IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM
REVISION NO. 459 OF 2021

CRDB BANK PLC ..... APPLICANT

VERSUS

LUCY WAMBURA ..... RESPONDENT

(From the decision of the Commission for Mediation and Arbitration of DSM at Ilala)

(Igogo, Arbitrator)

Dated 25th October 2021

in

REF: CMA/DSM/ILA/305/2020/164

12th & 25th August 2022

JUDGEMENT

Rwizile J

The applicant filed the present application to challenge the decision of the Commission of Mediation and Arbitration ("CMA") which was delivered on 25th October, 2021 by Hon. Igogo. M, Arbitrator. The application is made by notice of application supported by an affidavit deponed by Mr. Masoud Matange, applicant's Manager. On the other hand, the respondent challenged the application by filing the counter affidavit deponed by herself.

Briefly, the application arose out of the following context; the respondent was employed by the applicant as a Bank Teller since 01st July, 2016 on a permanent contract. She was stationed at different

branches and was last at Bunju Branch. The respondent was terminated from employment on 31st March 2020 on the ground of absenteeism. The record shows that the respondent was a member of seventh day Adventist Church therefore had a tendency of not attending work on Saturdays. The termination letter indicated that the respondent deliberately did not attend at work on 15th March, 2020 without permission and without reasonable excuse despite several warnings contrary to section 10.4.2 of Personnel Manual 2017. Aggrieved by termination the respondent referred the matter to the CMA claiming for unfair termination on the ground of discrimination.

After considering the evidence of both parties the CMA decided in the respondent's favour, where she was awarded a total of TZS. 46,200,051 being 36 months salaries for the alleged unfair termination.

Being dissatisfied by the CMA award, the applicant filed the present application, urging the court to determine the following issues: -

i. *Whether there were reasonable reasons for termination.*
ii. *Whether the applicant followed procedures during termination of the complainant's contract.*

iii. *Whether the respondent is entitled to the reliefs granted by the Arbitrator.*

iv. *Whether the CMA at Ilala had territorial jurisdiction to hear and determine the dispute and whether the CMA complied with the hearing procedures.*

The application was argued orally. Before this court, the applicant was represented by Mr. Sweetbert Elgidius, learned Advocate whereas Mr. Remmy William, learned Advocate appeared for the respondent.

I appreciate the comprehensive submissions of both Counsel which shall be taken on board in due course of constructing this judgement.

Since the last issue questions the jurisdiction of the CMA to adjudicate the matter, I will start with it first ahead of the rest. With respect to this ground Mr. Elgidius submitted that the respondent worked at Bunju Branch therefore, she ought to file her case at Kinondoni and not at Ilala District. He stated that CMA Ilala had no territorial jurisdiction as it was held in the case of **Changshun Liu v Rebecca Mussa and 2 others**, Misc. Appl. No. 387 of 2017, High Court, Labour Division at Dar es salaam and the case of **Mkombozi**

Commercial Bank PLC v Humphrey Singogo, Revision No.877 of 2019 High Court Labour Division at Dar es salaam where it was held that CMA Temeke had no jurisdiction to entertain the matter whose cause of action arose at Mkuranga District.

Responding to this ground Mr. Remmy submitted that Rule 22 of the Labour Institutions (Mediation and Arbitration) Rules, GN 64 of 2007 ("GN 64/2007") empowers the CMA to determine a venue for mediation or arbitration proceedings. He stated that it depends on where the employer has the office. He argued that the case was heard at CRDB Head Quarters at Ilala and so the respondent was terminated at Ilala. He strongly submitted that the CMA Ilala had jurisdiction.

Mr. Remmy further submitted that this ground ought to have been raised at CMA and decided by the arbitrator as per rule 20 of GN 64 of 2007.

He was of the view that it is not proper to raise the same at this stage because no evidence can be brought here. He added that the case of **Mkombozi Commercial Bank (supra)** cited by Mr.

Elgidius is distinguishable to the circumstances at hand. He therefore prayed for the entire application to be dismissed.

In a rejoinder Mr. Elgidius reiterated his submission in chief. He added that the CMA did not have to move suo motto and determine the issue of jurisdiction as it was held in the case of **Joseph Mwenda v MTL,** Revision No. 497 of 2019, High Court of Tanzania, Labour Division at Dar es salaam, at page No. 10.

Deciding on this issue, I have to say, jurisdiction is a very crucial matter which ought to be determined first before going to the merits of the application. This is also the position of the court in the case of **Mkombozi Commercial Bank PLC (supra).** I have considered Mr. Remmy's submission that the issue of jurisdiction ought to have been raised at the CMA. I fully agree with him and add that it is preferable objections as to court or tribunal's jurisdiction to be raised at the earliest stage of the case so as to avoid unnecessary utilization of resources and delays.

Nonetheless, it has been decided in numerous decisions that the issue of court's jurisdiction can be raised at any stage of the case even at

the revisional stage. This is the court's position in the case of **Amina Karim Jetha vs Wakf & Trust Property Commission** (Civil Appeal No.86 of 2019) [2019] TZCA 511; (13 December 2019) where at page 14 the court held that: -

> *"A court's jurisdiction is conferred by a statute and that parties cannot, expressly or by conduct, confer on a court the jurisdiction it does not have under the law. The issue of jurisdiction being so fundamental can be raised at any stage of proceedings."*

In the application at hand, it is undisputed fact that the respondent was stationed at Bunju Branch. The applicant only contended that Bunju Branch is within Kinondoni Municipality as per Dar es salaam Districts. It is not clear to me and the record does not present proof that Bunju is within Kinondoni District.

Furthermore, the records indicates that the respondent was terminated at Ilala whereas the notice to attend disciplinary hearing served to her (exhibit D2) only informed her to attend a disciplinary hearing which would be conducted on 20th March, 2020 at 8:30 am at DHR Meeting Room. There is no indication that the venue of the disciplinary meeting

was at Bunju or the applicant's head quoters which is alleged to be within Ilala District. Under such circumstances, it is my view that the matter was properly filed at CMA Ilala because there is no proof of territorial jurisdiction of the CMA. But one would also argue that the cause of action arises at the place where termination occurred and or where the employee worked.

Looking at the labour laws, they are silent on when an objection of territorial jurisdiction can be raised.

This is a lacuna, I take inspiration from the Civil Procedure Code, [CAP 33 RE 2019] ("CPC") where under section 19 it is provided as follows:

> *"No objection as to the place of suing shall be allowed by any appellate or revisional court unless such objection was taken in the court of first instance at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice."*

The CPC, a law of general application, does not have a straight application in the CMA. But this court and the Court of Appeal have in

certain instances applied some provisions of the same. I think, I have to add here that application of the CPC, must be when and only when, there is a gap in the CMA rules. It should not be applied, even in the situation I have just said, to hinder, but to facilitate CMA application of its rules to avoid delays and or any other thing that may lead to failure of justice. This is so because, when closely looked at, the CMA rules and the labour regime as whole allow, flexibility, equity and application of laws with minimum requirement of applied technicalities.

Therefore, for territorial jurisdiction to be pleaded successfully at this stage two tests must be applied; **first**, it should have been not only raised at the CMA, but also, it should have been at the earliest possible. **Second**, it should be proved that there was failure of justice. There is no proof that the above tests were met. I would further add, I think, the expression territorial jurisdiction or place of suing, simply means, the venue of the trial. It has nothing to do, in my view, with competency of the court. If that is the case then, how can a suit be defeated by reason of being tried by a competent court, but at a wrong venue? This ground has no merit, it is dismissed.

Arguing in support of the first ground Mr. Elgidius submitted that the reasons for termination were based on failure of the respondent to attend duties on Saturdays. That she did not work on Sundays and had several warnings to that effect as per exhibit D6. He submitted that the respondent worked at Bunju Branch and admitted that failure to work on Saturdays was against the applicant's manual. It was further submitted that the respondent did not have permission to work at another branch as she did. Mr. Elgidius added that the respondent had to prove, she was allowed to work at another Branch. To support his prepositions, he referred the case of **Abdul Karim Haji Vs. Raymond Nchimbi and another**, Civil No. 99/2004 at page 14.

Mr. Elgidius went on to submit that the respondent also received allowances for working on Saturdays as per exhibit D9 therefore, it was justified to have him terminated. He stated that the award at page 12-13, it is not true that evidence brought was a hearsay, he strongly submitted that the exhibit tendered was proper. To support his submission, he cited the case of **DPP v Mirzai C. Hadji and 30 others,** Civil Appeal No. 493/2016 at page 7-8.

As to termination procedures, it was argued that the same were complied with by the applicant. That the respondent was called at the hearing, she was afforded chance to appeal but she did not and went straight away to CMA. He insisted that the procedures were followed.

Regarding the last issue as to parties' reliefs Mr. Elgidius submitted that the reliefs granted by the arbitrator are not proper. He stated that there were reasons for termination and procedures were followed. Therefore, 36 months salaries were too excessive. The Counsel submitted that the respondent said she had 32 years thus, she ought to have alternative employment. He further argued that the decision was based on wrong analysis.

Mr. Elgidius submitted that to award excessive compensation reason must be adduced. He added, that the reasons should be related to failure of the respondent to get another job as it was in the Court of Appeal case of **Veneranda Maro & Another vs Arusha International Conference Center** (Civil Appeal 322 of 2020) [2022] TZCA 37 (18 February 2022).

Responding to the first issue Mr. Remmy submitted that the reason for termination it is not true. He stated that the respondent did not go to work on Saturday but she did the same on Sunday. He stated that she was terminated for failure to work on 15.03.2020 which was on Sunday as evidenced by the records. He stated that the respondent is a 7th days Adventist and she worked on Sunday instead of Saturday on that behalf.

The counsel submitted that the branch of Bunju did not operate on Sunday, she was therefore working at Tegeta branch that operates on Sunday. Mr. Remmy argued that it was not the duty of the employee to prove fairness of termination under section 39 of ELRA.

He went on to submit that the case of **Abdul Karim Haji** (supra) does not apply in this case because it is not a labour matter. He added, that the CMA was proper to hold that absence from office for one day does not warrant termination because the respondent admitted not work on that day due to sickness of her child and it was only on that day.

As to the second ground Mr. Remmy submitted that the award was clear that the procedures were not followed. He stated that no

investigation was conducted by the employer, the disciplinary hearing dealt with absence from duty on Saturday and so the evidence, but termination was based on absence on Sunday. He insisted that the applicant did not follow the law.

Turning to the last ground, it was submitted that the remedies for unfair termination are provided under section 40 of ELRA. Mr. Remmy submitted that the arbitrator exercised his discretion governed by CMAF1, where the respondent applied for 36 months and she said she cannot find a job in the banking sector because upon termination her name was sent to BOT. He added that the law allows him to grant more than 12 months.

The counsel argued further that the case of **Veneranda Maro** (supra) provides that there must be justification why over 12 months. He stated that the arbitrator is not allowed to award compensation apart from those prayed in CMAF1, thus, it was proper to grant 36 months.

In a rejoinder, Mr. Elgidius reiterated his submission in chief. On the allegation of investigation report, he added that it does not arise on issues where the investigation is not an issue as per the case of

Emmanuel Talalai v Cocacola Kwanza Ltd, Revision No. 24 of 2019 at page 10-11 **Obadious Mwangamila and Others v TCC**, Revision No. 334 & 355 of 2020 page 27. He strongly submitted that it was a misdirection to deal with investigation report.

After considering the parties submissions, I have to proceeding to deal with the remaining grounds. Starting with the first, as to whether there were reasonable reasons for the termination of the respondent's employment; as indicated in the termination letter (exhibit D4) the respondent was terminated for failure to attend her work on 15.03.2020. To be more precise the termination letter stated as follows: -

> *"That, on 15th March 2020 you deliberately not attended to your workstation without permission and without reasonable reasons following a number of warnings from your supervisor contrary to Section 10.4.2 of Personnel Manual 2017."*

The relevant provision of the Personnel Manual (exhibit D7) provides as follows: -

Clause 10.4.2, On MISCONDUCT

"Employees who breach any staff rules of these regulations, which constitute misconduct, shall be served with a written warning after each breach. Termination will be effected on the third breach of the same offence if committed within a period of 6 months."

I have cross checked the calendar of the year 2020, it shows that the alleged date, 15.03.2020 was on Sunday. In the disciplinary hearing form (exhibit D3) the respondent was charged for failure to attend work on most of the Saturdays notwithstanding the charged date was on Sunday. Even in the written warnings (exhibit D6 collectively) the respondent was warned for failure to attend work on Saturdays. In the circumstances, it is my view that the applicant intended to charge the respondent for failure to attend work on Saturdays. In the premises, it is my view that the date, 15.03.2020 which was on Sunday was mistakenly written as submitted by the applicant.

During disciplinary hearing, the respondent admitted that she failed to attend work on Saturdays because it is her day to go to church. Basing on the nature of applicant's business, it is obvious when, entering into employment contract, the respondent was aware that

she was required to work on Saturdays. Therefore, working on Saturdays being one of the clauses agreed by the parties in the employment contract, it is my view that the respondent had to obey the same, no matter how hard it contradicted with her religious belief. It has been held that parties are bound by the agreed terms of the contract. This is the position in the case of **Hotel Sultan Palace Zanzibar v Daniel Laizer & Another**, Civil. Application. No. 104 of 2004 (unreported), where it was held that:-

> *"It is elementary that the employer and employee have to be guided by agreed terms governing employment. Otherwise, it would be a chaotic state of affairs if employees or employers were left to freely do as they like regarding the employment in issue."*

During disciplinary hearing the respondent testified that she was working on Sundays at Tegeta Branch instead of working on Sundays at her stationed Bunju Branch. Looking at the record there is no any letter authorising the respondent to work at Tegeta Branch as alleged. There is no proof that she was attending work on Sundays at Tegeta Branch. This is also reflected in the respondent's testimony at the disciplinary hearing where she testified as follows: -

"(1) Which branch are you working? Bunju

(2) Who gave you permission to work on Sunday at Tegeta instead of Sundays at Bunju?

No answer."

Under such circumstances, it is my view that if the respondent wanted to work on Sundays instead of Saturdays as agreed she could have sought for permission or authorization first from the applicant before acting on her own. In the event, much as I respect the respondent's religious belief of not working on Saturdays, it is my view that any violation of any stipulated term of the contract amounts to breach of contract which will eventually attract termination of employment.

On the basis of the above analysis, it is my view that the applicant had valid reason to terminate the respondent's employment for failure to honour the employment contract taking into regard that she was previously warned. I have equally considered the respondent's allegation of discrimination. As stated earlier, from the commencement of the employment contract the respondent knew that she was supposed to work on Saturday.

Therefore, any change of such terms of the contract had to be made by mutual agreement between the parties and must be in writing pursuant to section 15(2) of the ELRA. Unfortunately, such a change is not reflected in the record. It is my view that discrimination would have stood, if other employees were allowed not to work on the day of their religious worship, while the respondent was denied such an opportunity. However, there is no proof that the respondent formally sought permission of working on Sundays instead of Saturdays as it was in the case of **National Microfinance Bank Ltd vs Neema Akeyo (NMB)** (Civil Appeal 511 of 2020) [2022] TZCA 44 (21 February 2022).

Coming to the second ground as to whether the applicant followed the procedure in terminating the respondent. As stated earlier the respondent was terminated on the ground of misconduct. The termination procedure on such ground is provided under Rule 13 of GN. 42 of 2007.

Looking at the matter at hand, the respondent is contesting that no investigation was conducted. The requirement to conduct investigation is provided under Rule 13(1) of GN. 42 of 2007. The respondent admitted, she was not going to work on Saturdays.

Therefore, under such circumstance, there was no reason to do investigation to prove the misconduct in question. In my view each case should be decided on its own peculiar circumstances. The circumstances of this case did not warrant further investigation to prove the respondent's absenteeism.

The respondent also claimed that she was not afforded the right to be heard. That she was charged for failure to attend work on Sundays and terminated as such while the disciplinary proceedings proceeded with respect of failure to attend at work on Saturdays. This issue has been addressed above that the applicant's conducts proved he intended to charge her for failure to attend work on Saturdays. Therefore, the Sunday was mistakenly placed.

I have also examined other termination procedures as they are provided in the cited provision and the same were also followed. In a nutshell, the respondent was served with a charge, she had enough time to prepare for her defence, she appeared at the disciplinary committee and defended herself. Therefore, all the termination procedures were followed in this case.

Turning to the last issue as to parties' reliefs, as it is found that the respondent's termination was fair both substantively and procedurally, I find the Arbitrator wrongly awarded the respondent. She is not entitled to any of the remedies provided under section 40 of ELRA. In the result, I find no merit in the application. Consequently, the CMA's award is hereby quashed and set aside. No order as to costs.

It is so ordered.

A.K. Rwizile

JUDGE

25.08.2022