IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 301 OF 2022

(Arising from the award of Commission for Mediation & Arbitration of DSM at Kinondoni Dated 16th March 2022 in Labour Dispute No. CMA/DSM/KIN/87/19/169)

ECO BANK (T) LTD.....APPLICANT

VERSUS

DAVID P. JAMES.....RESPONDENT

JUDGEMENT

K. T. R. MTEULE, J.

28th February 2023 & 13th March 2023

This application for revision arises from the award of the Commission for Mediation and Arbitration of Dar es Salaam, Kinondoni (CMA) delivered by **Hon. Wibard, G.M. Arbitrator**, dated 16th day of March 2022 in **Labour Dispute No. CMA/DSM/KIN/87/19/169**. The Applicant (former employer of the respondent) is praying for this Court to call for the record of the proceedings and the award of the CMA in the aforesaid Labour Dispute, revise, quash and set aside the award therein on the reason that the termination of the applicant's employment was fair in both reasons and procedures. The Applicant is further praying for an order or relief as the Honorable Court may deem fit and just in the circumstances.

From what is extracted from the CMA record, as well as the affidavit and counter affidavit filed by the parties, the applicant was employed by the respondent as a Bank Teller from **13th September 2013** under permanent terms contract. His employment was terminated on **28th December 2018** due to an allegation of misconduct (falsification of Bank's record, lending money within bank premises and non-filing of reconciliation report) contrary to Bank's Operational and Procedure Manual and Human Resources Policies. The applicant pleaded to have done the lending business because it was a normal practice which was happening in the Applicant's office premises by other staffs members. Disciplinary hearing was initiated by the employer where the respondent was found guilty of falsification of Bank records and lending money within Bank premises and terminated from the employment.

Being resentful with the employer's decision to terminate his employment, the respondent filed the **Labour Dispute No. CMA/DSM/KIN/87/19/169** claiming to be compensated to the tune of 47 months remuneration plus other terminal benefits such as notices, leave, severance pay and certificate. At the CMA, the arbitrator found that, the reasons and procedures for the respondent's termination were not fair. The arbitrator awarded the Respondent 12 months

compensation to the tune of TZS 20,106,000/=. This decision aggrieved the applicant and triggered this application for revision.

Along with the Chamber summons, the applicant filed an affidavit sworn by Mr. Abdallah Kichui the applicant's Human Resource Officer, in which after expounding the chronological events leading to this application, alleged the respondent to have been fairly terminated substantively and procedurally.

Paragraph 9 of applicant's affidavit contains four legal issues as reproduced hereunder: -

1. That the Arbitrator erred in law and fact in her findings by assuming that the respondent was charged with using the Bank's funds to carry out his lending business, while upon finalization of the investigation the respondent was charged with carrying out personal business within the bank premises without approval.

2. The arbitrator erred in law and fact in holding that there was no valid reason for termination, while the applicant admitted that he conducted money lending business at the applicant's premises.

    a. That the arbitrator misdirected herself in her findings by

assuming that the respondent was charged with using the Bank's funds to carry out his lending business, while upon finalization of the investigation the respondent was charged with carrying out personal business within the bank premises without approval.

b. That CMA erred in holding that **Rule 12 (1) (b) (iii) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007** was contravened; the Commission placed unnecessary burden on the Applicant to train the Respondent, while the guidelines in question i.e. carrying out business on the Bank Premises requires no special or extra skills to comply with, and that the Respondent was informed of the guideline from the onset of his employment.

c. The CMA erred in holding that **Rule 12(1) (b) (iv) of the Employment and Labour Relations** (Code of Good Practice) Rules 2007 was contravened; the Commission failed to grasp that the allegation by the Respondent that the Branch Manager was carrying out money lending business was a mere deflection especially since there is no

proof on record that indeed the Branch Manager was involved in the business.

2. That the arbitrator erred in holding that the termination was not procedurally fair by failing to comply with the **Rule 13(5) of the Employment and Labour Relations** (Code of Good Practices) G.N. No. 42 of 2007.

3. That the arbitrator erred in holding that the failed to take into consideration the respondent ground that he had family problems thus leading to shortages. That applicant had a duty to take steps to help the respondent.

4. That the arbitrator erred in awarding the respondent 12 months salaries as compensation.

The application was challenged by the respondent's counter affidavit sworn by the Respondent, David Patrick James. The deponent of the counter affidavit vehemently disputed the applicant's assertion that he was fairly terminated. All the applicant's assertive fact in the affidavit are disputed by the Respondent in the counter affidavit.

The application was disposed of by oral submissions. The Applicant was represented by Ms. Blandina Kihumba, Advocate from a firm styled as Asyla Attorney, while the respondent was represented by Mr. Juma

Maro, Personal Representative. I appreciate their rival submissions which will be considered in determining this application.

Having gone through the parties' submissions and their sworn statements together with the record of the CMA, I am inclined to address two issues. The first issue is **whether the applicant has adduced sufficient grounds for this Court to revise the CMA award** issued in Labour Dispute No. **CMA/DSM/KIN/87/19/169.** If the answer is affirmative then the second issue is, **to what reliefs are parties entitled**?

In addressing the issue as to **whether the applicant has adduced sufficient grounds for this Court to revise the CMA award**, the four grounds of revision will be considered basing on the facts that, they all fall under the ambit of two aspects of fairness of termination namely substantive fairness or fairness of reason and fairness of procedure.

It is to be noted that for a termination of employment to be fair, there are standards an employer must observe internationally and nationally to ensure fairness in ending or terminating employment contract. Termination of employment is said to be fair if it complies with **Section 37 of the Employment and Labour Relation Act, Cap 366 R.E 2019** which provides: -

"37 (2) - 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."

Internationally, Article 4 of ILO Termination of Employment Convention, 1982 (No. 158) provides: -

> *"Article 4: The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operation requirements of the undertaking, establishment or services."*

In the case of **Tanzania Revenue Authority V. Andrew Mapunda,** Labour Rev. No. 104 of 2014 High Court of Tanzania, it was held thus: -

> *"(i) It is the established principle that for the termination of employment to be considered fair it should be based on valid reasons and fair procedure. In other words, there must be substantive fairness and procedural fairness of termination of employment, Section 37(2) of the Act.*

(ii) I have no doubt that the intention of the legislature is to require employers to terminate employees only basing on valid reasons and not their will or whims."

In determining whether there are sufficient grounds for this court to revise and set aside the CMA award, I will start to see whether there were valid and fair reasons for termination of the Respondent's employment. In this matter, the respondent was terminated from employment for allegedly having committed misconduct, contrary to employer's policies. It is not disputed that there are documents which contained the disciplinary offences under which the Respondent was charged with and that these documents include a letter for explanation dated 1st November 2018 **(Exhibit 11)** addressed to the respondent to request him explanation about the following offences:

1. Falsification of Bank's Records
2. Carrying out personal Business within the Banking Premises without Approval
3. Non preparation/filing of Reconciliation Reports

It is further not disputed that the Respondent replied to the letter of 1st November 2018 vide a letter dated 2nd November 2018 **(Exhibit E12)** to address the same offences. It is further not in dispute that according

to the Notice of disciplinary hearing dated 19th December 2018 **(Exhibit E13)** and the hearing form **(Exhibit E 14)** it appears that the disciplinary charges against the Respondent were founded on the 1st and the second disciplinary offences which are Falsification of Bank's Records and Carrying out personal Business within the Banking Premises without Approval. According to the hearing form, the committee confirmed the offences of falsification of details in the deposit slips and carrying out of personal business within the banking premises without Approval. It is therefore apparent that the Respondent was terminated due to the offences he was charged with and the disciplinary committee found him to have committed such offences which are falsification of Bank's records and carrying out personal Business within the Banking Premises without approval.

The arbitrator did not find the two offences to constitute a reason which can lead to termination. According to the arbitrator the respondent was issued with a warning letter from Mr. George Kivaria who was the Head of Consumer to warn the respondent about the lending business and there was no evidence that the respondent resumed to that business after the warning. It was on this reasoning the arbitrator came up with the following findings. That it was not proved that the Respondent did

use the Banks's cash to do the lending business, that the Respondent continued with the lending business even after the warning, that the disciplinary committee advised training to the staff. Basing on these facts, the arbitrator conducted that the lending business was normal in the Applicant's premises and there was a discrimination hence no fair reason for termination.

The above findings of the Arbitrator is challenged by Ms. Blandina for the Applicant who submitted that the arbitrator misdirected herself by assuming that the respondent was charged with using the Bank's funds, while upon finalization of the investigation the respondent was charged with carrying out personal lending business within the banking premises without approval and that the respondent was actually charged with the offence of lending and not of using bank's money to do the lending business. According to Ms. Blandina, the arbitrator approached a wrong offence. She submitted that the arbitrator assessed a different charge from what used to charge the Respondent.

On the other hand, according to Mr. Maro for the Respondent, the respondent admitted that he was lending money to his fellow staff and that has been a common practice by other staff members and that the Respondent was not aware of the policy prohibiting lending business. In

his view, the money lending business did not amount to misconduct which can lead to termination.

As to whether there was a discrimination in terminating the Respondent, I reiterate that the Respondent alleged that the lending business was being carried out by other staff members who were not subjected to termination hence the policy was applied discriminatively. These assertions convinced the arbitrator and formed one of the reasons for the decision to find unfairness in the termination. it has to be noted that, according to the evidence adduced by DW1, what prompted the investigation against the Respondent was a secret informer who reported the conduct in writing. The investigation was carried out and confirmed the allegations by the secret informer. However, there was no similar circumstances in relation to the staff the Respondent alleged to have committed the same business of lending. No report submitted to any authority to allege any other staff of carrying out a lending business so as to prompt any investigation. The arbitrator based her reasoning on the recommendations of the investigation report to advise the applicant to train her staff on the policy and allegations of the Respondent.

I have contemplated the period under which the respondent worked with the Applicant which is from 13 September 2013 to 28 December

2018, more than 5 years. I am questioning the reasonability of the respondent not being aware of the employer's business of lending money. In my view, he ought to have taken initiatives to understand the policy of the Applicant. As well, as rightly submitted by Ms. Blandina, it does not need a training for an employee with such experience to know that doing staff personal lending business in a bank premise conflicts with the function of the Bank. I will borrow a leaf from my learned sister Hon. Muruke, J in the case cited by Ms. Blandina, **Tanzania Investment Bank v. Benjamin Mazigo & Another,** Revision No. 348 of 2022, High Court of Tanzania, at Dar es Saalam, (unreported) at page 7 and 8 where it was held that; -

> *"The fact that the loan was transacted with various department and others were not charged, can neither disprove what the respondents did nor, vitiate the validity of reason for terminating the respondent. The same cannot exonerate the respondent from their liability. I thus fault the arbitrator's findings that the applicant had no valid reason for termination."*

I would make it clear that employees owe a duty of acting reasonably and wisely on their daily duties. Misconduct cannot be justified by lack of legal action against some other employee alleged to have been involved in the same kind of misconduct even where no proof to such allegations.

Apart from the offence of lending Money in the Bank's premises, the respondent was also charged with the offence of falsification of Bank report. However, the arbitrator did not consider this offence at all. Since the disciplinary committee confirmed the commission of this offence, then it is a fair reason for termination of employment.

On such basis I differ with the arbitrator's findings on the issue of fairness of reason. I hold that the respondent was substantively fairly.

Having found that there was fair reason for termination, **the next question is whether the applicant's termination was procedurally fair**. The applicant argued that she complied with all procedures in exercising termination, the complaint was raised and received by the authorities, letter demanding explanation was written and replied to, the respondent was suspended, the investigation was conducted, notification on disciplinary hearing was issued and the

disciplinary hearing was conducted. On that basis Ms. Blandina is of the view that procedure for termination was complied with.

Disputing the procedural aspect of termination, the Respondent's counsel maintained that even though the investigation was conducted, the same was not availed to the respondent. He stated that it was critical for the investigation report to be availed to the respondent because the first information of the alleged misconduct came from a whistle blower or unknown person who is still unknown even today. He further added that it is a legal requirement for the evidence to be used against a person, then it must be made available to that person for preparation of defense.

From the above, the argumentative views centers on the investigation report not availed to the Respondent. Throughout the evidence, I could not notice any evidence to show that the investigation report was availed to the respondent. This aspect is already addressed by the Court of Appeal of Tanzania that, an employer must conduct the investigation and avail it to the employee and failure to do so is denying the respective employee with his right to defend himself from the allegations. (**see Severo Mutegeki and Another vs. Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA), Civil**

Appeal No. 343 of 2019, Court of Appeal of Tanzania at Dodoma).

Since no prove of service of the investigation report to the Respondent prior to the disciplinary hearing, then I agree with the respondent that the procedure for termination was not fair.

The last issue is to what reliefs are the parties entitled to. Unlike CMA, I have found that the respondent had fair reason to terminate the applicant, but she did not comply with one procedure among the many procedures enumerated in **Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, GN 42 of 2007**. The only procedure which was skipped was the availing of the investigation report to the Respondent. Although the procedural violation rendered the termination unfair in terms of procedure, the strength of the omission do not attract all 12 months remuneration as if the termination was fully not fair. I will be guided by the case of **Felician Rutwaza v. World Vision Tanzania,** Civil Appeal No. 213 of 2019, CAT at Bukoba (unreported). It was held; -

> *".....Under the circumstances, since the learned Judge found the reasons for the appellant's termination were valid and fair, she*

was right in exercising her discretion ordering lesser compensation than that awarded by the CMA....."

It is apparent in this matter that the investigation report was not availed as per the requirement in the above cited case. Since I have found unfairness in the procedure of termination, I find the 1st issue as to whether the applicant adduced sufficient grounds to warrant revision of the CMA is answered affirmatively.

In the circumstances the twelve months' salary compensation provided under **Section 40 of Employment and Labour Relation Act, Cap 366 R.E 2019** for unfair termination is reduced. I will reduce by awarding the applicant to be paid six (6) months' salary compensation basing on his net salary and other terminal benefits if not paid.

The application is therefore partly allowed to that extent. I give no order as to the costs.

Dated at Dar es Salaam this 13 day of March 2023.

KATARINA REVOCATI MTEULE

JUDGE

13/03/2023