

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 97 OF 2023

(Arising from an Award issued on 38/03/2023 by Hon. Kiangi, N. Arbitrator, in labour dispute No. CMA/DSM/KIN/453/17/551/2022 at Kinondoni)

BENEDICT NSOJO APPLICANT

VERSUS

FINCA MICROFINANCE BANK LIMITED RESPONDENT

JUDGMENT

*Date of last Order: 05/07/2023
Date of Judgment: 20/07/2023*

B. E. K. Mganga, J.

Brief facts of this application are that, on 10th September 2012, Benedict Nsojo, the herein applicant signed a one-year fixed term contract of employment with FINCA Microfinance Bank Limited the herein respondent subject to renewal after expiry of the agreed period. In the said contract, applicant was employed by the respondent as reconciliation officer. The parties enjoyed their employment relationship but on 11th April 2017, respondent terminated employment of the

applicant alleged due to insubordination and further that applicant showed a disrespectful behaviour to his manager.

Aggrieved with termination, applicant filed Labour CMA/DSM/KIN/453/17/551/2022 before the Commission for Mediation and Arbitration (CMA) at Kinondoni claiming to be paid TZS 100,000,000/= being salary compensation for not less than twelve months, damages, notice, 11 days worked for in April 2017 and accrued leave.

On 28th March 2023, Hon. Kiangi, N, arbitrator found that applicant's contract was terminated five months prior its expiry and that termination was substantively fair but procedurally unfair. Based on procedural unfairness alone, the arbitrator awarded applicant to be paid (i) TZS 1,940,000/= being 2 months' salary compensation, (ii) TZS 410,469/= being salary for 11 days worked for in April 2017 and (iii) TZS 257,476/= being leave pay all amounting to TZS 2,608,345/=. The arbitrator also ordered respondent to issue a certificate of service to the applicant.

Applicant was further aggrieved hence this application for revision. In the affidavit in support of the Notice of Application, applicant raised 5 grounds namely: -

1. *That, the Hon. Arbitrator erred in holding that termination of the applicant was based on a valid and fair reason.*
2. *That the Hon. Arbitrator erred in law and facts in deciding the dispute based on the offence which applicant was not charged with.*
3. *That, the Hon. Arbitrator erred in law and facts for failure to award notice pay to the applicant.*
4. *That, the Hon. Arbitrator erred in awarding compensation of two (2) months salary to the applicant.*
5. *That the Award is unlawful, illogical and irrational.*

In resisting the application, respondent filed both the Notice of Opposition and the Counter Affidavit sworn by Beatus Malawa, the Head of Legal Department.

When the application was called on for hearing, Mr. Juma Maro, Personal Representative, appeared and argued for and on behalf of the applicant while Yusta Kibuga, learned Advocate, appeared and argued for and on behalf of the respondent.

Arguing the 1st ground, Mr. Maro submitted that applicant was terminated for disrespect behavior and insubordination. He went on that, according to Human Resource Policy (exhibit D6), the penalty for 1st offence of insubordination and disrespect behavior is warning. He added that, Rule 12(2) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 prohibits termination on first offence save for where the offence is serious making employment intolerable. He submitted further that the arbitrator erred when she held

that Rule 12(2) of GN. No. 42 of 2007(supra) applies on procedural fairness while the rule applies to fairness of reason. Mr. Maro went on that, arbitrator was supposed to hold that respondent failed to prove fairness of reason because the penalty was not appropriate to the offence allegedly committed by the applicant.

Submitting on the 2nd ground, Mr. Maro submitted that arbitrator confirmed termination based on late submission of the report, failure to follow instruction and repeated acts of insubordination, the charges which, applicant was not charged with. He strongly submitted that GN. No. 42 of 2007(supra) does not provide for termination for the offence of insubordination on which applicant was charged with. On the offence of insubordination and disrespect, Mr. Maro submitted that it was alleged that applicant kept quite in the meeting of 24th February 2017. He went on that, evidence shows that in the said meeting, there was no question that was directed to the applicant for him to be charged that he failed to answer and kept silence to amount to insubordination.

On the 3rd ground, Mr. Maro submitted that termination letter (exhibit D4) shows that applicant was supposed to be paid notice pay but he was not paid. He went on that in his evidence, applicant (PW1) testified that the notice was not paid. Mr. Maro submitted further that; no proof

was submitted by respondent to show that applicant was paid notice pay. He cited the provisions of Section 41 of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] to support his submissions that applicant was entitled to be paid notice pay.

In respect of the 4th ground, Mr. Maro submitted that arbitrator erred to award applicant two months compensation on ground that termination was fair substantively but unfair procedurally. He maintained that termination was both substantively and procedurally unfair hence arbitrator erred to award two months' salary compensation.

On the 5th ground, Mr. Maro faulted the arbitrator in holding that an employee can be terminated for insubordination and disrespectful behavior but in the same award, holding that Human Resource Policy does not allow termination for the first offender. He submitted that, inconsistency of the arbitrator in the award makes the award illogical, irrational and unlawful. He therefore prayed the application be allowed by setting aside the CMA award.

Countering submissions that were made on behalf of the applicant, Ms. Kibuga, learned counsel submitted on the 1st ground that, applicant was terminated due to insubordination and disrespectful behavior because he failed to follow instructions given by superior. She clarified

that applicant submitted the report late without giving reason for that lateness. Counsel for the respondent submitted further that, applicant had no respect to his boss and was not in good terms with his superior because they were not greeting each other. Counsel for the respondent submitted further that applicant attended the meeting and remained mute on ground that the meeting was not properly constituted as there was no prior notice issued to him. Counsel went on that; the said meeting was a short notice meeting that does not require prior notice. Counsel went on that arbitrator found that there was valid reason for termination and that relationship was intolerable, but the punishment of termination was contrary to the Human Resource Policy.

Responding to submissions made on the 2nd ground, counsel for the respondent submitted that offences which applicant was charged with fall under insubordination. She argued that failure to follow instruction is insubordination and cited the case of ***GSM Tanzania Ltd V. Idd M. Kitambi***, Revision No. 197 of 2019 HC (unreported) to bolster her submissions.

Responding to the 3rd and 4th grounds, counsel for the respondent submitted that the arbitrator having found that termination was substantively fair but procedurally unfair, properly awarded applicant to

be paid two months compensation. To bolster her submissions, counsel for the respondent cited the case of ***Daram Singh Hanspaul and Sons Ltd V. Oswald Christopher Charles & Another***, Revision No. 69 of 2021, HC (unreported) and Rule 32(5) of GN. No. 42 of 2007 that arbitrators have power to award applicant based on the circumstances of the case.

It was submission of Ms. Kibuga learned counsel for the respondent that the 5th ground has no merit because the award is based on the law and evidence adduced by the parties hence there is nothing unlawful. Counsel for the respondent concluded by praying that the application be dismissed for want of merit.

In rejoinder, Mr. Maro, the personal representative of the applicant submitted that applicant was not charged for failure to follow instructions. He maintained that the charge was insubordination and disrespectful behavior contrary to Human Resource Policy of the respondent and the penalty is warning. He strongly argued that ***Kitambi's case*** (supra) cited by counsel for the respondent is distinguishable because applicant was not charged for failure to follow instructions.

I have examined evidence of the parties in the CMA record and considered submissions made on behalf of the parties in this application and wish, in disposing this application, to start with the 2nd ground. It was argued on behalf of the applicant that the arbitrator issued an award based on the offence which applicant was not charged with. I have examined the CMA record and find that on 30th March 2017, applicant was served with a notice to attend disciplinary hearing (exhibit D1). The charge which was indicated in exhibit D1 is insubordination and disrespectful behaviour to the line manager in violation of the Human Resources Policy manual Group A & B. Evidence shows that applicant was found guilty of those charges in the disciplinary hearing (exhibit D3). I have read the award, the subject of this revision and find that arbitrator based her findings on that charge contrary to what applicant has alleged in this application. I therefore find the 2nd ground devoid of merit.

It was submitted on behalf of the applicant that respondent did not prove fair reason and procedure for termination. I have examined evidence of Benedict Stephen (DW1) and find that the alleged insubordination was committed against Dorice Chagula who did not testify. It was evidence of DW1 that on 24th February 2017 while in the meeting, the said Dorice Chagula asked the attendee including applicant

to comment but the latter remained mute. DW1 testified further that, in the said meeting, they agreed to submit their work on 28th February 2017 at 13:00hrs and that others complied except applicant. It was evidence of DW1 that applicant (PW1) after his failure to submit his work in time, he stated that the said meeting and a decision thereof was invalid because the notice for the meeting was not communicated through email or skype. While under cross examination, DW1 testified that his evidence is based on information received from Dorice Chagula.

On the other hand, Benedict Nsojo (PW1) admitted to have attended a meeting on 24th February 2017 and that, he remained mute because DW1 and one Hilda Kimaro had already made comments. While under cross examination, PW1 admitted that the said Dorice Chagula, his line manager directed that reports should be submitted on 28th February 2017 at 13:00hrs but he submitted at 15:40hrs. It was evidence of PW1 that he submitted the report late because he was given another task by the said Dorice Chagula, the line manager, relating to NMB Corporate. That evidence was not shaken.

Based on the aforementioned evidence, it is my view that, the allegation of insubordination based on late submission of the report or disrespectful misconduct allegedly committed by the applicant was not

proved. I am of that view because, applicant gave reason as to why he failed to submit a report in time and that evidence was not shaken. I should point out at this stage that; the said charge did not contain particulars as to how and when applicant committed the alleged misconducts. In my view, that was not proper because the charge did not give information to the applicant to prepare for his defence. The charge was too wide to catch every fly. It is unknown as to whether, the alleged insubordination is based on what happened on 24th February 2017 when applicant remained mute, or it covers other dates alleged by DW1 that applicant was not in good term with his line manager to the extent of not exchanging greetings. It is my view that, respondent was bound to be specific in the charge as to the date and particulars of the alleged misconducts of insubordination and disrespectful behavior to the line manager.

As pointed hereinabove, Dorice Chagula did not testify at CMA as such, all claims relating to alleged misconducts committed by the applicant against her, is hearsay. In fact, DW1 admitted under cross examination to that aspect. It is my further view that, ***Katambi's case*** (supra) is distinguishable in the circumstances of the application at hand. In the application at hand, applicant gave reason as to why he failed to submit the report in time, namely, that he was assigned

another duty by Dorice Chagula, the line manager who did not testify. There is no other incidence that was mentioned to show that applicant did not follow instructions of his line manager.

In addition to the foregoing, according to the Human Resource Policy (exhibit D6), the allegation of insubordination and disrespectful to superiors, warrants verbal warning and written respectively for the first offence. It was not proved by evidence that, previously applicant committed the alleged misconduct and was warned. In absence of previous record warning, in my view, in terms of Rule 12(1)(b)(v) of GN. No. 42 of 2007(supra), termination was not an appropriate sanction. I therefore hold that termination was unfair substantively.

It was held by the arbitrator that termination was procedurally unfair and there is no contention on part of the respondent. Since I have held hereinabove that termination was unfair substantively, I hold that it was also procedurally unfair. ***Daram Singh's case*** (supra) cited by counsel for the respondent cannot apply in the circumstance of this application because termination was unfair both substantively and procedurally. I therefore allow the application and quash CMA award.

It is undisputed that applicant was employed for one-year fixed term contract and that, at the time of termination of his employment,

only five months were remaining. I therefore order that respondent shall pay applicant TZS 4,851,000/= being salary compensation for the remaining five months period of the fixed term contract of employment and TZS 970,200/= being one month salary in lieu of notice. In total respondent is hereby ordered to pay applicant TZS 5,821,200/= for unfair termination.

Dated at Dar es Salaam on this 20th July 2023.



B. E. K. Mganga
JUDGE

Judgment delivered on 20th July 2023 in chambers in the presence of Juma Maro, Personal Representative of the Applicant and Linda Mafuru, Advocate holding brief of Yusta Kibuga, Advocate for the Respondent.



B. E. K. Mganga
JUDGE

