IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB - REGISTRY OF MWANZA

AT MWANZA

LABOUR REVISION NO. 48 OF 2022

(From CMA/BUK/54/2019 of Mwanza Commission for Mediation and Arbitration)

ERIC SHEM GWAJE ----------APPLICANT

VERSUS

NMB BANK PLC----------RESPONDENT

JUDGEMENT

Aug. 9th & Sep. 8th, 2023

Morris, J

Mr. Eric Shem Gwaje, on 7th June 2023, filed the Notice of Application, Chamber Summons and Affidavit in this Court. He seeks the Court to, on the one hand, call for and examine the records in labour dispute number CMA/BUK/54/2019 of Mwanza Commission for Mediation and Arbitration (elsewhere, CMA or Commission). The objective is for the Court to satisfy correctness, rationality, legality, and propriety of CMA award dated 16th May 2022 (Hon. P.E. Kefa, Arbitrator). On the other hand, the Court receives an invitation to revise and set aside the CMA award should it find that remedy befitting.

From the record, the applicant was an employee of the respondent effective 2nd May 2006. He was, however, terminated on 2/3/2019. The reason for his termination is hinged on three loan transactions advanced to Witness Kokuhabwa Salvatory, Joel Theobald Kitale and Renna Rwehabura Joel (the customers/borrowers). It was alleged that in his capacity as a loan officer, the applicant misconducted himself in the processes of granting loans to the named borrowers.

His employer charged him with four counts: conspiracy to defraud the bank contrary to item 15.15 (7.6) of ***the NMB Human Resources Policy***, 2018 (hereinafter the policy); negligence of duty resulting in loss to the bank contrary to item 15:15 (6.1); unsatisfactory management of credit portfolio resulting in loss to the bank contrary to item 15:15 (6.8); and violation of section 3.4 of the respondent's ***MSE Manual*** ('the Manual') for failure to conduct proper verification of customers' collaterals and business ownership.

Investigation was made by Mr. Lwitiko Jackson (DW2). Upon hearing, he was held guilty and thus lost his employment. His appeal to the respondent's Appeals Committee was unsuccessful. He, hence, escalated

the matter to CMA. By its award, the CMA found his termination fair and proper substantively and procedurally. He stood disgruntled. This application manifests such plight.

According to paragraph 4 of the applicant's affidavit, this matter is pegged on four grounds. **One**, the arbitrator erred in law and fact to hold that there was fair reason for termination. **Two**, CMA erred in law and fact to hold that the procedure for termination was fair. **Three**, CMA erred by not including the evidence of the parties in the award; and **four**, the arbitrator erred by delaying to deliver the award. With my leave, the application was argued by way of written submissions. The applicant and respondent enjoyed services of Messrs. Reagan Charles and Sabas Shayo, learned Advocates respectively. Parties' submissions are analyzed in the course of determination of the grounds herein.

This being the second court to determine the dispute between parties, it adopts a form of rehearing. It is legitimate for the Court to re-appraise, re-assess and re-analyse the evidence on record before it arrives at its own reasoned conclusions. See, ***Paulina Samson Ndawavya v Theresia Thomasi Madaha***, Civil Appeal No. 45 of 2017; ***Makubi Dogani v***

Ngodongo Maganga, Civil Appeal No. 78 of 2019; ***Mwenga Hydro Limited v Commissioner General Tanzania Revenue Authority***, Civil Appeal No. 356 of 2019; and ***Diamond Motors Limited vs. K-Group (T) Ltd***, Civil Appeal No. 50 of 2019 (all unreported).

On record, the applicants' submissions do not navigate all the raised issues/grounds for determination. They rather center on only two, thus, faulting the CMA's decision on reasons and procedures for termination. Therefore, in line with the subject submissions, the Court will confine itself on the 1st and 2nd grounds of revision. Hence, the remaining two are considered abandoned by the applicant.

Regarding the first issue, it was submitted by the applicant that the CMA award was irrationally given because there were no valid or fair reasons for the applicant's termination. He argued that visitation for verification was done by team work of three respondent's officers. That is, the applicant, Theodore Rwegoshora (Sales and Relations Manager) and Joseph Iramba (Branch Manager). To him, onsite-interviews of neighbours were jointly done (pages 25 and 44 of CMA proceedings). That is why DW2 admitted that more than one neighbours were interviewed (page 16 of the

proceedings). To him, the ***Manual*** does not specify that all neighbors must be interviewed by one officer. Thus, he submitted that it was wrong for the respondent to investigate the applicant alone for the mistakes allegedly committed by the team.

The applicant also faulted the CMA conclusion regarding verification of authenticity of the sale agreement at the local government authorities. He argued that, DW2 also admitted to had failed to interrogate the said local government leader who signed the agreement (page 15 of the proceedings). Therefore, the allegations that the applicant did not verify the authenticity were not proved. Moreover, the applicant argued that the borrowers herein had requisite business experience and turnover both which were proved on visit (pages 6-7, 14, 16 and 17 of the proceedings) and the Hearing Form (exhibit D8). To him, he only processed issuance of the loan and obtained necessary approvals from his superior. Therefore, in absence of proof of how and why he obstructed his superiors from declining the loans applications; the applicant cannot be held liable singularly or at all.

The applicant's counsel argued further that the investigation by DW2 was biased as, in his investigation, he opted to ignore respondents who gave

evidence in favor of the applicant (pages 10, 11, 12 and 19 of the proceedings). Therefore, to the applicant DW2 was not credible witness and his evidence was largely hearsay and fabricated.

It was submitted further that the offences of conspiracy and negligence of duty resulting in loss to the bank were not considered under item 11 of exhibit D8 and/or proved. In addition, he argued that there was no actual loss which was proved as having been occasioned to the respondent because the loans were secured by collaterals. He cited the example that the recommendation by DW2 was that all loans are recoverable through sale of securities.

Regarding allegations of unsatisfactory management of credit portfolio; and verification of collaterals and business, the applicant argued that they were, too, not proved. That, DW2 testified to had not been aware of the number or categories of loans the applicant had in his portfolio (page 17 &19 of the proceedings). Rule 13 of ***the Employment and Labour Relations (Code of Good Practice) Rules***, 2007 (thereinafter, 'the Code') was referred to buttress that the respondent had a duty to investigate allegations and to prove the same.

Advocate Regan argued further that, the applicant's termination was not an appropriate sanction per rule 12 of ***the Code*** and ***National Microfinance Bank v Leila Mringo and two others***, Civil Appeal No. 30 of 2018; and ***National Microfinance Bank vs. Victor Modest Banda***, Civil Appel No. 29 of 2018 (both unreported). To him, termination is the last and most severe punishment to an employee. The suitable remedy was guidance, trainings or seminars to the applicant.

In reply it was submitted by the respondent that the applicant's argument of team-visit to the customers was an afterthought for it contradicts his statement (exhibit D14) and other evidence on record. To the respondent, the applicant admitted to had interviewed one neighbour only (pages 30-31 of the proceedings). It was argued further that, with such admission, there was no need to prove the said allegations pursuant to the case of ***Nickson Alex v Plan International,*** Revision No. 22 of 2014 (unreported).

Further, it was submitted by the respondent's counsel that, DW2 had proved that the procedures for issuing loan were not followed by the applicant. That is, the applicant did not verify the securities as per the

Manual and that the subject customers had banking experience of less than a month instead of at least 6 months which requirement was also admitted by the applicant (exhibit D-14). The respondent, also, submitted that his management took disciplinary actions against Theodore and Joseph according to how each participated in the commission of the offences.

According to the respondent, all offences were proved against the applicant thereby justifying his termination. To him, the core values of banking business are integrity, trust and confidence which the applicant did not promote. Consequently, the respondent lost trust with him thereby properly terminating his employment. I was referred to the cases of ***NMB Bank PLC v Andrew Aloyce***, Revision No. 1 of 2013; and ***National Microfinance Bank (NMB) v David Bernard Haule***, Revision No. 5 of 2013 (both unreported).

After considering the submissions for both parties, I will now determine whether the alleged offences were proved enough to warrant the sanction meted out to the applicant. It is cardinal law under section 39 of ***the Employment and Labour Relations Act***, Cap 366 R.E. 2019 (**the Act**) and rule 9(3) of ***the Code*** that the burden to proof regarding

termination of employment lies upon the employer. Also, per rule 8(1) (d) of ***the Code*** and section 37(2) (a) and (b) of ***the Act***, there must be valid reason for termination of employment. Further, such reason(s) must be fair in relation to the employee's conduct, capacity or capability. Rule 12 of ***the Code*** is categorical on factors to be considered by adjudicator on deciding whether termination was unfair. Thus;

> *12 (1) Any employer, arbitrator or judge who is required to decide as to termination for misconduct is unfair shall consider-*
> *(a) whether or not the employee **contravened a rule or standard** regulating conduct relating to employment;*
> *(b) if the rule or standard was contravened, whether or not*
> *(i) it is **reasonable;***
> *(ii) it is **clear and unambiguous;***
> *(iii) the **employee was aware of it**, or could reasonably be **expected to have been aware of** it;*
> *(iv) it has been consistently applied by the employer; and*
> *(v) termination is an appropriate sanction for contravening it.* (Emphasis added)

I will now navigate the offences herein by starting with conspiracy to defraud the bank under item 15:15 (7.6) of ***the Policy***. At page 6 of the

proceedings, DW1 testified that the applicant had coached the customers on how to respondent to the questions asked by bank officers during visit. On being cross-examined, he said he admitted that he had no personal information concerning the offences committed by the applicant. In his defence to the charge (exhibit D6) and statement (exhibit d 14), the applicant denied all the allegations specifically to had met the customers outside bank office.

However, in the investigation report (exhibit D-13) it was indicated that the applicant advised the customers to deposit money into their respective bank accounts in respondent's branches other than Kaitaba branch. Further, the report documented that loan processes were made outside the respondent's office (especially at police canteen and Sky-Hotel). Further, Patience Patrick Mlenge's statement (exhibit D16) revealed that the applicant couched him on how to answer questions of bank officials regarding his guarantee to Witness Salvatory's loan.

Therefore, from the foregoing record and testimony, the main evidence to prove this offence came from investigation report and statement by Patience. Evidently, investigation report contained information gathered

from third parties who were not called as witness. Indeed, even the said Patience was not procured to testify. It calls for no overstretch of muscles to conclude that the subject pieces of evidence remain to be hearsay. They carry no plausible evidential value. In my view, accordingly, the offence of conspiracy to defraud the respondent-bank stood as not proved.

Regarding the offence of unsatisfactory management of credit portfolio, the applicant argued that it was, too, not proved. The respondent, however, submitted that all offences were fully proved. My reading of the proceedings (especially page 19) leads me to DW2's denial that he was not assigned to investigate the applicant's management of credit portfolio. He also denied knowing the number of loans under the applicant's portfolio. To the contrary, at page 25, the applicant testified to had satisfactorily managed his portfolio leaving unpaid loans therein at 10%.

The foregoing evidence remained unchallenged during cross-examination. It is trite the law that failure to cross examine on critical matters amount to admission. See, for instance, ***Patrick William Magubo v Lilian Peter Kitali***, Civil Appeal No. 41 of 2019; ***Nelson s/o Onyango v Republic***, Criminal Appeal No. 49/2017; ***Paul Yustus Nchia v National***

Executive Secretary Chama cha Mapinduzi and Another, Civil Appeal No. 85 of 2005 (all unreported). I will not, therefore, delay to hold that this offence was not correspondingly proved against the applicant.

Now, the offence of violation of ***MSE Manual*** (section 3.4) for failing to conduct proper vilification of the collateral and business ownership. The applicant argued that the visit was done by a team of three people. And that he interviewed one neighbor while the other officers delt with the rest of neighbours. To him, if there was any violation against the respondent's ***Manual***, then the entire *trio*-team was liable. On part of the respondent, it was submitted that so long as the applicant confessed to had neglected his duty of interviewing four neighbors, he transgressed the manual.

I have keenly considered the submissions by both sides. Although the ***Manual*** sets a rule or standard to regulate conduct relating to employment of the applicant; as correctly submitted by the applicant, it is rather hard to draw a clear line between this alleged offence and that of negligence of duty resulting in loss to the bank (which is to be determined a little later). In my view, to unequivocally fault the applicant as having been negligent or not, it is vital to analyze if he abided by the employer's directives, checklist and

standards. I consider such aspects as being an integral part of the specific offence of negligence. Consequently, I will consider compliance with the ***Manual*** while determining the next/last offence below.

The last offence hereof is negligence of duty resulting in loss to the bank. This was formulated under item 15:15 (6.1) of ***the Policy***. The applicant claimed that he had visited the customers and verified the authenticity of documents with the local government leader who had witnessed the sale agreement between of Witness Kokuhabwa Salvatory and Peter Triphone. Further, it was argued that for this offence be complete, the employer must prove the actual loss suffered by him. To the applicant, the respondent had an unutilized recovery option of selling the collaterals.

The respondent, nonetheless, submitted that the offence was proved because the applicant confessed to had consulted only one neighbor and that he had not consulted the local leader for verification of the sale agreement. Further, to the respondent, such applicant's admission together with his acceptance that the borrowers had banking experience of less than 6 months, proved that he had breached the ***Manual***. That is, he was negligent which resulted into his employer suffering loss.

The above rival submissions have been considered by the Court. I concur with the respondent that the applicant admitted to had interviewed one neighbor (page 31 of the proceedings and pages 3, 4 of Exhibit D-14) contrary to ***the Manual***. He, too, admitted to had processed the loans to the 3 customers herein. It was his further admission that the borrowers operated their respective bank accounts for one month or so (pages 32-33 of the proceedings). However, during re-examination, he clarified that such 6-month requirement is in respect of business experience not for account operations.

Further, in his statement (page 3 of exhibit D14), the applicant confessed to had not verified the sale agreement with the local government authorities. Regarding the loan advanced to Joel Theobard Kitale, the applicant confessed to had not interviewed neighbors for the reason that they were not present. Yet, the statement by one Joseph Iramba (exhibit D15) reveals that the three bank officials visited the business sites and collaterals of the customers; and they all were satisfied that both merited for the loan applied for prior to the same being advanced. He too stated

that he had interviewed one neighbor of Witness Salvatory. An identical tale is accounted by Theodory Rwegoshora (exhibit D17).

I have read ***the Manual***. Section 3.4 thereof is specific for site visitation. It provides the objective of such visit. The major rationale is to verify whether the information gathered during the interview between bank and applicant-borrower is correct. Thereat, the whether the bank verifies business ownership by the customer; his financial position and steady cash flow; availability and suitability of the collateral(s); and residence and character of the customer -borrower. Moreover, ***the Manual*** also directs the interview to be done to at least 4 references and the visit to be made by two employees. Section 4.1 thereof requires the applicant-customer to have **business experience** of 6 months and 3 **months banking experience**.

Under section 8.5 provides for first default demand notice to be issued by branch manager on the 31st day of nonpayment. The second demand notice is to be served upon the defaulter 10 days after the first demand notice; followed by the third/final demand 51 days of the nonpayment. If the debt is still unpaid up to 61 days, the branch manager submits the

matter to the NMB appointed Debt Collection Agent for recovery of the loan (principal debt plus costs). After 91 days of nonpayment, such debt becomes **classified as a loss** and is sent to the Recovery Unit at Head Office. Between 91-271 days' recovery efforts should continue after which the loan is **written-off**.

Reading the appendix (page 2) to ***the Manual***, I note the Pre-Disbursal Checklist. It includes household, business and collateral visits; and verification of whether the customer maintains NMB Personal/Business account. Further, such checklist is signed by the loan officer and is approved by the branch manager. At page 11, the appendix casts the role to investigate client's portfolio and scrutinize his application upon the loan officer. The loan officer, also, has a duty to visit the customer in company of one branch official.

Upon analysis of evidence, I hold that it was proved that the applicant neglected his duties above. As demonstrated earlier, he admitted to had interviewed only one neighbour instead of four. Therefore, he cannot justifiably relegate or delegate such role to others. I have not come across any rule which permits him to do so. With regard to one of the customers

(Joel Theobard Kitale) he admitted to had found no neighbour around. In my view, such absence did not actually preclude him from revisiting the *locus* the other/next day. The applicant also admitted to had not interviewed the local leader in respect of the sale agreement. Further, the customer, according to ***the Manual*** only needs to have a 3-month banking experience with any bank; and business experience of at least 6 months. All these anomaly boil to negligent attributes on the part of the applicant. Negligence, as noted from the charge hereof, constitute one limb of the subject offence.

The foregoing interrogations notwithstanding, in CMA Form No. 1, the applicant stated that, offences against him were exaggerated. In the submissions, his counsel was of the view that there was no actual loss to the respondent because the loan was recoverable as stated in the statement of Theodory Rwegoshora. As I have aptly detailed loss-recovery procedures under ***the Manual***; no evidence was adduced by the respondent to prove that the debt by the customers had graduated to amount to loss to the respondent-bank. On record, it was merely stated that the customers were given demand notices (exhibits D21, D22 and D23).

Without overly repeating myself, pursuant to ***the Manual***, the unpaid debt is classified as a loss after 91 days of becoming due. Precisely so, after the 3rd and final demand notice to the defaulting customer. According to the manual, the person responsible to issue demand notices and to appoint debt collector is the Branch Manager. In the case at hand, such person was not paraded to testify before both the respondent's committee or CMA. I am, thus, loath to find that the respondent had suffered **established loss** at and/or before terminating the applicant's employment. Instead, the latter neglected or opted not to mount any meaningful debt-recovery measures.

According to ***the Manual*** (exhibit D2), there are two categories of offences of negligence. **Firstly**, negligence of duty **leading to** loss, damage and/or injury [section 15:15 (5.1)]. **Secondly**, is negligence of duty **resulting in** loss, damage and/or injury [section 15:15 (6.1)]. Essentially, the first one attracts a lesser-but-heightening punishment (final written warning for first offender; comprehensive final written warning to second offender; and termination to third-habitual offence). The second category earns the guilt only one penalty: termination of employment. The applicant herein was enveloped in the latter cluster.

As I delve towards concluding the first issue, I note from the investigation report that the applicant had clean record for the period of preceding 12 months. And no evidence was adduced as to his previous offence(s). Further, in the subject report, there was a recommendation by the investigator for the respondent to immediately initiate recovery plans against the customers in arrears. In addition, at page 17 of the proceedings, DW2 testified that no any person or obstacle hindered the sale of the collaterals. On such basis, I have but to arrive at a firm conclusion that the offence charged against the applicant was not only exaggerated but also not fully proved. I dare to reiterate that the respondent proved no actual loss, or at all; and no evidence as to failure of any recovery measures employed by him.

The first part of the offence of negligence was truly exhibited against the applicant; but the proof that such negligence **led to loss**, remained wanting. Such critical deficiency forms the basis of my founding the innocence of the applicant. Therefore, the first ground of application is merited to such extent. That is, there was no sufficient fair reason for termination of the applicant's employment.

Regarding the second ground: existence of fair termination procedures, it was the submissions of the applicant that there were none. To him, the personal representative of the applicant, one Adam Murusuli, was expelled and no ample time was given to him to find another representative. He argued further that, the respondent's committee relied on the investigation report which was arbitrary and lacked credibility. He also faulted the proceedings because the alleged interviewed witnesses were not called to testify; and that he was not availed with documentary evidence by the so-called impartial committee.

It was submitted further that the investigator had interviewed the customers in front of the branch manager, one Victorine Kimario. Also, that the latter interrogated the customers as DW2 recorded their responses (page 10 of hearing form; and pages 17,18 and 28 of CMA proceedings). It was argued further that DW2 testified that the customer was persistent to testify until the branch manager intervened. That DW2 further hid statements of other customers whom he interrogated on the pretext that they were unhelpful. Therefore, to the applicant, the committee was supposed to disregard the report and call the customers personally to testify.

In line with the foregoing context, the applicant submitted that for DW2 (investigator) testified alone; all information he gathered from the witnesses who did not testify, was hearsay, not admissible and/or of no adequate *probandi*. He also argued that, considering the fact that all evidence relied upon by the committee came from investigation report, the applicant had a right to be given that report for fair hearing before the committee. I was referred to the case of ***Severo Mutegeki and another v Mamlaka ya Maji Safi na Maji Taka Mjini Dodoma(DUWASA)***, Civil Appeal No. 343 of 2019 (unreported).

Lastly, the respondent's disciplinary committee was also branded as not being impartial. According to the applicant, the same was chaired by a person who had ordered investigation to be done. He also stated that the email that was sent to the investigator by the chairman was highly conclusive and it that it was the foundation of investigation aiming at making sure that the applicant was to be found guilty. Reference was made to ***Onael Moses Mpeku v National Bank of Commerce***, Labour revision no. 461 of 2019; and ***Utravetis Ltd v Baraka Emmanuel Lema***, Revision No. 26 of 2020 (both unreported). The motive to cite the two cases, was to

buttress the applicant's point that a person who participated in the investigation should not chair the disciplinary committee.

Replying, the respondent submitted that law enjoins the employer to conduct investigation; issue the employee with a charge sheet; call the employee to attend hearing in not less than 48 hours; conduct hearing; issue the appropriate sanction and provide the employee with right to appeal. According to him, all procedures were followed. That is, DW1 testified that the applicant was suspended pending investigation; he was served by a charge; he responded to the charge; was called for fair hearing; he was afforded with right to question witnesses; and was given right to appeal.

He, however, conceded that per the hearing form (exhibit D-8), the applicant went with legal officer against ***the Policy*** and rule 13 (3) of ***the Code***. In other words, the employee can only be represented by trade union representative or fellow employee. Lastly it was submitted that the Chairman never ordered the investigation as alleged.

I have serenely considered the submissions of both parties. Rule 13 (1) -(13) of ***the Code*** provides for procedures to be followed before

termination. According to rule 9 (1) of ***the Code***, the employer must follow fair procedure before termination. Termination is unfair if it was not done in accordance with laid procedure under section 37(2) (c) of ***the Act***. To appreciate the procedures adopted by the respondent I will decide on all aspect pointed by the applicant faulting the respondent.

Regarding right to representation, it was submitted that the applicant's personal representative (Adam Murusuli) was expelled from the meeting. The applicant considers such expulsion being denial of his fair trial. More so, as he was also denied opportunity to procure another representative. I have read page 89 of respondent's ***the Policy***. A personal representative therein may be a colleague from the bank, trade union representative of a formally recognized trade union within the bank. This also is in accordance with Rule 13(9) of the Code. Therefore, to me, Mr. Murusuli (a legal officer) did not qualify for audience before the committee. Nonetheless, as the applicant knew the kind of representatives allowed in the disciplinary hearing, he was supposed to find suitable representative for hearing. Further, according to exhibit D8 the applicant opted to proceed without a representative even

after having been accorded the opportunity to seek one. Therefore, this allegation lacks merit. I overrule it.

It was also alleged that the committee relied on the investigation report which was arbitrary and that lacked credibility. One basis for such argument was that interviews (customers) were interrogated by and/or in front of the branch manager. That argument was reinforced by the submissions that DW2 had also testified that the customers were not cooperative until when the branch manager was involved. The applicant also accused the investigator of hiding some statements of witnesses. The respondent's counsel, Mr. Shayo, did not reply these allegations.

Reading page 83 of ***the Policy***, one notes that investigation should be conducted by a duly appointed person. At page 18 of the proceedings, DW2 admitted as to the presence of the branch manager during investigation. At page 17 he also testified that he was alone but was financed by the branch for transport and other upkeeps. I find that the participation of the said branch manager was not fatal as he did not attend/testify at the disciplinary hearing. However, for he participated during investigation it was necessary to state both his presence and

involvement in the investigation report. Concealment thereof raises adequate doubt as to whether or not he had no influence to the answers given by the witnesses which formed the basis of termination.

Also, it was the evidence of DW2 that some witnesses were coached. Therefore, their statements were not recorded (page 21 of the proceedings). Hence, as correctly submitted by the applicant the investigation had a prime target of gathering information which was to find the applicant guilty of the offence. That is, the investigation processes were biased. I, too, align myself with the argument that failure to call the persons who were investigated/interrogated rendered the testimony by the investigator before committee majorly hearsay.

Further, the record is silent whether the applicant was given the investigation report. The respondent's submissions, also, did not address this aspect. They are silent on this allegation. It has been held numerous times that, to afford the applicant with fair hearing he must be given investigation report failure of that is a serious irregularity. See the case of ***Severo Mutegeki and another v Mamlaka ya Maji Safi na Maji Taka***

Mjini Dodoma (*supra*) and ***Kiboberry Limited vs John Van Der Voort,*** Civil Appel No. 248/2021 (unreported).

Lastly it was alleged that the committee was partial as its chair had ordered investigation by email. He also stated that the email that was sent to the investigator by the chairman was highly conclusive and it was the foundation of investigation aiming at making sure that the applicant was to be found guilty. It was the submissions of the respondent that the chairman never ordered the investigation. I have read the background at the first page of the investigation report. It tells;

> *"On 5th October, 2018 Forensic Unit received an email from Zonal Manager-Lake Zone that, he has noted four dubious loans at Kaitaba branch that were issued without following proper lending procedures. The allegations pointed out some weaknesses in leading process like two loans issued by using cheated collaterals and businesses, two borrowers issued loans by using the same business stocks, new borrower financed without complete documentation/analysis, high over-financing practice on startup businesses and all businesses financed were found closed during the visit. The allegation suspected RO-Erick Shem Gwaje who appeared to collude with customers in the deal of issuing suspicious loans."*

That information, as correctly submitted by the applicant was so detailed and formed negative opinion against the applicant. Therefore, I am inclined to agree that the chairman who ordered the investigation was not impartial as he had full details of the offence facing the applicant; he was the author of the terms of reference and was soliciting for specific information towards the desired end. I allow this ground as well.

From the above analysis of law and evidence, a proper and complete evaluation of evidence on record; the CMA would have been led to a steady conclusion that termination was both substantively and procedurally unfair. Naturally, as the arbitrator did not fault the respondent's reasons for and procedures adopted in termination of employment; he did not venture into matters of compensation and/or reinstatement/re-engagement. This Court will remedy the evident omission below.

The counsel for the applicant prayed for reinstatement or payment of 60 months compensation as the applicant had permanent contract with the respondent and at the time of termination, he had 19 more years to serve. It is so strange that there is no current contract between the parties in the records. The available contract of employment (exhibit D1) is for 2006

covering 3 years period of employment; subject to renewal. However, it is undisputed that the applicant was a pensionable member. At page 2 of the termination letter (exhibit D9) he was directed to contact the HR for his Pension. As to the alleged remaining period of service, the submissions of the counsel came from the bar. It cannot be relied upon because submissions are not evidence. That is the law.

It is cardinal law that if the termination is held to be both substantively and procedurally unfair, it befits the order reinstatement without loss of remuneration unless there are justifiable grounds for not doing so. That is the import of rule 32 (2) of ***the Labour Institutions (Mediation and Arbitration Guidelines) Rules***, 2007, G.N. 67 of 2007 (the Guidelines) as stated in the case of ***Magnus K. Laurean v Tanzania Breweries Limited***, Civil Appeal No. 25 of 2018 (unreported).

Considering the fact that, in the current matter, both the reason and procedures for termination were unfair; in the referral form, the applicant prayed to be paid the remaining months as outcome of mediation. During hearing before the CMA he prayed to be reinstated by the respondent. Rule 32(2) of ***the Guidelines*** provides exceptions for reinstatement and re-

engagement. *Inter alia*, where it is not reasonably practical for the employer to re-instate or re-engage the employee. In my view, the present case falls in this category of exceptional circumstances. **First**, the respondent seems to have not mounted recovery processes. The presence of the applicant in his former portfolio may pose a hindrance to such measures. **Second**, in the light of the findings regarding the first issue, I am not naïve to the fact that the relationship between the parties herein in no longer cordial. **Third**, the nature of the respondent's business calls for a higher degree of trust and honest [***NMB Bank Plc v Andrew Aloyce*** (*supra*)].

It is also cardinal law that the court generally has no jurisdiction to award relief which was not prayed in a referral form. At page 27 the Court of Appeal in the case of ***Magnus K. Laurean vs Tanzania Breweries Limited*** (*supra*) re-affirmed it a principle that;

> *" It is settled that generally an arbitrator or the High Court, Labour Division* ***has no jurisdiction to grant a relief which is not prayed for in the referral form, the said form being understood synonymously with a plaint*** *– see Security Group (T) Ltd. v. Samson Yakobo &Ten Others, Civil Appeal No. 76 of 2016; and Dew Drop Co. Ltd v. Ibrahim Simwanza, Civil Appeal No. 244 of 2020 (both unreported)"* (emphasis added).

Therefore, as the applicant never prayed for re-engagement or re-instatement in his referral form; and considering the Court's findings in relation to the charge of negligence, I am inclined to order compensation of 12 months salaries under section 40(1) (c) of **the *Act***. Further, the applicant is entitled to terminal benefits which are statutorily granted under section 44(1) & (2) of ***the Act***. As held in ***Magnus K. Laurean v Tanzania Breweries Limited*** (*supra*) at page 28; terminal benefits and a certificate of service are matters of right even if they are not claimed for in the referral form. See also, the case of ***Felician Rutwaza v World Vision Tanzania***, Civil Appeal No. 213 of 2019 (unreported). Therefore, the applicant in addition to the 12 months' salaries, he is entitled to terminal benefits stated in the Termination Letter (exhibit D9).

Consequently, I proceed to revise the CMA proceedings and award by quashing them and setting aside orders therefrom. In lieu thereof, I hold that the applicant's employment was unfairly terminated both substantively and procedurally. In consequence, I order the respondent to pay the applicant a total of twelve months salaries. Further, the applicant is entitled to the terminal benefits outlined above.

I upshot the application is merited to the extend stated herein. It is accordingly allowed. Each party shall shoulder own costs. It is so ordered. Right of Appeal fully explained to the parties.

C.K.K. Morris

Judge

September 8th, 2023

Judgement delivered this 8th day of September 2023 in the presence of Eric Shem Gwaje, the applicant.

C.K.K. Morris

Judge

September 8th, 2023