and behaviour prejudicial to the good name of the respondent by participating in approving seven fraudulent loans without verifying the customers and caused loss to the respondent.

He submitted that, during disciplinary hearing customers like Sihaba Chambuso, Jeniffer Milinga and Jantiel Mndeme appeared before the Committee and denied to have applied for the loan and stated that shows the loans were fraudulently issued. He stated that, as some of the customers appeared before the disciplinary committee and denied to have applied for the loan, there was no need of proving differences of signatures on the loan. He argued that, the

differences of signatures were immaterial because the purpose of signature is to authenticate a writing or provide notice of source, and to bind the individual signing the writing by the provisions contained in the document. He argued further that, the issue of proving the signatures was neither raised at the disciplinary hearing nor at the Commission, which means it was not a fact in dispute and according to section 60 of the Evidence Act Cap 6 R.E 2019 it was a fact admitted which do not need be proved.

He argued in relation to the second issue relating to withdrawer vouchers that, the issue of causing loss of Tshs. 20,500,000/= to the respondent was not disputed before the disciplinary hearing or at the Commission. He stated the whole process of withdrawing the money from accounts was proved by exhibits D1, D2 and D3 which includes withdrawing vouchers. He stated that, it is not true that withdraw vouchers were not produced at the Commission as evidence. He added that, the special audit report at the Commission shows that, according to the CCTV camera footage some of the respondent's untruthful employees were seeing collecting cash from different bank tellers.

As for the issue that the applicant had no power to sit as a credit committee member of the respondent, the counsel for the respondent argued that, the Respondent's Group Lending Policy, 2006 admitted in the minutes of the disciplinary hearing Committee and in the Commission as exhibit D12 shows the Respondent's Branch Group Lending Committee composed of Branch Manager, Bank Officer and Credit Officer who was the applicant. He argued that, the said evidence was never disputed anywhere at any time.

He stated the applicant admitted himself at page 15 paragraph 3 of exhibit D12 that he was the member of Branch Group Loan Committee until when he was terminated from his employment. He continued to argue that, it is not only on exhibit D12 where the applicant admitted to have signed the loan forms but he also admitted in exhibit D9 and D11. As for the issue of the applicant to sign the contract of employment, the counsel for the respondent argued the applicant never disputed his employment and the position he held at the respondent's bank. At the end he prayed the application be dismissed for lack of merit.

In rejoinder the counsel for the applicant argued that, the difference of signatures and withdrawer vouchers were issues before

the disciplinary hearing and before the Commission because the applicant was charged to have fraudulently approved seven loans without verifying the customers had applied for the loans. He submitted that the applicant denied existence of the said fact in his written statement of defence tendered before the disciplinary hearing. He submitted further that the bank customers testified before the disciplinary hearing committee did not testify before the Commission. He added that, the respondent was required to prove commission of the offence of misconduct levelled against the applicant as required by section 110 of the Evidence Act.

The counsel for the applicant went on arguing that, exhibits D1, D2 and D3 which the counsel for the respondent stated are withdraw vouchers are neither vouchers nor loan forms but it is an audit report which has no the documents mentioned. He submitted that the bank has employed several credit officers hence it cannot be said all credit officers are members of the credit committee at the same time. He argued that, it is a responsibility of the management of an employer to assign an employee to a particular position by instrument so that he can be accountable for any misconduct. He denied to have admitted before the Commission that he signed the

loan forms and submitted that, termination of his employment was unfair.

As the applicant's dispute before the Commission was based on unfair termination of his employment by the respondent the court has found proper to state at this juncture that, it is an established position of the law in our jurisdiction that employment of an employee will only be terminated on fair and valid reason and on fair procedure. The above position of the law is well provided under section 37 of the Employment and Labour Relations Act, Cap 366 R.E 2019 (ELRA) which states that, it is unlawful for an employer to terminate employment of an employee unfairly.

Sub section (2) (a), (b) and (c) of section 37 of the ELRA states that, termination of employment by an employer is unfair if the employer failed to prove the reason for termination is valid and the termination was made in accordance with a fair procedure. The above cited provisions of the law have been observed by this court in number of cases and one of them is the case of **Tanzania Revenue Authority V. Andrew Mapunda**, [2015] LCCD 1 where my learned

sister Aboud, J. stated as follows:-

"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 word there must be substantive fairness and procedural fairness of termination of employment."

When the court was considering the intention of the legislature in enacting section 37 (2) of the ELRA my learned sister Aboud, J. stated in the case of **Fredrick Miziwanda V. Tanzania Ports Authority**, Revision No. 220 of 2013 (unreported) that:-

"The intention of the legislature is to require employer to terminate employee only with valid reason and not at their own wills or whims. The position of our law took cognizance of the International Instruments to wit International Labour Organizations (ILO) No. 158 of 1982 which entered into force on 23^d November, 1985 whereas in Article 4, the conventions provides that:-

Employment of a worker shall not be terminated unless there are valid reasons for such termination connected with capacity or conduct of the worker or based on operational requirements of the undertaking establishment or service."

While being guided by the above stated position of the law the court has found the three grounds of revision deposed in paragraph

5.0, 6.0 and 7.0 of the affidavit supporting the application requires the court to determine whether termination of employment of the applicant was made on fair and valid reasons. In order for the court to be able to determine the said issue properly, the court has found it is proper to follow the issues raised in the mentioned paragraphs of the affidavit of the applicant listed earlier in this judgment.

I will start with the first issue which asks whether there was evidence on record showing signatures on the loan forms were different from the signatures in the respondent's system. The court has found that, as appearing in the submission made by the counsel for the respondent there is no clear evidence adduced before the disciplinary hearing committee or before the Commission to prove the loan forms signed by the applicant to approve grant of the loan said it caused loss to the respondent. It is also argued that, there is no police report from the police forensic department or internal audit report adduced before the Commission to show the applicant approved the loan caused the alleged loss to the respondent.

The court has considered the argument by the counsel for the respondent referred hereinabove and come to the view that, the argument that the issue of proving the signatures on the loan forms

were different from the signatures on the system was not raised before the Commission but failed to see any merit in the said argument. The court has come to the above finding after seeing that, as there was an allegation that the signatures on the loan forms used to approve the loan were different from the signatures of the people granted the loan as appearing in the respondent's system it was upon the respondent to prove the said difference by adducing sufficient evidence before the Commission to substantiate the said allegation.

As for the argument that the applicant approved the loan to non-existing customers as Sihaba Chamburo, Jenipher Milingi and Jantiel Mudema denied to have applied for the loan from the respondent the court has found that, that was not enough to prove the applicant approved the said seven loans to the said non-existing customers. The court has considered the argument by the counsel for the respondent that, as the customers mentioned hereinabove denied to have applied for the loan there was no need of proving differences of signatures used in the loan forms and those available in the respondent system but failed to see any merit in the said argument. To the view of this court there was a need for the respondent to

adduce evidence before the Commission to establish the applicant approved the loan issued to the said non existing customers.

The court has come to the above stated view after seeing section 39 of the ELRA states clearly that, in any proceedings concerning unfair termination of an employee by an employer, the employer is required to prove termination of employment of an employee was fair. That is also the requirement provided under section 110 (1) of the Evidence Act where is stated that, whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. That being the position of the law the court has found the respondent was duty bound to prove the reason used to terminate employment of the applicant was in existence and it was a valid or fair reason.

Coming to the second issue which states whether there was any withdraw voucher tendered before the Commission to prove the applicant caused the alleged loss to the respondent the court has found that, while the applicant is arguing there was no withdraw vouchers tendered before the Commission the counsel for the

respondent argued the withdraw vouchers were produced before the Commission and admitted in the matter as exhibit D1, D2, and D3.

Initially the said exhibits D1, D2 and D3 which appears were filed in the Commission as additional documents to be relied upon by the respondent were not in the record brought to this court by the Commission. However, after asking the parties if they have the copies of the said exhibits the counsel for the respondent told the court they have the copy and brought them to the court. The court has found that, although the applicant complained those documents were not tendered before the Commission but the court has found the complaint of the applicant is not supported by the record of the matter as the record of the Commission shows were tendered before the Commission and admitted in the case as evidence and marked exhibits D1, D2 and D3.

The court has considered the further argument by the applicant that the documents contained in exhibits D1, D2 and D3 are not withdraw vouchers and find that, although the applicant did not say how the respondent's withdraw vouchers appears, but it is true that there is no document in the mentioned exhibits named or titled withdraw vouchers. The court has also failed to see anywhere stated

in the evidence adduced before the Commission by the respondents' witnesses to establish which documents were used to withdraw seven loans alleged were approved by the applicant.

The court has found that, although there are some receipts in the said exhibits inserted with bank account number, name of a person, figure of money and signature of a person but there is nothing to show those documents are withdraw voucher used to withdraw the alleged loan from the respondent's bank and the said loans were withdrawn from the respondent's bank. Further to that, the court has found the said receipts do not carry the figure of money which establish the amount of the loss of Tshs. 20,500,000/= alleged the applicant caused to the respondent so that it can be said those receipts were used as the withdraw vouchers. In the premises the court has found there is no sufficient evidence to show how the money was withdrawn from the respondent's bank.

The court has gone through exhibits D1, D2 and D3 which the counsel for the respondent argued they shows the applicant approved the loan caused loss to the respondent. The court has found that, although DW1 said in her testimony that the said exhibits contain a register showing the applicant attended the meeting which

approved the loans caused loss to the respondent but there is no register seeing in exhibits D1, D2 and D3. What the court has seeing in those exhibits is that there are some forms containing the name and signatures of the applicant as one of the persons participated in approving the loan sought in the said forms.

The court has considered the argument by the applicant that he didn't attend any meeting of approving the stated loan and he didn't sign any form to authorize the stated loans and after carefully going through the said forms it has entertained doubt if the same were really signed by the applicant for the purpose of approving the said loans. The court has arrived to the above finding after seeing the document bearing the name and signature of the applicant is a separate document which can be attached to any other document. It has nothing showing those documents are part and parcel of the forms used to approve the loans alleged were issued to unknown customers. Therefore, it is the view of this court that, although it is true that there are documents in exhibits D1, D2 and D3 bearing the name and signature of the applicant but those documents do not prove the applicant approved the loans caused loss to the respondent.

The court has considered the further applicant's argument that he was not the sole credit officer who was working in the applicant's bank and said there were other credit officers. The court has found the said argument was not challenged by the respondent to show there was no other credit officers in the respondent bank who would have sit in the credit committee to authorise loans so as to say it was only the applicant who would have sit to approval the loans issued by the respondent.

The court has found that, the evidence adduced by DW1 and the argument made by the counsel for the respondent that the CCTV camera footage showed untruthful employees of the respondent taking the stated the loan but find it was not state the applicant was seeing issuing or taking the loans stated it caused the alleged loss to the respondent. That cause the court to find that, the allegation that the applicant is one of the persons participated in the approval of the loan caused the alleged loss to the applicant was not proved to required standard.

Coming to the third issue which asks whether there was evidence adduced before the Commission to prove the position held by the applicant the court has found that, as rightly argued by the

applicant there is no evidence adduced before the Commission to establish, he was a member of the group loan committee. The court has found that, although there is a copy of contract of employment of the applicant listed in the documents intended to be relied upon by the respondent which contains job descriptions of the applicant but there is nowhere in the proceedings of the Commission is indicated the contract was tendered and admitted in the case as evidence.

Besides, the court has found that, the applicant denied to have been issued with the said contract and denied to have signed the same and there is no any evidence available in the proceedings of the Commission to disprove the stated applicant's argument. The court has also found that, even if it will be said the said contract of employment was admitted in the matter as exhibit but there is nowhere stated in the job description contained in the said contract of employment that the applicant was a member of the credit committee which the respondent argued is the mandated to approve group loans in the respondent's bank.

The court has found that, as submitted by the counsel for the applicant the only evidenced adduced before the Commission was oral evidence adduced by DW1 and DW2 that the applicant was a

member of the credit committee of the applicant. The court has considered the argument by the counsel for the respondent that the applicant admitted in exhibit D12 that he was the member of the Group Loan Committee and he admitted in exhibit D9 and D11 that he signed the loan form but after going through the said exhibits the court has failed to see anywhere the applicant admitted to have signed the forms used to issue the alleged loans.

The further argument by the counsel for the respondent that, the applicant never disputed he was the member of the Group Loan Committee is also not featuring anywhere in all evidence adduced before the Commission. The court has considered another argument by the counsel for the respondent that the Group Lending Policy admitted in the matter as exhibit D18 shows the applicant was a member of the group lending committee but failed to see anywhere in the said policy stated so. To the contrary the court has found the said policy states at paragraph 6 of page 9 that the loans issued by the respondent are supposed to be approved by the Management Credit Committee at the branch level and confirmed by the Head Office Credit Committee and there is nowhere stated the applicant was the member of the mentioned credit Committees.

The court has found the last paragraph of the said page 9 of the Group Lending Policy of the respondent shows the duty of the applicant was to monitor group repayment of the loan and to make follow up of all partial payment. The above finding caused the court come to the view that, there was no sufficient evidence adduced to establish the applicant was holding the position of member of the group lending Committee.

All being stated the court has come to the conclusion that, the reason for termination of employment of the applicant was not proved by the respondent to the standard require by the law which is on balance of probability that termination of employment of the applicant was substantively fair. Consequently, the court has found that, the application of the applicant deserves to be granted, hence the award of the Commission is hereby revised and set aside.

The court has considered the reliefs sought by the applicant as appearing in the annexure attached with CMA F1 and find that, the prayer of being reinstated in his employment cannot be implemented as it has not been established the position he was holding in the respondent bank is still available as long time has passed from when he was terminated. To the contrary the court has found the applicant

can be compensated for the said unfair termination pursuant to section 40 (1) (c) of the ELRA.

The court has found that, although the applicant prayed to be given compensation of up to 30 months but he did not adduce any evidence to establish why he should be paid the stated amount of compensation. The court has taken into consideration the amount of compensation to be awarded as provided under section 40 (1) (c) of the ELRA, the factors provided under Rule 32 (5) of the GN. No. 67 of 2007 and the factors stated in the case of **NMB V. Neema Akeyo**, Revision No. 35 of 2007, HCLD at Arusha (unreported) in relation to the payment of compensation for unfair termination.

The court has found the applicant deserve payment of only twelve months salaries as compensation for unfair termination of his employment and not 30 months salaries. He is also entitled to be paid severance allowance and be issued with certificate of good service. The rest of the claims like payment of general damages and an order of payment of outstanding salaried loan are not granted as they were not substantiated.

In the final result the applicant is entitled to be paid twelve months salaries as a compensation for unfair termination of his

employment equal to Tshs. 1,227,411/= x 12 = 14,728,932/= and severance pays for 5 years equal to Tshs. 1,431,979.50. The total sum to be paid to the applicant by the respondent is Tshs. 16,160,911.50. The applicant is also entitled to be given certificate of good employment service. It is so ordered.

Dated at Dar es Salaam this 15th day of December, 2021.

Tesa

I. Arufani

JUDGE

15/12/2021

Court: Judgment delivered today 15th day of December, 2021 in the presence of the applicant in person and in the presence of Mr. Flavian A. John, Advocate holding brief of Mr. Geoffrey Tesha, Advocate for the respondent. Right of appeal to the Court of Appeal is fully explained.



Tesa

I. Arufani

JUDGE

15/12/2021