THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVSION APPLICATION NO. 137 OF 2021

BETWEEN

MKOMBOZI COMMERCIAL BANK PLC..... ..... APPLICANT

AND

BONIFACE THOMAS..... ..... RESPONDENT

JUDGMENT

Last order: 14/02/2022
Date of Judgment: 18/02/2022

B.E.K. Mganga, J

On 1st April 2019, applicant employed the respondent as Bank Manager. In the letter of employment, respondent was informed that he will be under probation for six (6) months with effect from 1st April 2019 to 1st October 2019 and upon successful completion of the probation period, he will be confirmed for the employment. On 31st March 2020, applicant informed the respondent that he has not been confirmed as Manager-banking Channels. Respondent was unhappy with that information as a result on 17th April 2020, he filed labour dispute No. CMA/DSM/ILA/321/2020/157/20 before the Commission for Mediation and Arbitration hereinafter referred to as CMA that there was unfair labour practice relating to probation as the process of confirmation for

employment was unfair and unjust as there was procedural irregularity. Due to the alleged unfair labour practice relating to probation, respondent prayed to be reinstated and payment of compensation of TZS 1,703,000,000/= for unfair labour practice which resulted to loss of employment.

On 12th February 2021, Ngaruka, W. O, arbitrator, issued an award in favour of the respondent that there was unfair labour practice relating to probation. The arbitrator ordered the applicant to pay the respondent TZS 66,000,000/= as compensation for 12 months' salary. This time, it is the applicant who was unhappy as a result she filed this application for revision. In the affidavit sworn by Mbagati Nyarigo, counsel for the applicant in support of the notice of application, the applicant raised five grounds namely:-

1. *That the Arbitrator erred in law and fact by considering that the applicant had the obligation to strictly account for reasons of non-confirmation of the respondent's employment or failure of the interview.*
2. *The Arbitrator erred in law for failure to consider the content of the investigation carried out by the applicant prior to non-confirmation of the respondent.*
3. *That the Arbitrator failed to consider that non-confirmation of the respondent was not on reason of poor performance hence there was no way the employee could be given a chance to improve.*

4. *That the Arbitrator erred in law and fact by concluding that the resignation of the respondent at the previous employer necessarily meant that the respondent had a good record with his previous employer.*
5. *That the Arbitrator erred in law and fact by ordering the applicant to pay twelve month's compensation while there was no any unfair Labour practice imposed on the respondent.*

Respondent filed a counter affidavit opposing the application. In the counter affidavit, respondent stated that the arbitrator correctly awarded him as there was breach of procedures.

When the application was called for hearing, both counsels prayed the application be argued by way of written submissions and the order was granted to that effect.

Mr. Claudio Msando, advocate arguing the application for and on behalf of the applicant, in the first ground of revision namely, that the arbitrator erred in fact and law by considering that applicant had the obligation to strictly account for reasons of non-confirmation of the respondent's employment or failure of interview, he submitted that applicant discovered that respondent was not fit for the job as he was associated with allegations of theft, which would badly paint the picture of the applicant. Counsel went on that, in terms of Rule 10(3) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007, applicant was at liberty to terminate employment of the

respondent as he was not fit for the job and to protect reputation and her image towards her clients. Mr. Msando cited the cases of ***Mtenga v. University of Dar es salaam*** [1972] EACA 3, ***Stella Temu v. Tanzania Revenue Authority,*** Civil appeal No. 72 of 2002 (unreported) and the case of ***David Nzaligo V. National Microfinance Bank PLC***, Civil Appeal No. 61 of 2016 (unreported) to support the position that, as the respondent was on probation, there was no automatic confirmation and concluded that applicant had no obligation to account for reasons for non-confirmation.

On the second ground, namely, that arbitrator erred in law and fact for failure to consider the content of the investigation carried out by the applicant prior to non-confirmation of the respondent, counsel for the applicant submitted that, applicant carried investigation at DCB Bank, the former employer of the respondent, and find that respondent was associated with charges relating to installation of malicious software that facilitated stealing client's money and tendered the report at CMA but the same was ignored by the arbitrator. Counsel submitted that this was a ground for non-confirmation of the respondent.

In the third ground namely, that the arbitrator failed to consider that non-confirmation of the respondent was not on poor performance hence

there was no way he could be given chance to improve, Mr. Msando submitted that, the bank is supposed to be a trusted entity due to its nature of service it provides. Therefore, there was no chance for the respondent to improve as was associated with allegations of theft that was likely to endanger the reputation of the applicant. He went on that; respondent was not fit for the job and it could have been chaos to confirm him and give him more chance. To buttress his point, counsel for the applicant cited the case of ***Hotel Sultan Palace Zanzibar v. Daniel Laizer & Another***, Civil Appeal No. 104 of 2004, CAT (unreported).

In the fourth ground, namely, that the arbitrator erred in law and fact in concluding that resignation of the respondent at his previous employer necessarily meant that he had a good record with his previous employer, counsel for the applicant submitted that, an employee could resign voluntarily during the period his fate is being ascertained and that, it does not mean, at all times when an employee resigns, he/she had a good record with his employer as he may resign after breach of contract. Counsel for the applicant reiterated that investigation done by the applicant indicated that respondent resigned from previous employer as he was associated with professional delinquency.

In the last ground, namely that the arbitrator erred in law and fact in ordering applicant to pay twelve months' salary compensation while there was no unfair Labour practice imposed on the respondent, Mr. Msando, counsel for the applicant, submitted that, twelve months' salary compensation is awarded in terms of section 40(1)(c) of the Labour relations Act [Cap.366 R.E. 2019] when there is termination of employment which is not the case in the application at hand.

On the other hand, Mr. Peter Wenceslaus Seni, counsel for the respondent, resisted the application and submitted that it is undisputed that respondent was under probation for six months, but he was not notified by the appointing authority that probation was extended. Counsel for the respondent referred to the Mkombozi Commercial Bank Human Resources Policy 2019 and argued that, the Management Committee which is the appointing authority vested with power to extend probation period failed to comply with applicant's policy. Counsel for the respondent argued further that, applicant failed to comply with Rule 10(7), (8)(a),(b),(c) and (9) of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007 that requires an employer to give a chance to employee to answer and defend any concern about his employment. Mr.Seni, counsel for the respondent

went on that, the letter of non-confirmation did not give reasons. Counsel therefore distinguished ***Mtenga's case,*** (supra), that it is not applicable in the application at hand as it was decided prior enactment of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] and Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007. He distinguished also ***Temu's case,*** (supra), and ***Nzaligo's case,*** (supra), on ground that the former gives purpose of probation, which is not an issue to the application at hand and it does not give out the procedure for terminating a probationary employee and that, in the latter case, the probationary employee resigned before confirmation and does not establish principles on the issues in the application at hand.

In the second ground, Mr. Seni, counsel for the respondent submitted that the investigation report was considered in the award by the arbitrator. Counsel for the respondent submitted that investigation report was doctored by the applicant to win the case and that it did not comply with the provisions of section 62 of the Evidence Act [cap.6 R.E. 2019]. He went on that, evidence of Daudi Senkondo is hearsay as the information was sourced from a person who was not called to testify, and no documentary exhibit was brought from the previous employer of the respondent. Counsel for the respondent submitted further that, even

if the allegations against the respondent was true; applicant was supposed to follow procedures of termination of a probationary employee. He cited the case of ***Agness B. Buhere V. UTT Microfinance PLC***, Revision No. 459 of 2015, High Court Labour Division (unreported) to support his argument.

Responding to the third ground, Mr. Seni, counsel for the respondent submitted that Rule 10 of GN. No. 42 of 2007, supra, requires both employer and employee to discuss issues of concern which may rise and in case of disagreement, allowing the parties to forward the issue to CMA. Counsel for the respondent submitted further that, the said Rule upholds the principle of *audi alteram paterm* i.e., no one should be condemned unheard. In this ground, Counsel for the respondent concluded by submitting that respondent was not invited to discuss concern till the end of probation period and received a non-confirmation letter.

Responding to the fourth ground, Mr. Seni, counsel for the respondent submitted that, respondent's resignation from his former employer means he had good record. He went on that, applicant gave contradictory evidence as initially evidence was led to the effect that respondent resigned when investigation process was carried out but

later on, gave evidence that respondent resigned on 24th September 2018, which is the date respondent was promoted. Counsel for the respondent submitted further that, respondent resigned on 6th March 2019, two days after an offer of employment by the applicant and that, the former employer accepted his resignation and received his entitlements, which negates the allegation of existence of investigation or concern, otherwise the employer could have refused resignation.

Responding to the fifth ground, counsel for the respondent submitted that, the award of TZS 66,000,000/= compensation to the respondent is proper as he suffered damages as a result of loss of his employment. Counsel argued that the said compensation was not based on termination of employment but unfair labour practices.

In rejoinder, Mr. Msando, counsel for the applicant submitted that, Rule 10(7), (8) and (9) of GN. No. 42 of 2007, supra, cannot apply in the application at hand as the same applies where an employee is not given a chance to improve when there is poor performance. Counsel submitted that; respondent was informed reasons for no-confirmation through documents that were in possession of the respondent. Counsel for the applicant refuted the allegations by counsel for the respondent that investigation report was doctors as no objection was raised at the

time of tendering it in evidence and that respondent is precluded from raising that issue at revision stage. Counsel for the applicant maintained that arbitrator ignored the investigation report contrary to what counsel for the respondent submitted.

From submissions of the parties, I noted that there is an issue of admissibility of documentary exhibits both for the applicant and the respondent. This is vivid as counsel for the respondent submitted that investigation report was doctored by the applicant to suit her interest while counsel for the applicant submitted that the said investigation report was tendered without objection and that respondent cannot raise that issue on revision as it was not raised at CMA. After close examination of CMA proceedings, and being mindful with these submissions, I resummoned parties and asked them to address the court whether, documentary exhibits both for the applicant and respondent, including investigation report, were properly admitted or not and effects thereof. I did so as this issue was not addressed by the parties in their written submissions.

Responding to the issue of procedure raised by the court, Ms. Patricia Tarimo, counsel for the applicant, submitted that Rule 25 of the Labour institutions (Mediation and Arbitrations Guidelines) Rules, GN. No. 67 of

2007 provides modes of proving the case at CMA. Counsel for the applicant submitted that this Rule has to be read together with Rule 4(1) of Order XIII of the Civil Procedure Code [Cap. 33 R.E.2019] that requires exhibits to be properly endorsed. Counsel for applicant submitted that there is no a similar provision in the Labour statutes, which is why, reliance has to be made to the Civil Procedure Code. Counsel for the applicant went on to submit that, the procedure of tendering exhibits was not adhered to, as documents were not properly admitted. She cited Rule 7(2) of Order XIII of the Civil Procedure Code to support her argument. Counsel for the applicant submitted further that, the irregularity has made the whole proceedings a nullity. She cited Court of Appeal decisions in the cases of ***M/S. SDV Chansami (Tanzania) Limited v. M/S. Ste DATCO***, Civil Appeal No. 16 of 2011, ***Ismail Rashid v. Mariam Msati,*** Civil Appeal No. 75 of 2015, **Ally Omar Abdi v. Amina Khalil Ally Hildid (As an administratix of estate of the late Kalile Ally Hildid)**, Civil Appeal No. 103 of 2016 all unreported.

Responding to the issue raised by the court, Mr. Boniface Thomas, the respondent who opted to argue the issue on his own, submitted that hearing at CMA is regulated by the provisions of Rule 25 of Labour

Institutions (Mediation and Arbitrations Guidelines) Rules, GN. No. 67 of 2007. He was quick to argue that there is no format on how exhibits can be marked at CMA. Respondent argued further that, as the law is silent on how to tender exhibits at CMA, the procedure that was adopted by the arbitrator is proper. Respondent submitted that cases that were cited by counsel for applicant requires endorsement to be made on exhibits, of which, it was done by the arbitrator. Respondent went on that applicant was asked by the arbitrator at the time of tendering exhibits and had no objection, as a result, arbitrator pronounced that exhibit so and so has been admitted and marked. When shown the handwritten record of CMA and asked by the court as to whether that is what is reflected in the proceedings, respondent replied that they did not know what the arbitrator wrote. When asked by the court whether, there was no objection in admitting the investigation report as submitted by counsel for the applicant in a written rejoinder submission, respondent submitted that he was asked by the arbitrator before admitting it and had no objection. Respondent concluded that exhibits were properly admitted and prayed the application be dismissed.

In composing my judgment, I have opted to start with the issue raised by the court, because in my view, this issue is key when

considering evidence of the parties in relation to the grounds of revision filed by the applicant.

In my careful examination of the CMA record, I have found that documentary exhibits were not formally tendered and admitted as evidence but the same were used and relied upon by the arbitrator in the award. I also noted that, when a witness was testifying, no prayer of tendering of exhibit was made. What is clear in the CMA record is that, when a witness was testifying in relation to a certain document, the arbitrator simply put that document in blanket without affording the other party an opportunity to comment whether, there is objection or not. More so, the arbitrator did not indicate that the document was admitted as exhibit. From the record, submissions by counsel for the applicant that investigation report was admitted without objection, bears no evidence or support. On the other hand, submissions by the respondent that parties were asked before documentary exhibits were tendered and that they were admitted as evidence is not supported by the CMA record. The CMA record is clear on this.

When Boniface Thomas (PW1), the respondent, who was the only witness on his side , was testifying, arbitrator recorded in part: -

*"...Mimi niliajiliwa na benk tarehe 1-4-2019 (**CD-1**)...HR hakunipa sababu yoyote kuhusu kupita kwa muda (**CD-2**)...Niliendelea kufanya kazi hadi tarehe 23/03/2020 Nilipokea email toka kwa Daudi (Manager wa Risk and Compliance) ilikuwa na kiambatisho ambapo kiliniuliza maswali kuhusu mwajiri wangu wa zamani (**CD-3**)...Mfano kwa nini niliacha kazi DCB, Oct 2018 ni la uongo maana nilikuwa bado mtumishi na nilipandishwa cheo barua ipo (**CD-4**)...31-03-2019 baada ya masaa ya kazi, nililetewa barua iliyosomeka Confirmation- sijathibitishwa (**CD-5**)...Sababu zilizotolewa zilikuwa ni za mdomo tuu (**CD-6**) na (**CD-7**)...3/7/2020 shauri likiwa CMA Mkombozi alitangaza ktk magazeti picha taarifa kwa umma kwamba siyo mwajiliwa wa benk ya Mkombozi (**CD-8**)...".*

I have tried to cover all portions that relates to the purported exhibits tendered by the respondent. From the quoted evidence, there is no indication that respondent prayed the bolded documents in the blankets to be admitted into evidence and the applicant was asked whether there is objection or not. That piece of evidence does not show that the said documents were admitted into evidence as exhibits to be relied upon by the arbitrator or this court at the revision stage.

On the other hand, when Daudi Senkondo (DW1) the only witness who testified for the applicant testified, the arbitrator recorded in part: -

*"...Tuliwasiliana na mwajiri wa zamani na kuomba appointment (DCB) tukapewa taarifa zote za mlalamikaji, nina Ushahidi wa mawasiliano hayo (**RD-1**). Nilimtuma afisa...alirudi ofisini na kuandika ripoti ya maongezi aliyofanya DCB ripoti hiyo ni (**RD-2**)...amefanya kazi DCB implement digital*

*services alikiri yeye mwenyewe wakati (**RD-3**) akijibu staff vetting...Riporti ilipelekwa kutothibitishwa mfanyakazi. Nina ushaidi huo ni (**RD-4**) ..."*

From the evidence of DW1 who testified on behalf of the applicant, there is no indication that bolded documents in the blankets were admitted as evidence. There is also no proof that respondent was asked whether he had objection or not.

That said and done, I am of the firm view that, no prayers were made by the parties to tender the bolded documents in blankets in the quoted piece of evidences and the opponent was not afforded right to object or not. The record does not show that the bolded documents in the quoted evidence were received, marked by the arbitrator and admitted in evidence. The procedure explained by the Court of Appeal in ***Chansami's case*** (supra)***, Ismail Rashid's case*** (supra)and ***Hildid's case*** (supra) were not complied with. The record does not show that parties were given an opportunity to comment on admissibility or otherwise of the documents. The CMA proceedings does not reflect the submissions made by the respondent that parties were afforded right to comment on admissibility of the documents and that they were admitted as exhibits. There is nowhere in the proceedings, where it is indicated that the arbitrator admitted the bolded documents in blankets in the quoted evidence both for the applicant and the respondent. In short,

parties were not afforded right to be heard on the purported exhibits. The Court of appeal had an advantage of discussing the effect of this omission in the case of ***Hai District Council and Another v. Kilempu Kinoka Laizer and 15 Others,*** Civil Appeal No. 110 of 2018(unreported) and held:-

> *"The procedure is clear, that it is the person raising an objection who starts to submit in support of his objection followed by a reply from the person who intends to tender the document. The party who raised the objection then concludes by making a rejoinder. For that reason therefore, the counsel for the appellants had the right to make rejoinder submissions after the reply submission by the respondents'counsel. Having perused the record of the proceedings,we agree with Mr. Sambo that the advocates for the appellants were not afforded that opportunity. Had they been so afforded but did not have any rejoinder to make, ordinarily, that* ***should have been reflected in the record of proceedings****.*
>
> *It is not disputed that failure to afford the appellants the right to make rejoinder submissions amounted to denying them the right to be heard. Since that is a fundamental right, its breach had the effect of vitiating the proceedings because it offended the principle of natural justice ...* ***there is no gainsaying that the breach vitiated the trial****. In the event we quash the proceedings, set aside the judgment and order a retrial"(emphasis is mine)*

It was argued by the respondent that no format of admitting exhibits at CMA as there is no law regulating admission of exhibits at CMA. On

the other hand, counsel for the applicant relied on Rule 25 of the Labour Institutions (Mediation and Arbitrations Guidelines) Rules, GN. No. 67 of 2007 and submitted that the said Rule provides modes of proving the case at CMA. No doubt, Rule 25 of the Labour Institutions (Mediation and Arbitrations Guidelines) Rules, GN. No. 67 of 2007 provides how hearing should be conducted at CMA but does not deal with admissibility of exhibits. Admittedly, the said Rule provide that parties should prove their cases by **evidence** and that witnesses shall testify under oath. Evidence, in my view, includes also exhibits. This Rule has to be read together with Rule 18(2) of GN. No. 67 of 2007, (supra), which provides that, hearing involve the process where parties present evidence and argument. As pointed out above, evidence includes also exhibits. This takes me to the provision of Rule 19(2)(b) of GN. No. 67 of 2007 (supra) that provides: -

> *"19(2) The powers of the Arbitrator include to-*
>
> *(b) summon a person for questioning attending a hearing, and* ***order the person to produce*** *a book,* ***document or object relevant to the dispute****, if that person's attendance may assist in resolving the dispute".*

In my view, in terms of the foregoing provision, when a person is called or appears at CMA intending to produce a document or object, there has to be an order showing that the document or object was

produced and received as evidence and the same has to be reflected in the proceedings. In the application at hand, as pointed hereinabove, no order was issued showing that the documents were produced. It was not also indicated as who produced the documents. In my view, this is in violation of the above Rule. It was argued by the respondent that there is no format on how exhibits can be received at CMA. Absence of clear format, in my view, does not mean that the arbitrator should not comply with Rule 19(2) of GN. No. 67 of 2007, supra. This Rule, in my view, indirectly, requires arbitrators to clearly show how the exhibits were received. In other words, absence of a similar provision to Rule 7(2) of Order XIII of the Civil Procedure Code, (supra) in labour laws is not a warrant for the arbitrators not to indicate in the proceedings that the party prayed the intended exhibit to be tendered, whether there was objection raised by the other party or not, the order thereof and formally receive, mark and admit exhibits into evidence. Failure to indicate clearly in that line, leaves the court at the revision stage in a difficulty state as it will not know what document or object was received, marked and admitted as evidence by the arbitrator. This is so because, at pleading stage, parties do file documents that they intend to be relied upon in proving their case and mark them according to their choice. It is no wonder, why the documents in the CMA record bears two different mark.

It is a trite principle of our courts that proceedings have to show what transpired in court or tribunal although not necessarily every detail of what occurred as it is not expected proceeding to show that at a certain point one party was chasing a fly that was trying to land on his or her nose. What has been insisted by courts is that proceedings should cover matters that are key to the determination of the issue(s) before the court or quasi-judicial body. In the case at hand, the bolded documents in blankets in the quoted evidence were key in determination of the dispute between the parties.

As the bolded documents in the blankets in the above quoted evidence was not admitted as evidence, I find that the arbitrator relied on documents that are not exhibits. Guided by the above Court of Appeal decisions, I hold that proceedings were vitiated by failure of the arbitrator to admit documentary exhibit into evidence, failure to mark them properly and failure to afford parties to express whether they object for admission or not. Due to that failure, arbitrator, improperly used those documents in determination of the dispute between the parties. The omission vitiated the whole proceedings as parties were not properly heard.

Worse, in the award, the arbitrator referred to documents such as B-1 (claim and Compensation with total amount of TZS 1,703,900,000/= presumably authored by the respondent) and B-6 (forma resignation letter dated 6th March 2019 authored by the respondent directed to Managing Director DCB) as reflected at page 8 of the award. These documents were not reflected in evidence of the respondent quoted hereinabove. In other words, the arbitrator considered and used documents that are not exhibit including B-1 and B-6.

For the foregoing, I nullify CMA proceedings starting from proceedings dated 15th October 2020, i.e., the date the complainant (respondent) gave his evidence to the conclusion of hearing and quash the award arising therefrom. I therefore order trial *de novo* before another arbitrator without delay. As this ground has disposed the whole application, I will not consider grounds raised by the applicant.

Dated at Dar es Salaam this 18th February 2022.

B.E.K. Mganga
JUDGE