IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 231 OF 2020

(Originating from Labour Dispute No. CMA/DSM/ILA/R/1041/16/920)

BETWEEN

AFRICAN BANKING CORPORATION (T) LTD..... APPLICANT

VERSUS

JOVINE MUGOO..... RESPONDENT

JUDGMENT

Date of Last Order: 15/11/2021

Date of Judgment: 11/02/2022

I. ARUFANI, J.

The applicant mentioned hereinabove employed the respondent as a Regional Manager - Easy Banking (Grade 15) from 3rd February, 2014 and his station of work was Mtwara and Lindi Regions. He continued serving in his position until 19th October, 2016 when he was terminated from his employment on ground of misconducts. It was alleged that on March, 2015 Mr. Hemedi Mohamed Mkowe, the client applied for a loan of TZS. 2,000,000/= from the applicant. Later on, he was no longer interested with the loan as he was changing his job. He thus written a letter to the applicant to cancel

his loan application. Despite of the stated cancellation, the loan was approved and credited into his NMB account.

It was further alleged as appearing in the record of the matter that, the respondent being the Mtwara and Lindi Zonal Manager, fraudulently he directed the said client to refund the said loan through mobile phone number 0763266636. The transactions were done twice to wit TZS. 1,000,000/=, was deposited on 11th March, 2012 and TZS. 920,000/= was deposited on the same number on 12th March, 2015. It was further alleged that, the applicant continued to hold the said amount of money, and fraudulently continued to deduct the money from the customer's Bank Account despite his several complaints.

Following the said allegations, the respondent was suspended from his employment and investigation was conducted which resulted into the respondent being charged with disciplinary offences of wilful dishonesty and fraudulent acts against the employer contrary to Rule 12 (5), (9) and (10) of the BancABC Employment Code of Conduct. The respondent was found guilty of the offences and he was terminated from his employment.

Being aggrieved by termination of his employment, the respondent referred the matter to the Commission for Mediation and Arbitration (hereinafter referred as the CMA) claiming to have been unfairly terminated from his employment. After hearing the matter, the CMA held termination of employment of the respondent was substantively unfair. The CMA awarded the respondent 24 months salaries as a compensation, 1 month salary in lieu of notice, severance pay, October remuneration, 15 days accrued leave, transport and subsistence allowances to the date of being repatriated to his place of domicile.

Having being aggrieved by the award, the applicant knocked the door of this court praying for the CMA award be revised and set aside. The application of the applicant is supported by the affidavit sworn by Lilian Richard Musingi, the applicant's Principal Officer and it was challenged by the counter affidavit sworn by the respondent. The grounds upon which the applicant invites the court to revise the impugned award as listed in the affidavit supporting the application are as follows:-

a) That the Honourable Arbitrator failed to analyse and consider the evidence of DW1, DW2 and DW3.

b) Whether it was proper for the Hon. Arbitrator to award the respondent twenty four months' salary amounting to 81,600,000/= without reasons to justify the same.

c) The Hon. Arbitrator erred in law and fact in awarding the respondent the relief that was not pleaded and not prayed for in the pleadings filed before the commission.

During hearing of the matter, the applicant was represented by advocates from Apex Attorneys and the respondent was represented by advocates from DIRM Attorneys. By consent the counsel for the parties prayed to dispose of the application by way of written submission and their prayer was granted by the court. I commend the counsel for the parties for abiding to the scheduling order given to them for filing their written submission in the court.

Submitting in support of the first ground of the application, the counsel for the applicant stated that, the Hon. Arbitrator failed to properly analyse the evidence of the applicant adduced by DW1, DW2 and DW3, as a result he arrived to a wrong conclusion that, the applicant had no valid reason for terminating employment of the respondent. He argued that, DW1 testified before the CMA that he

obtained the respondent's phone number from the Human Resources officer of Nanyumbu District.

He stated that, DW1 contacted the respondent who directed him to deposit the amount of money he had borrowed from the applicant though his mobile phone number 0763266636. He stated that, the question to determine here was whether the mentioned phone number belonged to the respondent and the Arbitrator found there was no prove if that number was belonging to the respondent. The counsel for the applicant submitted that, the phone number given to DW1 was owned by the respondent as he never disputed the same as per paragraph 2 of exhibit A5 which was prepared and signed by himself. He argued that, the respondent only denied to have instructed DW1 to deposit the money into his phone number.

It was further submitted by the counsel for the applicant that, the Arbitrator ignored exhibits A5 and A1 (bank statements). He stated that, the latter shows DW1 received TZS. 1,990,000/= as a loan in his bank account and the same amount was refunded to the applicant through the respondent's phone number 0763266656. He argued that, the Arbitrator was confused by exhibit A2 which was the

DW1's letter which states the amount of money refunded to the respondent was TZS. 2,000,000/=. He stated that, the Arbitrator decided not to consider what is stated in exhibit A1 (Bank Statement) that the respondent had no other explanation concerning the amount of money refunded to his phone number.

Coming to the second ground, the counsel for the applicant stated that, the law under Section 40 (1) (c), of the ELRA provides for compensation of not less than 12 months remuneration. He submitted that the Arbitrator wrongly awarded the respondent 24 months' salaries without any justification to that effect. He supported his argument with the case of **Lonagro Tanzania Limited v. Gilbert Katunzi**. Revision No. 928 of 2018. He further submitted that, the award of 12 months compensation is awarded when termination is unfair both substantively and procedurally. He argued that, as the termination was found procedurally was fair then the Arbitrator ought to have awarded six months compensation only. To bolster his submission, the counsel for the applicant cited the case of **Puma Energy Tanzania Ltd. v. Azayobob Lusingu and 2 Others,** Revision No. 697 of 2019 where the court awarded six months salaries as a compensation for unfair termination of

employment after being found termination was substantively fair but procedurally unfair.

With regards to the third ground, the counsel for the applicant submitted that, the Arbitrator was supposed to issue an award basing on what has been prayed by the complainant in his CMA F1. He submitted that, in the matter at hand the Arbitrator awarded the respondent the reliefs which were not claimed in the CMA F1. He mentioned example of the reliefs awarded to the respondent which were not prayed in the CMA F1 to be one months' salary (Tshs. 3,400,000/=) in lieu of notice and 15 days accrued leave of the sum of Tshs. 3,007,692.31. To strengthen his argument, he cited in his submission the cases of **Frank Saluhara and Another V. Nyanza Bottling Co. Ltd.**, Revision No. 44 of 2013 and **Precision Air Service Ltd. v. Edward Munanu**, Revision No. 106 of 2008 where it was stated that, parties are bound by their pleadings and are not entitled to what is not claimed in their pleadings.

He submitted that, in the CMA F1 the applicant prayed for reinstatement but the Arbitrator awarded him compensation without giving reason as to why he awarded the respondent compensation

contrary to the requirement of the law and contrary to what was stated in the case of **Precision Air Service Ltd. v. Edward Munanu** (supra). At the end he prayed the application be granted.

Responding to the submission by the counsel for the applicant, the counsel for the respondent stated that, the Arbitrator properly analysed the adduced evidence before arriving to the decision. He argued that, when DW1 was being cross examined he stated that he sent the money to phone number 0763266636 which was given to him by Mr. Ndinda, the Nanyumbu District's Human Resources officer. He stated that, he neither met the respondent nor cross checked on the registration status of the phone number he was given before sending the money to the number given to him.

He further stated that, DW1 failed to prove before the CMA that the phone number he sent the money belongs to the respondent by then or todate. The said phone number was registered in the name of Anzuruni Nkuyehe. He stated even the Arbitrator posed a question as how can he be sure that, the said number belongs to the respondent while there was no evidence to prove that the said money was sent to the respondent. He argued that, it is the requirement of the law that

he who alleges have the burden to prove. To support his argument, he cited in his submission section 110 (1) and (2) of the Evidence Act, Cap 6 R.E 2019 and the case of **Wolfgango Dourado v. Tito Da Costa, ZNZ,** Civil Appeal No. 102 of 2002 where it was held that, whoever alleges a fact has to prove it on balance of probability.

As regards to the second ground, the counsel for the respondent argued that, the law under section 40 (1) (c) of the ELRA gives mandate to the Arbitrator to grant remedies to the complainant having found that the termination was unfair. He stated it is the discretion of the Arbitrator or the court to award compensation to an employee basing on the adduced evidence. To support his submission, he referred the court to the case of **Patrickson Ngowi & Others v. Tanzania Breweries Ltd.**, Revision No. 300 of 2014. He added that, there are various court's decision which states that the law does not set the maximum amount of compensation. He submitted that the award should be fair depending on the circumstance of each case.

The respondent's counsel argued in relation to the third ground that, the reliefs prayed by the respondent as per the CMA F1 were

reinstatement, payment of terminal benefits, payment of damages, subsistence allowance, compensation for unfair termination and repatriation costs. He argued that, the Arbitrator awarded the respondent 24 months salaries as compensation, 1 month salary in lieu of notice, severance pay, October remuneration, 15 days accrued leave, transport and subsistence allowance to the date of repatriation from Mtwara to Lindi and certificate of service. He submitted the reliefs awarded to the respondent were in accordance with section 44 (1) of the ELRA and prayed for dismissal of the application.

In his rejoinder, the counsel for the applicant reiterated what he argued in his submission in chief. He added that, the fact that the phone number 0763 266636 belongs to Anzuruni Nkuyehe and not the respondent is baseless. He stated the said facts were raised while giving testimony before CMA and there was no proof tendered to prove the same. He submitted that, even if we assume that it is true that the said number has been registered in that name, the Arbitrator ought to have considered the fact that, the dispute occurred in 2016 and the hearing was conducted in 2019. Therefore, there was possibility for the respondent to abandon the number as it was

involved in fraud and the same be registered in the other person's name.

In addition to that, it was submitted by the counsel for the applicant that, the victim of the respondent's acts was residing in the area where there was no bank. Therefore, as the major tool of communication was phone it was easy for the respondent to instruct the client to refund the money through his phone number. He insisted on the prayer that, the CMA's award be revised and set aside.

Having carefully considered the rival submission from both sides and after going through the record of the matter and the laws applicable in the matter the court has found proper to determine this application by following the grounds raised by the applicant and argued in the submission filed in this court by the counsel for the parties. I will start with the first ground which states the Arbitrator failed to analyse and consider the evidence adduced by DW1, DW2 and DW3 and reached into a wrong conclusion that the applicant had no valid reason to terminate employment of the respondent.

The court has found the counsel for the applicant faulted the finding of the Arbitrator that, there was no proof that the phone

number stated was given to DW1 and used the same to refund the money given to him by the applicant as a loan was belonging to the respondent. The court has considered the argument by the counsel for the applicant that, as the respondent did not dispute at paragraph 2 of exhibit A5 that the phone number used by DW1 to refund the loan given to him belonged to the respondent and he only denied to have instructed DW1 to deposit the money into his phone number but failed to see any merit in the said argument.

The court has arrived to the above finding after seeing that, although it is true that the respondent did not state expressly in exhibit A5 that the phone number did not belong to him but the court has found when he was being cross examined, he stated categorically at page 40 of the proceedings of the CMA that, the mentioned phone number was not and it had never been his phone number. Therefore, it is the view of this court that, a mere fact that the respondent did not dispute in exhibit A5 that the phone number belonged to him it cannot be sufficient ground for finding the phone number belonged to respondent while it has not been indicated anywhere in the whole evidence adduced before the CMA that the phone number belonged to the respondent.

The court has also arrived to the above finding after seeing that, as stated by the counsel for the applicant and appears in the evidence adduced at the CMA, DW1 had never seen the respondent before sending the money to the phone number 0763266636 he stated he was directed by the respondent to deposit the money he was refunding to the applicant. He just stated that, he was given the phone number of the respondent by the Human Resources Officer of Nanyumbu District where he was working as a teacher and after communicating with the person, he stated was the respondent is when he was directed to deposit the money in the phone number which the respondent stated in his evidence it was not and it had never been his phone number.

The argument that the respondent did not dispute the mentioned phone number belonged to him cannot be a sufficient proof that the phone number belonged to the respondent and not anybody else. The court has found there was a need for the applicant as the employer to discharge the duty casted to an employer by section 39 of the ELRA to prove the phone number belonged to the respondent and not anybody else. The court has also found that, as rightly argued by the counsel for the respondent the applicant had a duty under section

110 (1) and (2) of the Evidence Act, and as stated in the case of **Wolfgango Dourado** (supra) to prove the phone number used by DW1 to refund the loan advanced to him by the applicant was owned by the respondent and not anybody else.

Sequel to the above stated view, the court has also arrived to the stated view after seeing that, the evidence adduced before the CMA shows DW1 said he was given the said phone number by Nanyumbu District's Human Resources Officer and not the respondent himself. In addition to that and as stated by DW3 at page 33 of the proceedings of the CMA the said phone number was registered in the name of Anzuruni Nkuyehe which is not the name of the respondent and it was not stated the respondent was using the said name or he was using the phone number registered in the said name.

The court has also found that, although the counsel for the applicant faulted the finding of the Arbitrator that the amount of the loan advanced to DW1 was TZS. 1,990,000/= but DW1 stated in exhibit A2 the amount he sent to the respondent through the phone number he was given was TZS. 2,000,000/=. The court has failed to see why the counsel for the applicant faulted the Arbitrator on the

stated finding while there is no clarification given to show why if the loan given to DW1 was TZS. 1,990,000/= why he sent TZS. 2,000,000/= to the number given to him.

In the light of all what I have stated hereinabove the court has failed to see any merit in the first ground of revision which states the Arbitrator failed to analyse the evidence adduced before the CMA by the applicant's witnesses. To the contrary the court has found the Arbitrator properly analysed the evidence adduced before the CMA by both sides to determine the issue of the phone number stated by DW1 that he used the same to refund to the applicant the loan given to him was belonging to the respondent.

Coming to the second ground of revision which states the Arbitrator awarded the respondent TZS 81,600,000/= being 24 months salaries as a compensation for unfair termination of his employment without reasons to justify the same the court has found it is true that there is no reason given by the Arbitrator in awarding the said relief. In awarding the said remedy the Arbitrator referred to section 40 (1) of the ELRA which provides for the remedies which can

be awarded to an employee who has unfairly been terminated from his or her employment.

Under the cited provision of the law, an arbitrator or the court has power to order an employee terminated unfairly from his or her employment either to be reinstated or re-engaged in his employment from the date of being terminated or be paid compensation of not less than twelve months remunerations. The court has found that, as stated in the case of **Patrickson Ngowi & Others** (supra) the Arbitrator or the court have discretion to award more compensation than the one provided under the cited provision of the law. The position of the law as stated in the case of **Multi Choice Tanzania Ltd. V. Felix Nyari** cited in the submission of the counsel for the respondent is that, section 40 (1) (c) of the ELRA is setting the minimum amount to be paid to an employee as a compensation for unfair termination of employment and not the maximum.

However, as stated in the case of **Lonagro Tanzania Limited** (supra), where there is a need for the Arbitrator or the court to award a compensation which is more than the minimum amount provided by the law the Arbitrator or the court is required to give basis or reason

for doing so. The stated requirement was also stated by this court in the case of **JHPIEGO V. Johnson Lyombe**, [2017] LCCD 74 where the court stated that, the Arbitrator misdirected himself for awarding 24 months salaries as compensation without justifiable reason whatsoever. That means the Arbitrators and the courts are required to exercise the discretionary power given to them judiciously by giving reason for awarding more or less compensation than the minimum amount provided under the law.

The court has considered the argument by the counsel for the applicant that, as the unfairness of termination of employment of the respondent was only found on the reason used to terminate his employment and not on the procedure then the Arbitrator was required to award the respondent compensation of only 6 months and not 24 months salaries. It is true that fairness of termination of employment of an employee as provided under section 37 of the ELRA is looked on both the reason and procedure used to terminate employment of an employee.

However, the court has stated in number of cases that, where it is only the procedure which has been violated the arbitrator or the

court can award less compensation than the minimum amount provided under section 40 (1) (c) of the ELRA. One of those cases is **Puma Energy Tanzania Limited** (supra). In the case at hand the Arbitrator found the evidence adduced before the CMA managed to establish the applicant had no fair reason to terminate employment of the respondent but the applicant followed the required procedure for terminating employment of the respondent.

That being the position of the matter the court has found it was not justifiable to award the respondent compensation of 24 months salaries which is two times the minimum amount provided under the law without giving any reason as to why he decided to award the stated compensation. It is the view of this court that, as the Arbitrator had no reason of awarding more compensation to the respondent than the minimum amount provided under the law and as stated in the case of **JHPIEGO** (supra) the Arbitrator was required to award the amount provided under the law which is compensation of twelve months salaries. In the premises the court has found it was not proper for the Arbitrator to award the respondent compensation of twelve months salaries without giving reason to justify the same.

As for the third ground which states the Arbitrator erred in awarding the respondent the reliefs that was not pleaded and not prayed in the pleading filed before the CMA the court has found that, as stated in the cases of **Frank Saluhara and Another** and **Precision Air Ltd.** (supra) parties are not entitled to be awarded what is not claimed in their pleadings. The court has found the reliefs sought by the respondent as indicated in the CMA F1 were reinstatement, payment of terminal benefits, payment of damages, subsistence allowance, compensation for unfair termination and repatriation allowance.

The impugned award shows the Arbitrator awarded the respondent 24 months salaries as a compensation, 1 month salary in lieu of notice, severance pay, October, 2016 remuneration, 15 days accrued leave, transport and subsistence allowances to the date of being repatriated to his place of domicile. The reliefs which the counsel for the applicant stated in his submission were awarded to the respondent while were not prayed in the CMA F1 are payment of one month salary in lieu of notice of termination of employment of the respondent and payment of 15 days accrued leave.

The court has carefully considered the argument by the counsel for the applicant and after going through section 44 (1) of the ELRA it has found the counsel has not taken into consideration what is provided in the cited provision of the law. The court has come to the above finding after seeing that, although it is true that you cannot sought and be granted both reinstatement and compensation for unfair termination but the cited provision of the law is very clear about what an employee who has unfairly been terminated from his or her employment is entitled if he or she has not been reinstated or re-engaged in his or her employment.

Since the Arbitrator ordered the respondent to be paid compensation for unfair termination instead of being reinstated in his employment the court has found the reliefs of one month salary in lieu of notice of termination of his employment and 15 days accrued annual leave were properly awarded to the respondent pursuant to section 44 (1) (c) and (d) of the ELRA read together with section 31 (1) and 41 (5) of the same law. As for the argument by the counsel for the applicant that the Arbitrator did not provide the reason as to why he awarded compensation while respondent prayed for

reinstatement the court has found it is not true that the respondent did not pray for compensation.

First of all, the court has found that, as indicated hereinabove the respondent prayed not only for reinstatement but he also prayed to be paid compensation for unfair termination of his employment and other reliefs. Secondly, the court has found it is not true that the Arbitrator did not give reason for awarding compensation instead of reinstatement as he categorically stated in the award that he granted compensation after seeing it is an executable remedy. Therefore, the argument by the counsel for the applicant that the Arbitrator awarded reliefs which were not pleaded and no reason for awarding compensation instead of reinstatement was given have no merits.

In the final result the court has found the application filed in this court by the applicant deserve to be partly allowed to the extent of reducing the compensation of twenty four months salaries awarded to the respondent to twelve months salaries. Consequently, the award of the CMA is hereby partly revised to the extent that, the respondent will be paid TZS 40,500,000/= being twelve months salaries as a compensation for unfair termination of his employment together with

the rest of the reliefs awarded to him by the CMA which have not been altered by the court. It is so ordered.

Dated at Dar es Salaam this 11th day of February, 2022.

I. Arufani

JUDGE

11/02/2022

Court: Judgment delivered today 11th day of February, 2022 in the presence of Ms. Hadija Luwongo, Advocate for the Applicant and in the absence of the respondent. Right of appeal to the Court of Appeal is fully explained.

I. Arufani

JUDGE

11/02/2022