IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NDIKA, J.A., SEHEL, J.A., And KHAMIS, J.A.)

CIVIL APPEAL NO. 398 OF 2020

NATIONAL MICROFINANCE BANK PLC ..... APPELLANT

VERSUS

ELIZABETH ALFRED KHAIRO ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, Labour Division at Dar es Salaam)

(Muruke, J.)

dated the 29th day of July, 2020

in

Revision No. 552 of 2018

.....

JUDGMENT OF THE COURT

5th July & 10th August, 2023

NDIKA, J.A.:

The appellant, National Microfinance Bank PLC, appeals against the judgment of the High Court of Tanzania, Labour Division at Dar es Salaam (henceforth "the High Court") dated 29th July, 2020 in Revision No. 552 of 2018 upholding the finding by the Commission for Mediation and Arbitration (henceforth "the CMA") that the termination by the appellant of the employment of Elizabeth Alfred Khairo, the respondent herein, was substantively and procedurally unfair.

It is indispensable to begin with the essential facts of the case. The respondent was employed by the appellant on 1st January, 2004, her work station being Muheza branch. She was transferred to Ilala branch in 2005 where she worked for three years until 2008 when she was moved to Kariakoo branch, Dar es Salaam. After working for six years, she was transferred to Muhimbili branch, also in Dar es Salaam, in May 2014.

On 20th November, 2015 the respondent's employment was terminated on the ground of absenteeism. According to her, the termination was due to her enforced absence from work every Saturday because, being a Seventh Day Adventist, she was obliged on that day to attend church services, dedicate herself to prayer and abstain from any form of work.

The respondent lodged an unfair termination claim against the appellant in the CMA, claiming that she was discriminated against because of her religion and belief; and that her freedom of worship and conscience was abrogated. Apart from sustaining the discrimination accusation, the CMA took the view that the alleged absenteeism was not established, mostly in view of the evidence that the appellant allowed the respondent to attend church and observe the holy Sabbath for the large part of her service until shortly before she was dismissed. Moreover, the CMA concluded that the procedure applied to charge, hear, and dismiss the respondent was unfair

on two grounds: first, that the chairperson of the Disciplinary Committee, one Ms. Vicky P. Bishubo, the appellant's Zonal Manager, Dar es Salaam, wrongly acted as the appointing authority. She is the person who purportedly terminated the respondent's employment as evidenced by the letter of termination (Exhibit A9), which she issued and signed. Secondly, that the respondent was not accorded an opportunity to put forward any mitigating factors before the decision to terminate her employment was made after she was found guilty. This omission was a violation of rule 13 (7) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007, Government Notice No. 42 of 2007.

In consequence, the CMA ordered on 15th January, 2018 that the respondent be reinstated to her employment from the date of her termination without loss of remuneration during the period of her absence from work. As at the aforesaid date, the accumulated remuneration was computed to be TZS. 51,459,659.80. In the alternative, the appellant was ordered to pay remuneration for twenty months amounting to TZS. 41,167,727.80 as compensation in lieu of reinstatement. Additionally, the appellant was adjudged liable to pay TZS. 24,700,636.70 as recompense for discrimination.

Resenting the aforesaid outcome, the appellant approached the High Court seeking revision of the CMA's award. The court upheld the CMA's finding on the unfairness of the termination, both substantively and procedurally. So far as reliefs are concerned, the court vacated the order of reinstatement on the reason that, in view of the special circumstances and demands of the banking sector, restoring the respondent to her former position was not in the interests of justice given that her relationship with the appellant bank was so strained. In the place of reinstatement, the court ordered that the respondent be paid remuneration:

> *"... for the whole period she has been out of employment to the date of this judgment and compensation of 12 months' [remuneration] instead of reinstatement. Therefore, [the] order for payment of 20 months' [remuneration] is quashed and set aside. Equally, payment of 12 months [remuneration] for discrimination is quashed and set aside."*

Still dissatisfied, the appellant lodged this appeal based upon seven grounds of complaint. We think that three issues constitute the thrust of the said grounds: **one**, whether the reason for the termination was fair and valid; **two**, whether the termination was in accordance with a fair procedure; and **finally**, whether the award of compensation is proper.

Mr. Antipas S. Lakam, learned counsel, appeared at the hearing for the appellant whereas Mr. Jamhuri Johnson, also learned counsel, represented the respondent.

We find logical to begin with the question on fairness and validity of the reason for the termination.

Mr. Lakam made extensive submissions on the above issue. In essence, he argued that the High Court wrongly decided the issue because it failed to consider that the respondent was bound by her contract of employment (Exhibit D1) stipulating under Clause 3 that her office hours were 8:00 a.m. to 5:00 p.m. Mondays to Fridays plus half day on Saturdays with one hour for lunch every day. The respondent, he added, could only go to church on Saturday upon seeking and obtaining permission but she defied the authority by refusing to request permission. Invoking the principle of sanctity of contract, he contended that parties to a contract must honour their contractual obligations as stated in, among others, **Mohamed Idrissa Mohammed v. Hashim Ayoub Jaku** [1993] T.L.R. 280; and **George Shambwe v. National Printing Company Limited** [1995] T.L.R. 262. He insisted that if the respondent could not work on Saturdays for a religious reason, she should not have committed herself to the contract which bound her to work on such days.

Mr. Lakam, then, faulted the High Court for disregarding three key factors on the issue at hand: one, that the respondent violated the appellant's circular dated 6th December, 2012 (Exhibit D5) requiring all its employees to comply with the instruction to work on Saturdays; two, that in terms of section 19 (2) (a) of the Employment and Labour Relations Act, Cap. 366 (henceforth "the ELRA") working days in any week are prescribed to be six; and three, that the respondent received three written warnings (Exhibits D2, D3 and D4) for skipping work on Saturdays, implying that she had never been given any long-lasting permission to skip work on such days. Moreover, referring to the testimony of DW1 Katengesya John who was the appellant's Human Resources – Business Partner, he firmly contended that, it was established that because of the nature and scope of the respondent's position, she could not be transferred to the headquarters (which had a five-day working week) or to other branches operating on Sunday.

Rebutting, Mr. Johnson supported the High Court's conclusion that the termination arose from the respondent's refusal to work on Saturdays, which was necessitated by her attendance of church services in exercise of her freedom of worship and conscience pursuant to Article 19 (1) of the Constitution of the United Republic of Tanzania, Cap. 2 (henceforth "the Constitution"). Citing the full bench decision of the Court in **Zakaria**

Kamwela & 126 Others v. The Minister of Education and Vocational Training and the Attorney General, Civil Appeal No. 3 of 2012 (unreported), he submitted that to the extent that the appellant's circular (Exhibit D5) curtailed freedom of worship and conscience by imposing on her employees an onerous obligation to seek permission repeatedly, it was unconstitutional and of no effect.

It is undisputed that the respondent's contract of employment (Exhibit D1) stipulated under Clause 3 that her office hours would be 8:00 a.m. to 5:00 p.m. Mondays to Fridays plus half day on Saturdays, with one hour for lunch every day. It is also acknowledged that the appellant's circular dated 6th December, 2012 (Exhibit D5) required its employees at all branches to comply with a binding instruction to work on Saturdays, and on Sundays, where appropriate. Certainly, the aforesaid contractual stipulation and the circular must be read subject to section 19 of the ELRA, which prescribes the maximum number of working hours and days as follows:

> *"**19**.-(1) Subject to the provisions of this Sub-Part, an employer shall not require or permit an employee to work more than 12 hours in any day.*
> *(2) Subject to this Sub-Part, the maximum number of ordinary days or hours that an employee may be permitted or required to work are-*
> *(a) six days in any week;*

(b) 45 hours in any week; and

(c) nine hours in any day.

(3) Subject to this Sub-Part, an employer shall not require or permit an employee to work overtime

(a) except in accordance with an agreement; and

(b) more than 50 overtime hours in any four-week cycle.

(4) An agreement under subsection (3) may not require an employee to work more than the 12-hour limit contained in subsection (1).

(5) An employer shall pay an employee not less than one and one-half times the employee's basic wage for any overtime worked."

Briefly, while subsection (1) above proscribes an employer from requiring an employee to work more than twelve hours in any day, subsection (2) stipulates that an employee may be permitted or required to work six days in any week or forty-five hours in any week or nine hours in any day at maximum. Subsections (3), (4), and (5) above, which are obviously not at issue in this dispute, regulate the permissible length of overtime work and its corresponding remuneration.

In general terms, the respondent's contract of employment (Exhibit D1) setting forth her working hours does not derogate from section 19 (2)

of the ELRA. So is the case with the circular (Exhibit D5) requiring all branch employees across the country to work on Saturdays, including Sundays where applicable, subject to overtime payment where appropriate.

As indicated earlier, it is strongly posited for the appellant that the respondent's dismissal was due to her absenteeism; that she repeatedly absented herself from work on Saturdays without permission, claiming that she could not work on such days as she, instead, had to attend church services; and that the termination was not an affront to her exercise of freedom of worship and conscience. This submission is anchored on the testimony of DW1 Katengesya John, who was the only appellant's witness before the CMA. The essence of his evidence in Kiswahili, shown at pages 219 to 220 of the record of appeal, translates to English as follows:

> *"The termination was due to her repeated absenteeism on Saturdays ... The conduct started in 2011. She received a written warning from her manager (Exhibit D2) but she was unrelenting, resulting in her being issued with another warning in writing in 2012 (Exhibit D3) .... Yet, she went on defying the instruction to work on Saturdays and in 2014 she was sterniy reprimanded for the misconduct vide Exhibit D4."*

On how the respondent could have sought and obtained permission to attend church services on Saturdays, DW1 adduced, as shown at page 220 of the record of appeal, as follows:

> *"As the employer, the appellant supported the respondent's wish to attend church services on Saturdays, but she had to seek and obtain requisite permission from her Branch Manager. Most of our Adventist employees used to report for duty every Saturday morning to seek and obtain such permission, which was invariably granted."*

We have examined the warnings (Exhibits D2, D3 and D4) which DW1 referred to in his testimony. Exhibit D2 dated 5th January, 2011 warned the respondent that the Kariakoo Branch Management would no longer tolerate her non-attendance at work on Saturdays that happened in the whole previous year on the church attendance ground. Exhibit D3, issued by the same Kariakoo Branch on 20th December, 2012, reveals the same stance. In its operative part, it cautioned that:

> *"The Branch Management is not pleased with this kind of Saturday absenteeism. Several negotiations have been done [with] you so as to rectify this situation but [they have born no fruit] and for this reason this letter serves as a* ***Strong Warning*** *to you."*

Furthermore, Exhibit D4, dated 3rd October, 2014 issued by the Zonal Manager, Dar es Salaam, presented to the respondent a *"comprehensive final written warning."* It notified the respondent thus:

> *"We wish to inform you that following the Zonal Disciplinary hearing held on 29th September, 2014 at Dar es Salaam zone office discussed (sic), among other things, your pending disciplinary case on failure to adhere to laid down procedures governing working hours whereby you have been absenting yourself from working on Saturdays without any permission from the management or any reasonable cause. You don't work on Saturdays whereas you are aware [that] NMB working days include Saturdays. The committee reviewed your defence during the hearing and despite the point that you are reluctant to work on Saturday for personal reasons the committee decided to issue a Comprehensive Final Written Warning to you as a final reminder to ensure that you fulfil what the policy of the bank on working hours requires failure of which will attract more severe penalty any time the deviation will be noted."*

Undoubtedly, the respondent refused to work on Saturdays on the ground that, being an Adventist, that day was her day of worship. Both parties agree that Article 19 (1) of the Constitution guarantees freedom of

worship, which includes freedom of conscience or faith as well as choice in matters of religion. Furthermore, it is evident from DW1's evidence as well as the three warnings excerpted above that the appellant was aware of the underlying reason for the respondent's unavailability for work on Saturdays. In the premises, it is our view that had the respondent not been an Adventist, the termination would not have happened because she would have freely and keenly worked on Saturdays as she did on other days. By blaming the respondent for "absenteeism" on Saturdays, the appellant necessarily ignored her persistent plea to be allowed to observe holy Sabbath by attending church services, dedicating herself to prayers and avoiding non-essential work.

The decision of the Labour Appeal Court of South Africa (henceforth "the LAC") at Cape Town in **TDF Network Africa (Pty) Ltd. v. Deidre Beverley Faris**, (CA 4/17) [2018] ZALAC 30; [2019] 2 BLLR 127, cited to us by Mr. Lakam, is quite instructive. In that case, the respondent was an Adventist and in terms of her religion every Saturday was a holy Sabbath requiring her to observe it by not partaking of secular labour but dedicating herself to spiritual and religious matters. Following her repeated failure to do stock taking on Saturdays as she had to observe holy Sabbath, she faced an allegation of absenteeism. At a hearing, she cited the religious reason as

the underlying factor and sought special accommodation to be made particularly by allowing her to do the stock taking on Sundays. The appellant refused the requested accommodation on the reason that stock taking arrangements cannot be changed to fit the needs of one person and on the fear that it would open the Pandora's box. The appellant commenced incapacity proceedings and terminated the respondent's employment for her unavailability for work on Saturdays.

In its judgment, the LAC held that it is was disingenuous to argue that the respondent's unavailability on Saturdays was the reason for her dismissal without having regard to the underlying cause of her unavailability, which was manifestly faith-and-conscience-based. More pertinently, in paragraph 32 of the decision, the LAC took judicial notice of the notorious tenets of the Seventh Day Adventist religion, which, according to the Christianity.com website, bar Adventists from partaking of any secular labour on Saturdays, save for emergency humanitarian work. The Court concluded that stock taking on a Saturday in pursuit of profit would *"not fit the mould of the category of exception."* We are persuaded by this reasoning and in a similar vein we take judicial notice pursuant to section 122 of the Evidence Act, Cap. 6 of the existence of the aforesaid tenet of the Adventist religion barring its

adherents from partaking of any secular work on Saturday except for emergency humanitarian work.

It is implicit from the appellant's own evidence as adduced by DW1 and supplemented by the three warnings (Exhibits D2, D3 and D4) that her managers did not appreciate the significance and inviolability of the aforesaid tenets of the Adventist religion within the rubric of the constitutional guarantee of freedom of worship and conscience. That is why they kept insisting on the respondent showing up at work every Saturday morning to seek and obtain permission to attend church services. It is not clear why the appellant being fully aware of the respondent's faith did not arrange for a general leave enabling her to meet her spiritual commitments on every day of her worship.

Both the CMA and the High Court faulted the appellant for neglecting or failing to accommodate the respondent's unavailability for work on Saturday. Indeed, it is in the evidence that she pleaded, not for the first time, vide an email (Exhibit D7) to be excused from attending work on Saturdays and offered to be transferred to other branches operating on Sundays so that she could work on such days. She also suggested to be transferred to a department that maintains a five-day working week.

Submitting for the appellant, Mr. Lakam referred to the testimony of DW1 and contended that it was established that because of the nature and scope of her position, the respondent could not be transferred to the headquarters (which had a five-day working week) nor could she be relocated to other branches operating on Sundays. It turned out that DW1 tendered no documentary proof of his claim. The evidence on record, in our view, does not indicate that the parties had any meaningful consultation on this aspect. Most probably, the appellant did not appreciate its duty to reasonably accommodate the respondent in view of her constrictive religious precepts by relocating her to the headquarters or other branches as she had requested.

The appellant's mainstay all along was that the respondent's contract of employment, freely entered, required her to make herself available for work every working day including Saturday and that she was in breach for failing to do so. Mr. Lakam stressed the principle of sanctity of contract, censuring the respondent for committing herself to a contract she could not fulfil on a religious ground. With respect, this submission is manifestly mistaken; for it ignores the centrality of the constitutional guarantee of freedom of worship and conscience. We think it is pertinent to refer to the

LAC's reasoning in **TDF Network Africa** (*supra*) in paragraph 45 of the judgment thus:

> *"TFD [Network Africa] seems indifferent to or not to understand that important precept of our constitutional dispensation. Without question, an employment practice that penalises an employee for practising her religion is a palpable invasion of her dignity in that it supposes that her religion is not worthy of protection or respect. It is a form of intolerant compulsion to yield to an instruction at odds with sincerely held beliefs on pain of losing employment.* ***The employee is forced to make an unenviable choice between conscience and livelihood. In such a situation, the dictates of fairness and our constitutional values oblige the employer to exert considerable effort in seeking reasonable accommodation.***"
> [Emphasis added]

In the instant case, we have no doubt that the respondent was effectively required to choose between exercising her freedom of worship and conscience as an Adventist, on the one hand, and working on Saturdays against the sacred precepts of the Adventist religion, on the other. The appellant, as the employer, had a duty of finding a reasonable accommodation of the respondent and her constraining religious beliefs but

it did not discharge that duty. Accordingly, we uphold the finding by the CMA and the High Court that the appellant's termination was without any fair and valid reason.

The second issue enjoins us to inquire into whether the termination was in accordance with a fair procedure. In essence, the matter revolves around the role of Ms. Bishubo, the appellant's zonal manager for Dar es Salaam. It is on record that apart from presiding over the Disciplinary Committee as the chairperson, she acted on the recommendations of the Committee and proceeded to sign and issue the letter of termination.

As hinted earlier, the CMA faulted Ms. Bishubo for usurping the power of firing vested in the Chief Executive Officer of the appellant, who employed the respondent. The High Court upheld that finding, concluding that Ms. Bishubo's approach derogated from the principle of fair hearing.

Before us, Mr. Lakam stoutly censured the above conclusion, submitting that Ms. Bishubo acted in accordance with the procedure. He relied upon the decision of the High Court, Labour Division at Tanga in **National Microfinance Bank Ltd. v. Leila Mringo**, Revision No. 25 of 2015 (unreported). Conversely, Mr. Johnson supported the High Court's reasoning and finding. He argued that Ms. Bishubo was not the appellant's

employer; that she usurped the power of the appellant's Chief Executive Officer of hiring and firing; and that she was manifestly biased.

The question at hand should not detain us. We think that it is pertinent at this point to recall that in **National Microfinance Bank Ltd. (NMB) v. Neema Akeyo**, Civil Appeal No. 511 of 2020 (unreported), we held that:

> *"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."*

Given that the above case is in all fours with the instant matter, we hold that the question of the fairness of the procedure employed in the termination is inconsequential.

We now round off with the propriety of the compensation made in favour of the respondent.

As stated earlier, the High Court varied the CMA's award by ordering, in the place of reinstatement, that the respondent be paid remuneration for the whole period she was out of employment to the date of the judgment as well as compensation of twelve months' remuneration. Mr. Lakam attacked the first limb of the award, arguing that there was no legal basis for it. While equating the said award to an order of reinstatement without loss of

remuneration pursuant to section 40 (1) (a) of the ELRA, he strongly contended that the respondent, in the circumstances of the case, could only be compensated in terms of section 40 (1) (c) of the ELRA. In support of his submission, he cited our decision in **National Microfinance Bank v. Leila Mringo & 2 Others**, Civil Appeal No. 30 of 2018 (unreported)

In rebuttal, Mr. Johnson was quite brief. He countered that the High Court did not order any reinstatement and that the compensation as ordered was properly made under section 40 (1) (c) of the ELRA.

Section 40 (1) of the ELRA provides remedies for unfair termination as follows:

> ***40.-****(1) Where an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer:*
> *(a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or*
> *(b) to re-engage the employee on any terms that the arbitrator or Court may decide; or*
> *(c) to pay compensation to the employee of not less than twelve months remuneration."*

The import of the above provision is well settled. For instance, in **National Microfinance Bank v. Leila Mringo & 2 Others** (*supra*), this Court stated that:

> *"We are settled in our mind that reinstatement or re-engagement or compensation in subsection (1) (a), (b) and (c) of section 40 of the ELRA [respectively] must be read disjunctively. The 'or' in the subsection is not conjunctive, it is disjunctive.... We thus agree with Mr. Kamala that by ordering reinstatement and compensation of twelve months' salaries conjunctively, the High Court fell into error. It should have ordered disjunctively as the CMA did."*

Applying the above position to the instant case, we have no difficulty in upholding Mr. Lakam's submission. We agree with him that the order for payment of remuneration for the whole period the respondent was out of employment to the date of the judgment of the High Court had no legal basis in the circumstances of this case. It could only have been lawfully made had an order of reinstatement been made pursuant to section 40 (1) (a) of the ELRA. Certainly, it was not, and could not, be made under section 40 (1) (c) of the ELRA, which fixes compensation of twelve months remuneration as the minimum for unfair termination. Nor could it be made under section 40 (1) (b) of the ELRA governing the relief of re-engagement. In the premises,

we find merit in the complaint at hand and proceed to quash and set aside the aforesaid erroneous order. For avoidance of doubt, the respondent remains entitled to the compensation of twelve months' remuneration as ordered by the High Court in the second limb of its order.

In the final analysis, we allow the appeal to the extent shown above. We make no order as to costs since labour disputes do not customarily attract such awards.

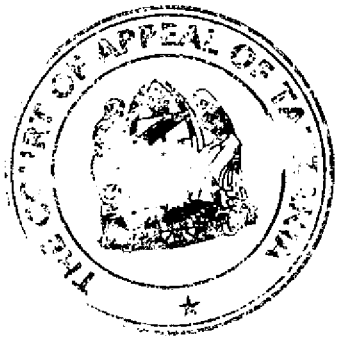
DATED at **DAR ES SALAAM** this 9th day of August, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The Judgment delivered this 10th day of August, 2023 in the presence of Mr. Ezekiel Joel Ngwatu, learned Counsel for the Respondent, also holding brief for Mr. Pascal Kamala, learned Counsel for the Appellant, is hereby certified as a true copy of the original.



R. W. Chaungu
DEPUTY REGISTRAR
COURT OF APPEAL