

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

REVISION NO. 950 OF 2018

(ARISING FROM LABOUR DISPUTE NO. RF/CMA/MOR/227/2015)

NMB BANK PLC.....APPLICANT

versus

LAMECK MATEMBA.....RESPONDENT

JUDGEMENT

12th & 26th October 2021

Rwizile, J

The applicant has filed this application against the decision of the Commission for Mediation and Arbitration to be referred as the Commission in labour dispute no. RF/CMA/MOR/227/2015. Revision application was made under section 91(1) (a) (b), (2) (a) (b) (c) and section 94 (1) (b) (i) of the Employment and Labour Relations Act, No. 6 of 2004, Rule 24 (1), (2) (a) (b) (c) (d) (e) (f), (3) (a) (b) (c) (d) and Rule 28 (1) (c) (d) (e) of the Labour Court Rules, GN No. 106 of 2007. The applicant is therefore praying for the following; -

1. That the Honourable Court be pleased to call for the records and examine the proceedings of the Commission

for Mediation in Labour Dispute No. RF/CMA/MOR/227/2015 delivered by Hon. Hilary, H.N with a view of satisfying itself as to the legality, propriety, rationality and correctness thereof.

2. That the Honorable Court be pleased to revise and set aside the Commission for Mediation in Labour Dispute No. RF/CMA/MOR/227/2015 delivered by Hon. Hilary, H.N Arbitrator.

The Application is supported by the affidavit of Consolatha Resto the Principal Officer. Opposing the application, the respondent's counter affidavit was filed.

It has been recorded that the applicant was a Branch Manager until when he was terminated. He was employed by the respondent in 2001 as the bank supervisor and rose to the rank of the branch manager, the post he held until termination. The relationship between the parties was good until 2015, when it turned sour. The respondent was charged of various offences falling under misconduct. The same offences include failure to perform duties to the required standard thereby causing loss to the bank, used bank funds for personal gain or gain for others contrary to the procedure, failure to comply with established procedure and standing

instructions, failure to effectively control branch activities, acting in a manner that does not promote the good name and wellbeing of the bank and failure to act with integrity in dealing with the bank. All offence were against the code of conduct and human resource policy. Upon disciplinary hearing, the respondent was found guilty of gross misconduct that is issuing loans to borrowers who had no business licenses and whose business were not viable to the loans issued, issuing loans without loan application forms and loan files, approving fiction or ghost loans without visiting customers' businesses and for authorizing loan disbursements to customers with outstanding loans before paying off the outstanding loans. He was therefore terminated. In protest, he filed a dispute for unfair termination with CMA which decided in his favour.

The applicant was ordered to pay compensation for 12 months salaries, salary arrears from termination, the sum of 176,675,488/= and a certificate of service. Dissatisfied with the CMA's decision, applicant filed the present application.

At the hearing, the applicant was represented by Mr. Sabasi Shayo, learned counsel, while the respondent was represented by Mr. Emmanuel Zongwe as a Personal Representative from (TPAWU). Mr. Shayo argued grounds I,

II, III, and IV, VI, VII together, while V, VIII and IX were argued together as well. Starting with the first batch of grounds, it was submitted that at the CMA the issue was whether there were good reasons to terminate the respondent. It was his submission that at page 40 of the award, the evidence of Dw1 was discredited because he testified that as a Human Resource officer did not know issues relating to loans. The same, he said, would be proved by other witnesses. Therefore, the same was proved by other witnesses as Dw2 via his evidence as indicated at page 16-20 of the award.

Submitting further, the learned counsel was of the view, that there was nothing wrong for Dw1 to testify so. The Counsel submitted that Dw1 testified on how the respondent failed to comply with the rules on issuing loans as the same was issued to the customers who had not settled their previously loans as evidenced by bank statements exhibit D7-D20, admitted collectively.

It was further submitted that the respondent being Branch Manager was responsible for loans as he was the last approver. It submitted, he cannot shift his burden to the Loan Officer. The available evidence including

exhibit D2 which is the respondent's defense, justify admissions of the charged offence.

Mr. Shayo argued as well that since the respondent was the custodian and loans last person to make approval, he could not be exempted from liability. He stated that honesty and integrity is the corner stone in banking business therefore failure to observe the same is contrary to Rule 12(4) of G.N No. 42 of 2007. To bolster his submission, he cited cases of **Japhate Kessy vs NMB**, Application, No. 39 of 2017 HC (Unreported), at page 6, **NMB v. Andrew Alloyce**, [2013] LCCD 84, **Nickson Alex vs Plan International**, Revision No. 22 of 2014 at page 6-7, where it was held that when there is admission of misconduct, there is no need for disciplinary hearing.

Arguing the second batch of grounds, the counsel submitted that CMA did not consider the position the respondent held in finding that the misconduct did not merit termination as per Rule 12(3) of the G.N No. 42 of 2007. Justifying his stand, he cited the case of **NMB v. David B Haule**, [2014] LCCD1, 256, 48.

He further averred that since the relationship between the applicant and respondent become intolerable, it was not right for the CMA to issue an order of reinstatement as for the same to be issued must be guided by Rule 32 (2) of G.N 67 of 2007. In supporting his position, he referred the case of **Mathias Petro v. Jando Construction and Plumber**. [2015] LLCD, 185.

In reply Mr. Zongwe submitted that the evidence of Dw2 was considered and analyzed as indicated at page 15-21 of the award. The Commission found the same to be contradictory because exhibits D7-20 shows the same were paying loans before being issued with new loans. Therefore, the Commission was right in disregarding the same. He cited the case of **Kilombero Sugar v Peter Sulle**, Revision No. 19 of 2019, High Court of Tanzania, at Morogoro (unreported) to support his stand. Regarding exhibit D-2 which is a defense to the charge, the Counsel submitted that what was stated by the respondent was just an apology therefore the same doesn't amount to an admission.

On point V, VIII and XI Mr. Zongwe submitted that at Commission, it was proved that the respondent had previous good record based what is in line with Rule 12 of the Code of Good Practice, G.N No. 42 of 2007. He stated

that there was no proof that the applicant was negligent and had been found to commit any misconduct. Therefore, the issue of being senior and being Branch Manager does not warrant termination. The same must be proved that misconducts were committed therefore the award was correct.

Mr. Zongwe submitted that Commission did not receive evidence that their relationship become intolerable, on the basis Commission was correct to award reinstatement as per 32(2)(d) of G.N No. 67 of 2007. To support his submission, he cited the case of **Tanzania Bureau of Standards v. Anita Kaveva Maro**, Revision No. 35 of 2016, High Court of Tanzania, at Dar es salaam(unreported).

In rejoinder the applicant's counsel reiterated his submission in chief but urged this court regarding the case of **Tanzania Bureau Standards** (supra) as distinguishable because there were alternatives offered to the employer.

Having considered the record and arguments of the parties, I have to determine if -

- i) The applicant's termination was substantive fairly?
- ii) What reliefs are parties entitled?

Regarding the reason for termination the pertinent provision is section 37(2) of the Employment and Labour Relation Act, [Cap 366 R.E 2019], it provides that; -

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.

It is a well-established principle of law that once there is an issue of unfair termination the duty to prove reasons for termination was valid and fair lies on the employer as per section 39 of ELRA as the case of **Tiscant Limited vs Revocatus Simba**, Revision No. 8 of 2009, High Court, Labour Division, at Dar Es Salaam and **Amina Ramadhani v Staywell Apartment Limited**, Revision No. 461 of 2016, High Court Labour Division, at Dar Es Salaam) as was cited by this Court in the case of **Boni**

Mabusi v The General Manager (T) Cigarette Co. Ltd, Consolidated

Revision No. 418 and 619 of 2019 at page 14 of the award.

It is on record that the applicant was charged for various offences of misconduct including approving fictitious loans, issuing loans to the customers with no business license, authorizing loans before paying off the outstanding loans and issuing loans without verifying collaterals as evidenced by exhibit D-5 a termination letter, upon being found guilty at the disciplinary hearing.

I noted that its undisputed that loans were issued as per exhibit D7-21 which are the customers' bank statements. No business licenses were attached to the loan forms when the authorised loans were for running business. On 19th October 2013, the respondent approved the loan of Tsh 15,000,000/= insisting a borrower to adhere to payment schedule. Further, the loan of Tsh 15,000,000/= was approved to Sefu Yusuph Malamla without a loan form and a collateral for the approved loan.

All this supported applicant's allegations as evidenced by exhibit D-2, which is a reply to the charge sheet. The respondent apologized for the same. In circumstances of approving fictitious loans the respondent's allegation regarding sickness is invalid. Under normal circumstances issuing

loans without adhering to normal procedure amounted to gross negligence which falls under Rule 12(2) and (3) of the Code of Good Practice, G.N No. 42 of 2007.

Therefore, the respondent's allegation regarding absence of the said misconduct in the employer's code has no legal basis. It falls under Employment and Labour Relations (Code of Good Practice) G.N No. 42 of 2007. If proved, as in this dispute, merits termination. It can therefore be safely held that there was fair and valid reason for termination. The procedure for termination was valid as decided by the Commission.

Regarding reliefs as the termination was fair in both aspects, I find nothing to award. In the final result, I find that termination was both substantively and procedurally fair. This application therefore has merit. The award is quashed and resultant orders set aside. Each party to bear its own costs, as this is a labour dispute.




A.K.Rwizile

JUDGE

26.10.2021