IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 451 OF 2022

BETWEEN

NATIONAL BANK OF COMMERCE LIMITED .... APPLICANT

VERSUS

JASINTA DIONIZI KATABARO .... RESPONDENT

JUDGEMENT

Date of Last Order: *25/04/2023*
Date of Judgement: *30/05/2023*

MLYAMBINA, J.

The Respondent was employed as a Clerk of the Applicant on 4th July, 2008. However, her employment contract was terminated on 13th December, 2012 for being absent from work. It was alleged that her absenteeism was without permission or notice from 3rd December, 2012 to 13th December, 2012 for more than 5 working days contrary to the *NBC Disciplinary, Capability and Grievance Standard*. Being aggrieved with the termination, the Respondent referred the dispute to the Commission for Mediation and Arbitration (herein CMA) alleging for unfair termination and seeking reinstatement and payment of all wages which accrued since termination. Upon hearing, the CMA held that the Respondent was unfairly terminated, and the Applicant was ordered to pay the compensation of, among other things, 36 months salaries. The Applicant is highly aggrieved by the said

Award especially on the finding of unfair termination, the assessment and award of compensation. Hence this Revision application made under *Section 91(1) (a),(b), S.94(1)(b), (i) of the Employment and Labour Relations Act, [Cap 366 R.E 2019]; Rule 24 (1), (2) (a), (b),(c),(d),(e),(f); 24 (3) (a), (b), (c),(d), Rule 24(11), (b), Rule 28 (1) and Rule 55 (1) and (2) of the Labour Court Rules, GN. No 106 of 2007,* whereby the Applicant prays for the following orders:

1. That, this honourable Court be pleased to call for and examine the record and proceedings and subsequent award of the Commission for Mediation and Arbitration at Dar es Salaam in the Labour Dispute CMA/DSM/ILA/68/21 by Hon. Ndonde S. Arbitrator, dated 17th November 2022 between Jasinta Dionizi Katabaro and National Bank of Commerce Limited, due to material irregularities and errors in the exercise of the Commission's jurisdiction.
2. That, the honourable Court be pleased to revise and set aside the Award of the Commission for Mediation and Arbitration dated 17th November 2022 on reasons that the said Award was grounded on material irregularities and error of law.
3. Cost of this revision to follow the event.
4. Any other relief the Honourable Court may deem fit and just to grant.

At the hearing, the Applicant has been represented by Counsel Comfort Opukwu while the Respondent was represented by Counsel Dickson Sanga.

The issues for determination as ironed out in the supporting affidavit of the Applicant and presented for determination at the hearing are three: *One*, whether the arbitrator correctly considered the legal effects of being absent from work for more than five days. *Two*, whether the Arbitrator was correct in holding that the Respondent's termination was substantively unfair. *Three*, whether the Arbitrator considered the reasonableness and legality of awarding 36 months salaries as compensation which is way above the statutory minimum.

The Respondent in her Counter affidavit admitted that she was absent for more than 5 days from 3rd December, 2012 to 13th December, 2012 but due to sickness. She was therefore of the firm position that: *One*, the trial arbitrator correctly considered the legal effects of being absent from work for more than five days and properly considered the reasons for such absenteeism. *Two*, the trial arbitrator was correct in holding that the Respondent's termination was substantive unfair. *Three*, the procedures for termination were not followed. *Four*, the trial arbitrator exercised properly and judicially her discretion in awarding 36 months salaries.

As regards the first issue, Counsel Comfort submitted that the Arbitrator was not correct in considering the effect of absenteeism at work for more than five working days. According to Counsel Comfort, absenteeism under *item 9 of the Employment and Labour Relation (Code of Good Practice) G.N. No. 42 of 2007* is one among of serious conduct which leads to termination.

Also, Counsel Comfort told the Court that it was undisputed facts the Respondent was absent from work from 3rd December, 2012 to 13th December, 2012 without any notification to her employer. The Respondent had annual leave for ten days which started on 23rd November, 2012. she was supposed to report at work place from 3rd December, 2012. Eventually, the Respondent did not do so. This is clearly seen on page 2 of the CMA Award.

Thus, the Respondent being absent for 12 days from work place without any notification and permission from her employer, and with regard to the Respondent's position to the Bank, which was very clucial "Bank Clerk", the Applicant could not leave the vacant so long due to the nature of the business.

It was the view of Counsel Comfort that as much as the employee needs protection from work, the same needs be extended to the employer,

otherwise the business will be affected by non attendance at work place by an employee who in return will demand for salaries of which they did not work for. Counsel Comfort cited the *NBC Disciplinary capability and Grievance Policy* admitted as exh. D3 at CMA, which clearly stipulates that:

> *Absent from work for more than five working days consecutively without a valid reason or fail to report absence to the Bank at earliest opportunity time, may lead to termination.*

Counsel Comfort was, therefore, of firm position that the misconduct done by the Respondent had one penalty of termination.

In response to the first issue, Counsel Dickson Sanga submitted that the Respondent was absent from work for more than five days. However, her absence was with good reason or accepted reasons. The Respondent was suffering from Mental illness from 18th September, 2012 to 2020. There was exhibit P1 issued by Muhimbili Hospital. It can be captured from page 6-8 of the Award. The Employer was aware from Mental illness of the Respondent from 25th November, 2012. The termination was done on 13th December, 2012. (Exh.P2) was the internal letter from the Applicant. Good enough, when DW1 while being cross examined by the Counsel of the Respondent (page 3 of the Award), admitted that she was aware of the mental illness of the Respondent and there was an internal letter to that effect which was signed by the Human Resource Manager regarding the

Respondent being paid half salary due to the Mental illness. It was justified that there were good reasons for her absence. Counsel Sanga cited the case of **Jimson Security Service v. Joseph Mdegela**, Civil Appeal No. 152 of 2019 Court of Appeal of Tanzania at Iringa (un-reported), pp 6 & 8 which lays a position that sickness is good reason for being absent from work. Once the employee establishes sickness, the employer should not terminate him/her.

In rejoinder to the first issue, Counsel Comfort admitted that the Applicant was aware that the Respondent was suffering from temporary mental illness which started around September 2012. But the Applicant received the letter from Bugando dated 30th November, 2012 that declared the Respondent to be mental stable and able to resume her daily work. It can be seen at p.2 of the CMA Award. Thus, the employer was not aware of the Respondent was still mental ill by the time she was on leave.

Having heard the submissions of both parties, considered the affidavit evidences and the record of the CMA, I find it clear that in terms of *Rule 9(1) of the employment and Labour Relations (Code of Good Practice)* Rules, 2007 as expounded in the case of **Constantine Victor John v. Muhimbili, National Hospital,** Civil Application No. 188/01 of 2021, Court of Appeal of

Tanzania at Dar es Salaam (unreported), pp.4 & 14, absenteeism from work for more than five days justifies termination of employment contract.

However, there is one evidential point which I would like to deal with immediately in relation to the Applicant's termination of employment. In this application, both parties do not dispute that the law requires termination from employment is valid only if absence from work is "without permission" or "without acceptable reasons". The construction of those phrases is left to the discretion of the Court on case-to-case basis.

It is also not in dispute that ill health is an acceptable ground of absenteeism from work. It was therefore the duty of the Applicant herein to prove the absence of the Respondent was without good cause lies to the employer in terms of *Section 37(2) and 39 of the employment and Labour Relations Act, Cap 366 (Revised Edition 2019) (herein ELRA).* However, such duty was not discharged at all.

As correctly submitted by Counsel Comfort, the proceedings indicates that the Applicant tendered a letter from Bugando Hospital dated 30th November, 2012 which declared the Respondent to be mental stable and able to resume her daily work. However, such evidence was denied by the Respondent. There was no further evidence from the herein Applicant to clear such denial. To the contrary, exhibit P1 tendered by the Respondent

herein shows that the Respondent was refereed to Muhimbili National Referral Hospital from Amana Hospital since 18th September for mental illness.

The issue here is whether there are evidences to the effect that the Respondent's absenteeism from work was reasonably communicated to the Applicant. On this point, I agree with the findings of the trial Commission and the submissions of Counsel Dickson that the Applicant herein was aware of the Respondent's sickness. That is why, on 26th November, 2012 the Respondent's Head of Human Resource informed the Manager of Payroll and Pension to pay the Respondent half salary because of her more than three months absence from work on sickness ground.

The second issue is; whether the Arbitrator was correctly in holding that the Respondent's termination was substantively unfair. Counsel Comfort submitted that the Arbitrator was wrong in holding so. According to her, the Applicant had a valid reason for termination because absenteeism is a serious misconduct which may led to termination.

It was Counsel Comfort submission that page 5 of the CMA Award reveals the Respondent admitted that she did not ask for permission from her employer and that she was sick and found herself at hospital. Hence, she could not ask for permission from her employer.

In reply, Counsel Dickson submitted that the CMA Arbitrator directed herself properly because the termination was substantively unfair because there was no valid reason of terminating the Respondent.

It was the submission of Counsel Dickson Sanga that the absence of the Respondent was due to mental illness as per exh-P1. The Applicant was aware as per exh. P2 (internal letter). At page 3, DW1 admitted that the Applicant was aware of the Respondent's mental illness.

In the light of the foregoing, I do not doubt at all that the Applicant being aware of the Respondent's illness, had no right of terminating the employment of the Respondent. The termination without good reason was substantively unfair. If the Applicant was to terminate the Respondent on misconduct basis, had the duty to conduct investigation to ascertain whether there are good grounds for hearing. Such findings take the Court to the last issue.

The third issue was; whether the Arbitrator considered the reasonableness and legality of awarding 36 months salaries as compensation which is above the statutory minimum salaries. It was submitted by Counsel Comfort that in the case at hand, the Respondent prayed for reinstatement, but the Arbitrator awarded 36 month's salary as compensation due to the circumstances presented before CMA. It was Counsel Comfort that it was

wrong for the Arbitrator to declare that the Respondent be awarded 36 months salaries on reason that due to her age it will be difficult to secure a new job and for holding that the Applicant herein had no valid reason for termination and procedures were not adhered.

Counsel Comfort, however, admitted that the Applicant did not comply with the procedures. But to her view, noncompliance of the procedure alone cannot rescue the Respondent who committed Misconduct of absenteeism from work. She cited the case of **NMB v. Christian Nicholas Gudean,** Revision No. 336 of 2020 High Court of Tanzania Labour Division (unreported) p.7 and *Section 3(a) of ELRA.*

Counsel Comfort maintained that the Award of 36 months' salary is against the objective of *Section 3 of ELRA* while the Respondent conducted such misconduct. Counsel Comfort, therefore, prayed for this Hon. Court to revise and set aside the CMA Award.

In response, it was the Respondent's position that the amount awarded was correct and fair. It was awarded in accordance to the law. The compensation was awarded in accordance to *Section 40(1)(c) of ELRA (supra),* read together with *Rule 32(5) of the Labour Institutions (Mediation and Arbitration Guideline) G.N. No. 67 of 2007* which provides the factors to be considered in awarding compensation among others; (b) extent of

unfairness of the termination. The Respondent was terminated unfairly both substantively and procedurally; (c) the possibility of securing another job after termination. The Arbitrator was clear that as per the age of the Respondent, it was difficult to secure another job; (d) The employees amount of remuneration. Page 9-11 of the CMA Award lays down all the reasons. To that effect, Counsel Dickson Sanga cited the case of **Veneranda Maro & Another v. Arusha International Conference Centre,** Civil Appeal No. 322 of 2020 Court of Appeal of Tanzania at Arusha (unreported) p. 11, and of **Hussein Said Kayagila v. Bulyanhulu Gold Mine Ltd**, Civil Appeal No. 508 of 2021 Court of Appeal of Tanzania at Shinyanga (unreported) p. 11 & 12. For those reasons, counsel Dickson Sanga prayed the application be dismissed for lack of merits.

On the last issue of 36 months salary compensation, the Arbitrator was of view that the remuneration was too small. Counsel Comfort, however, in rejoinder submitted that compensation is not an award of general damages. Compensation includes penalties to the employer for failure to adhere to procedural termination of employment.

Counsel Comfort recited the case of **Veneranda Maro** *(supra),* p. 19 while referring to the case of **Viljoer v. Nketoance Local Municipality** (2003) 24 ILJ 437. It was totally wrong for the Arbitrator to compensate

such amount of money to the Respondent. It was the view of Counsel Comfort that the Arbitrator could rather award general damages but not 36 months salary as compensation.

With due respect to Counsel Comfort, I find no good reason offered as to why the CMA should had awarded general damages instead of 36 months salary as compensation. It is an elementary principle of law that general damages are awarded on discretion basis of the Court after considering the circumstances of the case. This was the position of the Court in the case of **Tanzania-China Friendship Textile Co. Ltd v. Our Lady of the Usambara Sisters** [2006] TLR 76.

Indeed, *Section 40 (1) (c) of ELRA* does not provide the maximum of awarding salary compensation to the employee who is unfairly terminated. The Arbitrator gave reasons of awarding such compensation at page 9-10 of the impugned decision as follows:

> Considering the fact that the extent of unfairness of the complainant's termination is great because her termination is both substantively and procedurally unfair, and the fact that her salary is low as it will be calculated at 2012's rates, also considering the complainant's age, it will be difficult for her to rescue another job, I find 36 months' compensation reasonable in the circumstances.

It follows, therefore, that the award of compensation to the Respondent was predicated on three factors: *One,* her termination was based both on the substance and on procedural aspects. *Two,* her salary is

low. *Three,* her age. It will be difficult for her to get another job. It is the view of this Court that the 36 month's compensation adhered to social justice and in accordance with *Section 3 of ELRA.* To the contrary, the Applicant has not satisfied the Court on whether the three reasons given by the Arbitrator are invalid or hopeless.

In the circumstances, the application is hereby dismissed for being devoid of merits. It is so ordered.

Y.J. MLYAMBINA
JUDGE
30/05/2023

Judgement pronounced and dated 30th day of May, 2023 in the presence of Counsel Comfort Opwuku for the Applicant and Comfort Opwuku holding brief of Dickson Sanga for the Respondent. Right of Appeal is fully explained.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) (Labour Division) DIVISHENI YA MAHAKAMA YA KAZI

Y.J. MLYAMBINA
JUDGE
30/05/2023