IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUGASHA, J.A. SEHEL, J.A. And KAIRO, J.A.)

CIVIL APPEAL NO. 511 OF 2020

NATIONAL MICROFINANCE BANK LTD (NMB)..... APPELLANT

VERSUS

NEEMA AKEYO..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Arusha)

(Nyerere, J.)

dated the 2nd day of June, 2017

in

Revision No. 35 of 2017

JUDGMENT OF THE COURT

18th & 21st February, 2022

MUGASHA, J.A.:

This is an appeal against the decision of the High Court which dismissed an application for revision and confirmed the decision of the Commission for Mediation and Arbitration (the CMA). The background underlying this appeal is briefly as follows: The respondent was employed by the appellant as a Bank teller at its Branch in Karatu. The employment commenced on 27/10/2010 up to 5/6/2015 when the appellant terminated the respondent on accusations of absenteeism and insubordination. This made the respondent to refer the matter to the

CMA claiming that the termination was procedurally and substantively unfair and prayed to be paid compensation for breach of employment agreement.

The appellant denied the allegations, contending that termination was for valid reasons and requisite procedures were complied with. It was the appellant's contention that, the termination was prompted by the respondent's failure to attend at work on Saturdays which was in contravention with the local employment agreement and the Human Resource Policy and NMB PLC Code of conduct.

After a full trial, the arbitrator was satisfied that, the respondent was unfairly terminated both substantively and procedurally in the wake of absence of proof from the appellant that the respondent was not attending work on Saturdays. Further to that, it was also found that after the respondent was found guilty, she was not given opportunity to give mitigating factors. As a result of the said unfair termination, the CMA awarded the respondent 36 month's salary as compensation.

Undaunted, the appellant, lodged an application to the High Court seeking to have the CMA decision revised. However, the application was dismissed and instead, the CMA's award was confirmed on ground that

the termination was substantively and procedurally unfair. Apart from the High Court concluding that the appellant had failed to prove that the respondent was not attending at work on Saturdays, it found the appellant's conduct to have amounted to discrimination against the respondent on religious basis which was contrary to the Constitution of the United Republic of Tanzania, 1977 and the Labour Laws. Still dissatisfied, the appellant has preferred an appeal to the Court. In the Memorandum of Appeal, she has fronted five grounds of complaint as follows:

1. *That, the Judge erred in law and in fact by holding that the NMB Human Resource and Policy of 2013, staff Rules and the NMB Code of Good Practice contravene section 7 (9) of the Employment and labour Relation Act.*

2. *That, the Judge in determining ground No. 1 of Revision erred in law and fact by ignoring exhibit D-1 the final written warning issued to the respondent herein, exhibits D-6 disciplinary hearing thus arriving at the wrong finding.*

3. *That, the Judge erred in law and fact by holding that the complaint was terminated on ground of discrimination based on region,* ***which was not framed as an issue neither at the Commission for Mediation and Arbitration nor at the High Court and which was not in*** *the jurisdiction if the court to determine*

4. *That, the Judge erred in law and in fact by holding that the applicant was not entitled to summon the respondent herein in the disciplinary hearing in view of Rule 1 of General Offences under GN No. 42 of 2007 the Employment and Labour Relation (Code of Good Practice) Rules.*

5. *That, the Judge erred in law and in fact by holding that the applicant herein did not comply with legal procedures before terminating the respondent herein while the record clearly depicts the opposite."*

At the hearing the appellant was represented by Paschal Kamala, learned counsel whereas the respondent had the services of Mr. Yoyo Asubuhi, learned counsel.

Before the hearing of the appeal commenced, following a brief dialogue with the Court, the appellant's counsel abandoned the 2nd ground of appeal which contains factual issues and thus not according to the dictates of section 57(1) of the Labour Laws which enjoins the Court to entertain only questions of law. Then, the appellant's counsel adopted the written submission earlier filed and proceeded to make clarifications on the remaining four grounds of complaint.

In addressing the first ground of appeal, the appellant faults the learned judge of the High Court having held that, the NMB Human Resources and Policy of 2013, staff Rules and the NMB Code of Good Practice contravene section 7(9) of the Employment and Labour Relations Act (Cap 366 R.E. 2002). Apparently, in the written submissions the appellant canvassed is a different matter not related to the ground of appeal and instead it addresses the compatibility of the prescribed hours of work in a week ranging from 40 to 45 hours in both section 19(2) (a) (b) and (c) of ELRA and the NMB Staff Rules. We shall revert to the matter at a later stage.

As for the 3rd ground of appeal, the appellant faulted the learned High Court Judge in holding that, the termination was based on discrimination on religious grounds as that was not among the issues framed be it at the CMA nor the High Court. In this regard, it was that, apart from the High Court not being seized with jurisdiction to determine the issue not originally framed before the CMA, yet the appellant was denied right to adduce evidence which was a violation of a constitutional right to be heard. On this account, the appellant urged the Court to nullify the decision of the Court. To support his propositions, the cases cited were; **ABDUL ATHUMANI VS REPUBLIC** (2004) TLR, **REMIGIOUS MUGANGA VS BARRICK BULYANHULU GOLD MINE**, Civil Appeal No. 47 of 2017 (unreported) and **MBEYA RUKWA AUTOPARTS VS JESTINA GEORGE MWAKYOMA** (2003) TLR 251.

When probed by the Court if the appellant was aware of the nature of respondent's defence who stated to have been unfairly terminated on the basis of discrimination to exercise right of worship, and if the appellant had cross-examined the respondent, the learned counsel was very evasive and reiterated that no issue was earlier framed in that regard.

Regarding the 4th ground of complaint, the appellant is challenging the decision of the High Court in holding that, the appellant was not entitled to summon the respondent at the disciplinary hearing in view of Rule 1 of the General, Offences, of the Code of Good Practice Rules. It was submitted that, the correct Rule is 13(1) which regulates issues of investigation in matters of misconduct whereas that cited by the High Court Judge is relevant in determining whether the offence committed is serious to warrant termination or not. It was difficult for us to discern the nature of the appellant's complaint and again, we shall address this at a later stage.

In respect of ground 5, the appellant is faulting the learned High Court Judge in holding that the law was not complied with in terminating the respondent from employment. It was submitted that, the appellant had complied with all the legal requirements as opposed to the decisions of both the CMA and the High Court, that the termination was unfair both procedurally and substantively. Ultimately, on the basis of the arguments fronted in support of the appeal, Mr. Kamala urged us to allow the appeal and set aside the decisions of the CMA and the High Court.

On the other hand, Mr. Yoyo Asubuhi vigorously opposed the appeal contending the same to be misconceived. He made a generalised reply to the grounds of complaint. He began by challenging the appeal that it raises factual issues as opposed to the questions of law thus, offending the dictates of the law which mandates the Court to entertain and determine questions of law and not facts.

Regarding the complaint on the non-framing of the issue of discrimination, he challenged the same arguing that, the appellant was aware of that issue which was **firstly,** raised by the respondent in the answers to the charges against her as reflected at page 62 of the record of appeal; **secondly**, the issue of discrimination was raised by the respondent at the hearing of the disciplinary committee and **thirdly**, it was in the evidence of the respondent who besides contesting the termination, testified that, the termination was based on religion considering that termination as those of other religious sect were allowed to leave the place of work for the purposes of worshipping. The learned counsel, further contended that, before the High Court, apart from learned Judge amplifying on the nature of discrimination, in the exercise of revision powers she was mandated to consider the propriety or otherwise of the proceedings and the decision of CMA as per the

dictates of section 94 (1) of ELRA and rule 28 of the Labour Court Rules. Thus, it was Mr. Asubuhi's argument that, the appellant was pretty aware about the nature and circumstances surrounding the termination which was the basis of the respondent's complaint and yet did not cross-examine the respondent.

The respondent's counsel as well submitted that since the burden to prove that the termination was unfair lies upon the employer, it was incumbent on the appellant to discharge the burden which she failed to do having not canvassed material evidence including not parading as a witness, the immediate supervisor of the respondent at the disciplinary committee. The respondent's counsel supported the position of CMA which was to the effect that, the termination not within the warning period because 10 months had expired after the warning. Finally, Mr. Asubuhi urged the Court to dismiss the appeal and uphold the concurrent decisions of the CMA and the Labour Court.

Mr. Kamala had nothing to make a rejoinder on what was submitted by the respondent's counsel. He declined to do so even upon being probed by the Court on the crucial matters raised by the respondent's counsel.

Having heard the contending submissions of the learned counsel, the main issue for determination is whether or not the termination of the respondent was unfair both procedurally and substantively and whether the appellant was denied a right to be heard. We shall dispose of the 1st and 4th grounds together and the 3rd and 5th grounds of appeal will each be determined separately.

At the outset, we wish to restate that, in terms of section 57 of the Labour Institutions Act, appeals to the Court shall only be on points of law. The said provision stipulates as follows: -

> *"Any party to the proceedings in Labour Court may appeal against the decision of the High Court to the Court of Appeal on points of law only.*

What constitutes a question of law upon which a party could appeal to the Court was considered in the cases of **ATLAS COPCO TANZANIA LIMITED VS COMMISSIONER GENERAL, TANZANIA REVENUE AUTHORITY,** Civil Appeal No. 167 of 2019; and **KILOMBERO SUGAR COMPANY LIMITED VS COMMISSIONER GENERAL** (TRA), Civil Appeal No. 14 of 2007 (both unreported). In the latter case, the Court defined the phrase "matters involving questions of law only" upon which

a party could appeal to the Court from any decision of the Tax Revenue Appeals Tribunal in terms of section 25 (2) of the Tax Revenue Appeals Act, Cap. 408 R.E. 2006. Having referred to the decision of the Supreme Court of Kenya in **GATIRAU PETER MUNYA V. DICKSON MWENDA KITHINJI & THREE OTHERS** [2014] eKLR, the Court, then, defined the phrase "question of law" as follows:

> *".... a question of law means any of the following: **first,** an issue on the interpretation of a provision of the Constitution, a statute, subsidiary legislation or any legal doctrine on tax revenue administration. **Secondly,** a question on the application by the Tribunal of a provision of the Constitution, a statute, subsidiary legislation or any legal doctrine to the evidence on record. **Finally,** a question on a conclusion arrived at by the Tribunal where there is failure to evaluate the evidence or if there is no evidence to support it or that it is so perverse or so illegal that no reasonable tribunal would arrive at it."*

The cited decision defining what entails a question of law was adopted by the Court in the labour cases of **CGM TANZANIA LIMITED VS JUSTINE BARUTI**, Civil Appeal No. 23 of 2020 and **PANGEA**

MINERALS LIMITED VS GWANDU MAJALI, Civil Appeal No. 504 OF 2020 (both unreported).

We have deliberately restated the above because apparently, although the appellant's counsel abandoned the 2nd ground of appeal which was purely a factual issue, yet the substantive part of the appellant's written submissions on the ground of appeal addresses factual issues relating to the evidence paraded before the CMA and the respective determination by the two courts below. As such, in the event there is no complaint on the misapprehension of the evidence on the part of the two courts below, the determination on factual matters ended at the High Court. As such, in compliance with the dictates of the law, without prejudice, we shall not deal with the complaint relating to factual questions, save where we deem it necessary for the better meeting the ends of justice.

In grounds one and four, we could not discern any prejudice on the part of the appellant sufficing to be a ground of complaint. In relation to ground one, although the learned High Court Judge stated that the NMB Human Resource Policy contravenes section 7 (9) of the ELRA, that was a slip of the pen because the provision defines what is

an employment policy or practice. That apart, in the written submissions, the appellant addressed a totally different issue prescribed working hours in week stated in the ERLA and the appellants' Human Resource staff rules which is not compatible with the purported ground of complaint.

In respect of the 4th ground, together with the related written submission basically we could not discern any complaint therein as the appellant merely faults the learned Judge in holding that, the appellant was not entitled to summon the respondent. Apparently, the issue before the CMA and the High Court was whether the termination was fair both substantively and procedurally, and not whether the appellant was justified to open up investigation against the respondent. In a nutshell, in the 1st and 4th grounds the appellant seems to be raising new issues which were not dealt with in the courts below and as such, do not at any stretch of imagination qualify to be grounds of appeal.

Next is the 3rd ground of appeal and the gist of the appellant's complaint is that the ground of discrimination based on religion was not framed as an issue at the CMA and as such; the High Court lacked jurisdiction to determine it and yet, the appellant was denied a right to

be heard. Parties locked horns on the issue having submitted contending arguments.

We begin with what was decided by the learned High Court Judge and the aspects considered. At page 379 – 381 of the record of appeal, the learned High Court Judge considered: **one,** the right of worship as enshrined under Article 1 of the Discrimination (Employment and Occupation) Convention, 1958, Article 19(1) of the Constitution and sections 7(4) (a) of ERLA, **two,** the respondent's submission at page 380 of the record to the effect that, the appellant's act to allow some of the employees including the Branch Manager to exercise their freedom of worship and at the same time deter the respondent from enjoying such rights. Thus, she concluded as follows:

> " *Therefore (the) respondent was terminated for breach of NMB Code of Good Practice, in which the said policy and staff Rules contravene section 7(9) of the ERLA ... therefore 1 ... conclude that the applicant ground of terminating respondent on ground of absenteeism due to the facts the respondent used the two hours for worship it is not only to infringe the constitution of the United Republic of Tanzania, but also the applicant contravened section 7 of the ERLA*

which prohibit discrimination on ground of religion in the work place."

In view of the said excerpt, it is not true as suggested by Mr. Kamala that, the issue of discrimination cropped up at the High Court. In fact, the learned High Court Judge applied the law on the factual account on how the respondent was treated differently from other staff in exercising the right of worship during working hours. In the circumstances, as correctly found by the learned Judge of the High Court, the act of the appellant as an employer contravened the provisions of section 7 (4) of the ELRA which abhors discrimination at place of work in the following terms:

> *"No employee shall discriminate, directly or indirectly, against an employee in any employment policy or practice, on any of the following grounds; colour, nationality, tribe or place of origin, race, national extraction, social origin, political opinion or* ***religion****, sex, gender, pregnancy, marital status or family responsibility, disability, HIV/AIDS, Age, or station of life."*
>
> [Emphasis supplied]

In respect of the appellant's complaint that the issue surrounding termination based on discrimination cropped up at the High Court, we found it wanting. We are fortified in that regard because: **one**, the respondent's reply on accusations levelled against her by the appellant, is reflected at page 47 of the record of appeal as follows:

> *"... it is therefore apparent to draw a conclusion that every person has absolute right of worship without being interfered by any other person, ... I find it very unjust to be charged on ground of my faith as the same amount to nothing but discrimination which is prohibited."*

Secondly, before the CMA, it is glaring that apart from the respondent denying the charges on absenteeism her response is reflected at page 331 of the record of appeal is to the effect that, on Saturdays she reported at work place and at ten o'clock, she sought and obtained permission from the manager to attend religious services. She as well, testified that the Muslims were given such permission on Friday's, then when asked on the issue of discrimination she replied in the affirmative as follows:

"kwa sababu wengine walikuwa wanaruhusiwa kusali

e.g. waislam, mimi kwenda, kusali ilikuwa tatizo."

The unofficial English rendering is that, while others e.g the Muslims were given permission to go for prayers, on my part going for prayers was considered as a problem.

Thirdly, yet before the High Court, in the written submissions the appellant canvassed the issue of termination based on religious discrimination at pages 351 to 352 of the record calling upon the learned High Court to determine which she is now denying and shifting the goal post.

In the light of what, we have endeavoured to unveil, we agree with Mr. Asubuhi that, apart from the High Court being seized with jurisdiction to exercise revision powers, the appellant was not denied the right to be heard on the issue of termination based on discrimination and the appellant's complaint suggested by Mr. Kamala is with respect, apart from being untrue, in our considered view, it is an afterthought. Besides, as the appellant did not cross-examine the respondent on the question of being discriminated by the employer, that means the appellant admitted what was asserted by the respondent in the evidence

which is settled law in our jurisdiction. In the premises, the cases of **ABDUL ATHUMANI VS REPUBLIC** (supra), **REMIGIOUS MUGANGA VS BARRICK BULYANHULU GOLD MINE** (supra) and **MBEYA RUKWA AUTOPARTS VS JESTINA GEORGE MWAKYOMA** (supra) cited to us by the appellant's counsel all dealt with omission and remedy on a denial of a right to be heard which is not the case here and as such, those decisions have been with respect, cited out of context. In the premises, the 3rd ground is not merited at all.

Finally, we come to the last ground in which the learned High Court Judge is faulted for having held that the termination was procedurally and substantially unfair. While Mr. Kamala argued that the law was complied with to the letter, Mr. Asubuhi argued to the contrary. In the event, the learned High Court Judge found that the termination was based on invalid reasons which rendered the termination substantively unfair, the determination of procedural compliance was inconsequential and could not add any value in the wake of lacking valid reasons for the termination. Without prejudice, that apart, Rule 13 of GN 42/2007 was to some extent followed except for the respondent being denied to give mitigation before the appellant's final verdict which offended Rule 13(7) of GN 42 of 2007.

In view of what we have endeavoured to discuss, apart from agreeing with Mr. Asubuhi, the respondent's counsel, we are satisfied that the termination of respondent from employment was substantively unfair and, in the circumstances, both the CMA and the High Court were justified to award 36 month's salary as compensation. Thus, in the absence of sound reasons to vary the decision of the High Court, we find the appeal not merited in its entirety and it is hereby dismissed.

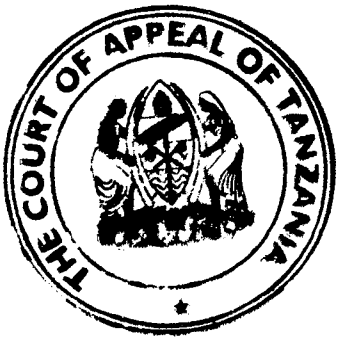
DATED at **ARUSHA** this 21st day of February, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

This Judgment delivered this 21st day of February, 2022 in the presence of Mr. Asubuhi John Yoyo holding brief for Mr. Paschal Kamala, learn counsel for the Appellant and Mr. Asubuhi John Yoyo, learned counsel for Respondent, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL