

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 22 OF 2022

(From the decision of the Commission for Mediation and Arbitration of DSM at Ilala (Hon Kokusiima L Arbitrator) dated 15th December 2021 in Labour Dispute No. CMA/DSM/KIN/195/2022)

DOMINIC NOMBOAPPLICANT

VERSUS

ACCESS BANK TANZANIA LIMITEDRESPONDENT

JUDGEMENT

K. T. R. MTEULE, J

6th October 2022 & 31st October 2022

The applicant lodged this application for revision praying for this Court to call and revise the proceedings, quash and set aside the award of the Commission for Mediation and Arbitration of Dar es Salaam at Ilala (CMA) in the **Labour Dispute No. CMA/DSM/ILA/195/2021** delivered on 15th December 2021. From the accompanying affidavit and counter affidavit together with the CMA record, the following are the facts of the case. The applicant herein was employed by the Access Bank Tanzania LTD (the respondent) sometimes in 2010 with a starting position as a loan officer. Later he was promoted to various positions under fixed term contracts and his last position when he exited the

respondent's office he was working as a credit risk manager, under a contract which commenced on 1st August 2018.

Around 22nd of January 2020 the applicant faced disciplinary issues where internal disciplinary processes were initiated with a disciplinary hearing held on the 24th January 2020. **(Copies of the said letter is annexed herewith as DN 2).**

It was alleged in the disciplinary committee that in the period between 2015 to 2018 the applicant breached the Bank's procedures by paying through his office phone number a total of five transactions to various loans clients of the Bank and made three cash deposits worth TZS 283,800.00 into different loan clients' accounts. The applicant was further accused of receiving a total sum of TZS 150,000.00 from one MAGETA/E, YASINTA who the Respondent claimed to be a client of the Bank.

Following the findings of the disciplinary hearing, the respondent terminated the Applicant from the employment.

Aggrieved by the termination, the applicant referred the matter to the CMA. The arbitrator found both the procedure and reasons for termination to be fair and pronounced the award in favor of the respondent. This aggrieved the applicant who made further reference to this court by this revision application.

The affidavit sworn by the applicant Dominic Nombo in support of the application, narrated the facts of the case and stated that the procedure for termination as well as the reasons for such termination were not fair. In the affidavit, the applicant asserted that the arbitrator ruled that the reason for termination was fair while the respondent failed to tender the evidence to prove the existence of the alleged transactions and to what extent the said transaction amounted to breach of respondent's bank procedures in absence of evidence to substantiate it.

The affidavit asserted further that the Award is tainted with irregularities leading to injustice to the Applicant, in the following legal issues;

- (i) The Arbitrator erred in law and in fact by failing to properly analyze evidence.
- (ii) The arbitrator erred in law and in fact by entertaining the respondents' testimony and considering transaction that had no evidence.
- (iii) The arbitrator erred in law and in fact by shifting burden of proof from Respondent to Applicant contrary to the law governing labour dispute.
- (iv) The arbitrator erred in law and fact by misinterpreting the information filled in CMA FORM NO 1 and claiming that the Applicant to have admitted to the claims he was accused of.

- (v) The Arbitrator erred in law and in fact by holding that, the applicant was fairly terminated.
- (vi) The Arbitrator erred in law and fact by holding that the Applicant had received memorandum OM-018 of 2015 without any proof of such service thereof.
- (vii) The Arbitrator erred in law and fact by considering and believe the allegations of the respondent to the complainant without any form of proof whatsoever.

The Respondent filed a counter affidavit in which all the material facts were disputed. In the counter affidavit, the respondent emphasized that the termination was based on fair reasons and the procedure was well complied with.

The application was heard by written submissions where the applicant was represented by Ms. Asella Arcard Kokushubira from A and F Attorneys while the Respondent was represented by Mr. Humphrey Mwasamboma (Advocate) in Legal Department of the respondent.

In her submission, arguing the **first** ground that the arbitrator erred in law and in fact by failing to properly analyze the evidence, Ms. Asella submitted that the arbitrator failed to see the weight of evidence produced by the applicant, to counter all the claim against him. In her view, the respondent failed to counter the evidence under oath that the

monies were sent to the Applicant in a private transaction and in his private number (0658 302151) which is his private belonging still to date and even after his untimely termination. According to Ms. Asella, the Respondent did not prove his case and failed to produce key evidence to further their claims against the Applicant. She gave an example of missing evidence in the CMA which is the respondent's failure to tender phone records or even the names and bank Accounts of such customers to support the claim that monies were sent from the applicant's personal mobile number to the loan Account of five customers. She submitted that the offence of misconduct was never proved. She cited the case of **Mkulima Mbagala VS Republic, Criminal Appeal no 267 of 2006 (unreported)** where the court emphasized the importance of objective evaluation of evidence in a case.

Regarding the **second** ground that the arbitrator erred in law and in fact, by entertaining the Respondent testimony and considering transaction that had no evidence, Ms. Asella questioned the Arbitrator's failure to raise doubt on the testimony presented by the respondent which was in a skeleton way that had no evidence to support the allegation.

According to her, the transactions claimed to have been performed by the Applicants were the basis of termination of his employment, but there was no evidence to that effect.

With regards to the **third** ground of revision that the arbitrator erred in law and in fact by shifting burden of proof from respondent to applicant, Ms. Asella is of the view that the burden of proof lies upon the person alleging. According to her, the respondent alleged that there was misconduct committed by the applicant but failed to prove how that misconduct was actually done. In her view, the respondent narrated a story which has no evidence.

She stated that the Applicant was a diligent employee of the Respondent for 15 years and in the time of termination he was not a loan officer and therefore had no direct dealings with Loan applicants. She questioned how he is accused of colluding with clients and even so without evidence and how Respondents rushed into terminating him before collecting and analysing evidence if what they claim was true. She cited **Rule 9 (3) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N NO 42 of 2007** which provides that "*The burden of proof lies with the employer*".

She further cited the case of **Fredy Ngodoki V. Swissport Tanzania Plc Court of Appeal of Tanzania at Dar es Salaam** where

Rumanyika J,A stated that in order to discharge the burden, the employer must prove that the employee was terminated for a valid and fair reason and upon fair procedure.

With regards to the **fourth** issue that, the arbitrator erred in law and fact by misinterpreting the information filled in CMA form no 1 and claiming that the applicant have admitted the claims he was accused of, Ms. Asella refuted such allegation of applicant's admission. In her view, the arbitrator did interpret differently from what was claimed.

Submitting on the **fifths** ground that, the arbitrator erred in law and fact by holding that the applicant was fairly terminated, Ms. Asella claimed that the termination of the employment was not fair in terms of procedure and substance, due to the fact that the employee was not availed with the reason for his termination. She urged for this court not to affirm the termination of this employment to be fair in procedure and substance. She cited **section 37 (1) and (2) of the Employment and Labour Institution Act Cap 366 R.E 2018** where it provides among other things thus:-

"It is unlawful for an employer to terminate the employment of an employee unfairly, that is to say, the termination has to be on the basis of the valid reason and fair procedure"

She further cited section 37(2) which describes the fairness of termination.

According to Asella, the above provisions are supported in the case of **TANZANIA RAILWAY LIMITED V. MWAJUMA SAID SEMKIWA, REVISION NO. 239 OF 2014, HIGH COURT LABOUR DIVISION AT DARES SALAAM** where it was held that;

"for the termination of employment to be considered fair it should be based on valid reason and fair procedure", that there must be substantive fairness and procedural fairness of termination of employment."

On the **sixth** ground of revision, Ms. Asella asserted that, the arbitrator erred in law and fact by holding that the applicant had received memorandum OM-018 OF 2015 without any proof of such service thereof. She argued that as a general rule, service of documents must be accompanied by the proof of receiving which was not the case in this matter. According to her, the memorandum claimed by the respondent to have been received by the applicant was not received as claimed and the proof of service was not tendered.

In response to the applicant's written submissions, having adopted the contents of the counter affidavit as part of the respondent's submission,

Mr. Humphrey Mwasamboma urged the court not to consider the applicant's affidavit because the applicant did not adopt it, while making submissions.

He proceeded to submit on the **first** ground that the Arbitrator erred in Law and in Facts by failing to properly analyse the evidence.

He cautioned the counsel for the applicant on what transpired during the proceedings of the case at the CMA, that there was no any claim countered against the applicant as he was the one who complained at CMA claiming the termination of his employment to be unfair and not the Respondent. He stated that the Respondent herein disputed the Applicant's claim and produced evidence that he was legally and fairly terminated due to misconduct, where the Applicant breached bank's procedure which prohibit effecting Electronic/Cash Transaction between customers and the Bank Staffs.

In his view, the Arbitrator analyzed all the evidence adduced by the parties properly as required by the law by determining the relevant issues which made the Arbitrator to reach a fair decision affirmatively as discussed in the CMA Award.

Mr. Mwasamboma submitted that the fact that there was electronic money transaction between the Applicant and the Respondent's client (PW1) where TZS. 150,000.00 was sent to the Applicant's mobile

number 0658302151 was not in dispute and that the Applicant clarified the reasons for such amount to be a deposit on his number from the client on personal business relation. According to him, the reason for termination of Applicant's employment was due to the act of receiving money from the client of the bank which was termed as misconduct, as it is contrary to procedures and policies of the Bank (Respondent) regardless of any forcing reasons or personal business relationship between them.

According to Mr. Mwasamboma, it was testified by DW1 that receiving and effecting payments in capacity of client is contrary to the Human Resources Policies (exhibit D5). In his view, taking into consideration that the applicant did not dispute the facts, the Hon. Arbitrator observed that there was no need of more evidence to proof the act of transaction as the admission of the alleged act proved the reason for termination. Mr. Mwasamboma submitted that it would be of another position if the act of transaction was disputed by the applicant, thereafter the Respondent would have supposed to tender evidence showing the transaction of the said amount from PW1 (bank's client) to the Applicant.

Mr. Mwasamboma submitted that in the CMA Award the Trial Arbitrator successfully and properly analyzed evidence as presented before the

Commission contrary to what has been submitted by the Applicant. He submitted further that the Counsel for the Applicant is trying to seek Court's sympathy.

He challenged the usefulness of the cases cited by the applicant for having not been attached them to the written submission and served to the Respondent, making him unable to rely on them.

Regarding the second ground, that the Arbitrator erred in Law and Fact by entertaining the Respondent testimony and considering transaction that had no evidence, Mr. Mwasamboma made reference to Page 2,3, 4 and 5 of the CMA Award, and stated that the testimonies of witnesses DW1 and DW2 were supported by Exhibits D1, D2, D3, D4, D5, D6, D7, D8, D9 and D10. In his view, the testimony was not skeleton and thus the ground is baseless with no merit.

Responding to the **third** ground asserting the arbitrator of having shifted the burden of proof from Respondent to Applicant, Mr. Mwasamboma argued that the issue of burden of proof is obvious and has been elaborated by the Hon Arbitrator at page 7 of the CMA Award, that is a well-established principle of the Law that once there is an issue of unfair termination the duty to prove the reasons is upon the employer and not otherwise. He submitted that, in proving the case the Respondent's witness DW1 tendered investigation report as **Exhibit D-**

2 to prove the act of Misconduct. He considered as baseless the stories of the Applicant, that the he was an employee of the Respondent for 15 years.

He maintained that the Applicant was fairly terminated after Internal Disciplinary Process which was proved before the Commission and a number of Exhibits were tendered to prove the terminating procedures undertaken by the Respondent and that's why the CMA Award was in favor of the Respondent.

Submitting on the fourth ground that the Arbitrator erred in Law and Fact by misinterpreting the information filled in CMA form No.1 and claiming that the Applicant have admitted the claims he was accused of, Mr. Mwasamboma submitted that the Trial Arbitrator did not error because it is true as the applicant's admission is seen at Page 5 of the CMA. F. 1 on part B (4) b, where the Applicant admitted in the commission of disciplinary offence which he was accused of internally.

He quoted the respective words from the CMA Form No 1 thus:-

"On fact it was a first time offence, I had no prior disciplinary issues, the nature of offence did not cause any loss or damage to the institution".

In his view, the Counsel for the Applicant misconceived the Hon. Arbitrator on the evaluation of evidence with relation to what has been

stated in CMA.F. No 1. He referred the Court to have a look at page 11 paragraph 2 of the CMA Award.

Regarding the **fifth** ground that, the Arbitrator erred in Law and Fact by holding that the Applicant was fairly terminated, Mr. Mwasamboma invited this Court to have an eye at page 2, 7 up to 14 of CMA Award, claiming that the trial Arbitrator has clearly analyzed/established how fairly the termination was in terms of fair reasons and procedures by discussing the raised issues in details, hence there is no error in that regard.

Submitting on the **sixth** ground that, the Arbitrator erred in Law and Fact by holding that the Applicant received memorandum OM-018 OF 2015 without any proof of such service thereof, Mr. Mwasamboma Asserted that the Applicant seem not to be conversant with the Commission Award, at Page 6 Paragraph 4 of the CMA Award where it has been clearly recorded what transpired during hearing of the case, that during cross examination it was recorded that the applicant admitted to be aware of the restriction to bank staffs to receive or send money from/to the customers through electronic transaction. He submitted that the issue of service of documents as alleged by the Counsel for the Applicant is of vacuum as it is nowhere to be found in the proceedings of the case at the CMA. In his view, it is baseless.

Having gone through the parties' submissions and their sworn statements together with the record of the CMA, I am inclined to address one issue as to **whether the applicant has adduced sufficient grounds for this Court to revise the CMA award issued in Labour Dispute No. CMA/DSM/KIN/195/2022.**

In addressing the above issues, all the 6 grounds identified in the affidavit and submissions of the parties will be considered. What I comprehend from the **first**, the **second** and the **third** ground, is that they all covers matters of evidence. I will address them all compressed together to form one sub issue as to whether the arbitrator did properly consider and evaluate the evidence on record.

As the practice in Labour dispute determination, the arbitrator addressed two aspects one being fairness of termination and the second one being the fairness of procedure. The arbitrator was guided by the provision of section 37(2) of Cap 366 which reads as follow:-

"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

(c) That the employment was terminated in accordance with a fair procedure”.

The arbitrator found sufficient evidence to prove that there was a transaction which flew from the respondent's client to the applicant's phone number, something which was not disputed by the applicant. The arbitrator considered the applicant's defence that money was for land purchase transaction the applicant had with the bank's client, which caused the sending of TZS 150,000 into the applicant's account. The arbitrator was not convinced with this applicant's defence since there was no any evidence tendered by the applicant to support his words to indicate existence of any land deals and transactions between him and the Respondent's client which culminated to payment of TZS 150,000. The Human Resource Policy and the Code of Conduct were tendered and admitted as Exhibit D5 and Exhibit D4 respectively. Both documents contain clauses which clearly prohibit receipt of cash from the bank client. The arbitrator was also convinced by the applicant in CMA Form No 1 in which he admitted that the offence was a first time disciplinary offence. Basing on these facts, the arbitrator confirmed that there was a disciplinary offence of receiving TZS 150,000 from the arbitrator which she considered to constitute fair reason for termination.

The words quoted by the respondents from the CMA Form No. 1 in my view, constitute admission and therefore it's later denial needed corroborative evidence. It was not disputed in the CMA that the transaction was ever made. I do not agree with the applicant that there was a need to tender the phone record since it was not in dispute that the transaction actually took place.

In this respect, I agree with the arbitrator that there was a fair reason in the termination of the Applicant employment.

As to whether the arbitrator did shift the burden of proof, I am not in agreement with the assertion because the respondent proved the existence of fair reason by the evidence of DW1 and the Exhibits tendered. (Exhibits D1, D2, D3, D4, D5, D6, D7, D8, D9 and D10.). In my view there was no shifted burden of view.

The aforesaid is sufficient to answer the 1st, 2nd and 3rd sub issues thus the arbitrator did properly analyse the evidence. The disputed transaction was sufficiently proved and he properly considered the testimony. I could not see a shifted burden.

With regards to issue No. 4, it is already found that there was no misinterpretation of the information filled in CMA Form No. 1.

With regards to the fifth issue, there could be no finding by the arbitrator other than existence of fairness in the termination. In my view the arbitrator, basing on his findings in terms of evidence, was right in finding the termination to be fair in terms of reasons and procedure.

With regards to the sixth issue, I have gone through the CMA record and noted that memorandum **OM-018 of 2015** was intended to prove on undisputed fact that the applicant know the restrictions to bank staff to receive or send money from clients. I agree with Mr. Mwasamboma that the receipt evidence was not necessary as no further evidence was required to prove undisputed fact. This issue do not affect the findings of the arbitrator.

From the foregoing, the first issue is answered negatively that no sufficient grounds established by the applicant to warrant setting aside of the CMA award. I hereby uphold the CMA award and dismiss this application for revision for want of merit. Each party to take care of its own cost. It is so ordered.

Dated at Dar es salaam this 31st Day of October 2022



KATARINA REVOCATI MTEULE

JUDGE

31/10/2022