

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

REVISION NO. 336 OF 2020

BETWEEN

NATIONAL MICROFINANCE BANK PLC.....APPLICANT

VERSUS

CHRISTIAN NICHOLAS GIDEON.....RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J:

The respondent herein was employed by the applicant on 01/07/2009 as a Bank Teller for about five (5) years. He worked until the year 2014 when he was terminated from employment on the ground of misconduct namely; unreasonable/unjustifiable absents from work on Saturday and intentionally failing to comply with lawful instructions from management. Aggrieved by the termination, he partly successfully referred a dispute No. CMA/DSM/KIN/178/19/121 ("the Dispute") at the Commission for Mediation and Arbitration for Ilala ("CMA"). He pleaded that he was harassed by the Branch Manager towards him which orchestrated his dismissal. In her award, the arbitrator made a finding that the respondent was properly charged and the conviction justified as his

conducts showed insubordination on his part contrary to Rule 12(3)(f) of the Employment and Labour Relations (Code of Good Practise) G.N. No. 42/2007 ("the Code"). Hence the termination of the respondent was found to be substantively fair.

However, it was the arbitrator's finding that the respondent was unfairly terminated procedurally. She faulted the act of the Chairman of the Disciplinary Hearing Committee ("the Committee") to convene the disciplinary hearing, sitting as a member of the Panel and eventually being the authority in the termination letter. To that effect, the arbitrator made a finding that the applicant materially breached the provisions of Rule 13(7) of the Code and owing to that; she ordered the re-engagement of the applicant. Aggrieved by the award, the applicant has lodged this application under the provisions of Section 91(1)(a),(b) and (2)(a)(b) 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) and (3)(a),(b),(c) and (d), Rule 24(11) and Rule 28 (1)(c),(d) and (e) of the Labour Court Rules, GN. No. 106/2007) moving the court to:

1. Call for the records and examine the proceedings of the CMA in the dispute with a view to satisfying itself as to the legality, propriety, rationality and correctness thereof.

2. Revise and set aside the award of the CMA.

The application was supported by an affidavit of Ms. Lillian Komwihangiro, Principal Officer of the applicant dated 17th August, 2020. As per the notice of application, the applicant was represented by Mr. Paschal Kamala, learned advocate. The respondent was represented by Mr. Jamael Ngowo from the Legal Department of TUICO Headquarters. The application was disposed by way of written submissions.

It is pertinent to note that the respondent has not filed any revision against the finding of the arbitrator that his termination was substantively fair, hence I will not deal with that part. In fact, on page 5 of his submissions to oppose the application, the respondent submitted that *"the findings of the honourable chairman from page 9-12 of the typed award are correct and are made upon evaluation of the testimony of both witness of the applicant during hearing..."* The only issue that I will deal with is whether the termination of the respondent was procedurally fair to justify the order of re-engagement issued in the award of the CMA.

In his submission Mr. Kamala contended that according to Rule 11 of the Code, the Guidelines for disciplinary, incapacity and compatibility policy and procedures, the Chairman is given power to consider whether

to terminate is fair or not. That the provisions provides for dimensions that the Chairman should consider before imposing the sanction of termination.

On the issue of the Zonal Manager being the Chairperson of the disciplinary hearing, Mr. Kamala submitted that the Applicant's HR policy provides for members who will sit to determine disciplinary cases and that the policy is in conformity with the law.

In reply, Mr. Ngowo submitted that the respondent was served with an invitation for hearing which was prepared by the Zonal Manager one Nazareth Lebbi and during the disciplinary hearing, the records clearly show that it is the same person who was the Chairman. Further that the same Mr. Lebbi signed the termination letter. He argued that there was no justice in this procedure hence the findings of the arbitrator that the termination was procedurally unfair was correct. Further that the applicant violated the provisions of Rule 13 of the Code as the person who was to chair the disciplinary hearing was to be a neutral party from outside the office so as to avoid biasness. Further that the respondent was terminated by the disciplinary committee and not his employer.

In rejoinder, Mr. Kamala submitted that Mr. Ngowo is misleading the court because the provisions of the law are clear on who is to be the Chairman of the Disciplinary hearing. That Rule 4(1) of the Code gives a guidance for disciplinary procedures and the Chairperson is required to be someone from Senior level of management and shouldn't be involved in the issues giving rise to the dispute. That the policy of the applicant directs that the Chairperson of the committee will be the zonal manager which was the case in this dispute. He then reiterated his submissions in chief on this issue.

Having considered the parties' submissions, I will start with the provisions of Rule 13(4) of the Cod:

"The hearing shall be held and finalized within a reasonable time and chaired by a sufficiently senior management representative who shall not have been involved in the circumstances giving rise to the case."

It is now to look at the Chairperson of the committee and see whether the Chairperson of the committee was not involved in the circumstances giving rise to the case. The respondent submitted that the invitation to disciplinary hearing was signed by one Nazareth Lebbi and during disciplinary hearing he was the Chairperson and that at the

end of the hearing it was the same person who signed the termination letter. Further that it is the same person who signed the charge sheet. Looking at the charge sheet (EXP3), it originated from the Zonal Manager but it was signed by one Michael Bildad and not Mr. Lebbi. Indeed EXP5 shows that it was signed by Nazareth Lebbi. According to this record, the Zonal Manager was the investigator, the accuser (prosecutor), the judge and finally the executing authority, This was a procedural irregularity because it is the rule of fair hearing under a legal maxim "*Nemo dat in causa sua*" that a person shall not be a judge of his own cause. Hence I agree with the finding of the CMA that the termination of the respondent was procedurally unfair.

The next issue is the reliefs sought because in her award, having found that the termination of the respondent was substantively fair but procedurally unfair, the arbitrator ordered re-engagement of the respondent. Mr. Kamala argued that having found that the termination was procedurally fair, re-engagement was not an appropriate remedy. That re-engagement is a high penalty and it should be awarded only when termination is found to be unfair both in terms of reason and procedure. This argument was supported by the case of **Felician Rutwawa Vs. World Vision Tanzania, Civil Appeal No. 213/2019.**

On his part, Mr. Mnyele argued that the award was based on Section 40(1)(b) of the Act.

On my part, I am in agreement with Mr. Kamala that the order of re-instatement/re-engagement is an order that may be issued when the termination of the respondent is found to be substantively unfair. That the employer had no justifiable reason for the termination, this is when the employer is ordered to reinstate or re-engage the employer because he has no fair reason to terminate him in the first place. But in this case, the reason for termination was found to be fair hence the fact that the procedure was not followed will not defeat the fact that the employee actually conducted the offence charged with. Re-engagement will entail engaging the person who conducted an act which was not in line with the employer's policies and procedures hence replanting the mischief. This will be unfair to the employer and the farfetched effect is to cultivate and promote indiscipline at work place.

That said, I hereby allow this revision by revising the award of the CMA and set aside the order for re-engagement of the respondent. Instead I make an order under Section 40(1)(c) of the Act, that having breached the procedures for termination, the applicant pay a compensation to the respondent equivalent to six (6) months' salaries.

Since the last salary of the respondent has not been revealed in the records of the CMA, it shall be so calculated accordingly during execution by parties bringing proof of the salary. The award of the CMA is therefore revised to the extent explained.

Dated at Dar es Salaam this 28th day of March, 2022.




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S.M. MAGHIMBI
JUDGE