

TANZANIA / JUDGMENT

crdb bank plc vs dina phip 2023

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IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA LABOUR DIVISION AT DAR ES
SALAAM REVISION APPLICATION NO. 159 OF 2023 (Arising from the award of the Commission
for Mediation & Arbitration of DSM at Ilala) (G. Wilbard: Arbitrator) Dated 9th May 2023 in
Labour Dispute No. CMA/DSM/ILA/122/21/47/21) BETWEEN CRDB BANK
PLC.....APPLICANT VERSUS DINA
PHILIP.....RESPONDENT

JUDGEMENT

29th Sept.-13th Oct. 2023 OPIYO, J. This decision concerns revision application arising from the award issued in Labour Dispute No. CMA/DSM/ILA/122/21/4721 in the Commission for Mediation, and Arbitration of Dar es Salaam, Ilala (herein after referred to as CMA). Aggrieved with the award the applicant has filed this application under the provisions of Section 91 (b), S. 91 (2)(a),(b), S. 94(1) (b),(i) of The Employment and Labour Relations Act[CAP 366 R.E 2019]; Rule 24 (2) (a), (c), (d), Rule 24

- (3) (b),(c), (d), and Rule 28(1)(c)(d) Rule 24 (11) (b) and (e) of the Labour Court Rules, G.N. No. 106 of 2007. The prayers contained in the Chamber summons are that this Honorable Court be pleased to 1 call for records, revise and set aside the CMA award No. CMA/DSM/ILA/122/21/47/21 by Hon. Wilbard, G.M dated 9th May 2023. The origin of this application is extracted from the CMA records, applicant's affidavit, and the Respondent's counter affidavit are as hereunder clarified. The Respondent was employed by the Applicant as Bank Officer Trainee. On 30th March 2021 he was terminated for the reason of Misconduct (absenteeism). Being dissatisfied with the termination, the respondent referred the matter to the CMA. Having found the termination to be unfair in both aspects; procedure and reason, the CMA reinstated the respondent without loss of remuneration to the tune of TZS 78,000,000/= The award aggrieved the Applicant who decided to lodge this application for revision. Accompanied with the Chamber summons, in support of the application, the affidavit of the applicant was filed, in which after expounding the chronological events leading to this application, the Applicant claimed that the Respondent's employment was fairly terminated after being found for the alleged offences. The Applicant further challenged the arbitrator's decision regarding reliefs. The applicant's affidavit contains four (iv) legal issues to wit; - 2

- i. That the Hon. Arbitrator erred in law and facts by saying that there was no reason for termination contrary to evidence on record and the law. ii. That the Hon. Arbitrator erred in law and facts by saying that procedure was not followed contrary to evidence on record and the law. iii. That the Hon. Arbitrator erred in law and facts by failing to determine appropriate remedy contrary to law. iv. That the Hon. Arbitrator immensely failed to assess evidence, hence wrong decision regarding fairness of respondent's termination. This application was contested by the Respondent's counter affidavit which denied existence of fair termination in both aspects substantively and procedurally. It was further disputed by the respondent, the existence of any irregularities or errors on the award by CMA. The application was disposed by way of written submissions, the applicant was represented by Mr. Innocent Felix Mushi, Advocate from a firm stylized as Lawfront Advocate, whereas the Respondent 3 was represented by Mr. Emmanuel Akyoo, Advocate of Rollette & Partner. In his submissions Mr. Mushi abandoned forth ground and proceeded to argue for the remaining three grounds. Starting with the first ground Mr. Mushi submitted that the arbitrator erred in law and facts by holding that procedure was not followed contrary to evidence that was on records. He stated that at page 14 paragraph 3 of the award, the Hon. Arbitrator ruled out that the procedures were not followed for one reason that the applicant was issued with termination letter before the appeal. He further added that the applicant is not in agreement with this reason for being contrary to Rule 12 of the Employment and Labour Relations (code of Good Practice) G.N. NO. 42 of 2007 which directs as follows:- "An employee may appeal against the outcome of a hearing by completing the appropriate part of the copy of the disciplinary form and give it to the chairperson within five working days of being disciplined..." Mr. Mushi argued that basing on Exhibit C-7, C-8 and C9, he is of the view that the termination letter was properly issued by the applicant, on the reason that she was informed of the right to appeal which was 4 within 5 days. He further added that the applicant termination letter only becomes valid and final after appeal and appeal outcome is out or after lapse of the 5 days to appeal. On that basis he is of the view that there is no way one can appeal without disciplinary hearing outcome. Regarding remedy, Mr. Mushi submitted that the same was issued contrary to Rule 32 (1) (2) (b) of Labour Institutions (Mediation and Arbitration Guidelines) G.N. No. 67 of 2007 which directs that, where an arbitrator finds a termination to be unfair, the Arbitrator may order the employer to reinstate, re-engage the employee or to pay compensation to the employee. Relief to be awarded depends on nature of the case. According to him, the circumstances surrounding the termination are such that a continued employment relationship would be intolerable, as the employer is insisting working on Saturday, but the employee is not ready to work on Saturday. It was submitted that according to evidence on record specifically Exhibit C-10 (Personnel Manual) specifically Part Three at page 21 item number 3.1.1, 3.1.2 it is clear that working days is Monday to Saturday which through Exhibit C-1 which is employment letter item number 9, the complainant agreed to work from Monday to Saturday 5 but later on she refused to do as she was not coming to work on Saturday which makes the employer to charge her for absenteeism and proceeded to terminate her. Mr. Mushi added that at CMA and according to Exhibit C-7 which is hearing minutes at the second page question number

4 from the top, the employee was asked whether she is ready to work on Saturday, but she refused. Basing on those evidence, he is of the view that, the Hon. Arbitrator was supposed to use Rule 32(1) (2) (b) to order compensation, if at all was required but not to order for reinstatement as she did while she is aware that the circumstances surrounding termination are such that a continued employment relationship would be intolerable. On third ground he argued that, the Arbitrator erred in law and facts by saying that there was no reason for termination contrary to evidence on record and the law. Mr. Mushi contended that, the Hon. Arbitrator at page number 13 of the award ruled out that there was no reason for termination because absenteeism was not for 5 days consecutively. According to him, it was a wrong findings, and it is contrary to evidence on record. He stated that Exhibit C-2 which is First written warning shows that the Complainant was absent for 11 days. Exhibit C-3 which is second written warning shows that the 6 complainant was absent for 1 day making a total of 16 days after adding other 4 days as per charge sheet. He further argued that, it is not necessary for an employee to be absent consecutively, what is important is number of days should be more than five days. In backing up his stand, he cited the case of Platinum Credit v. Joseph ELias Masaga, Consolidated Revision No. 290 & 291 of 2020, High Court of Tanzania, at Dar es salaam, at page 11, in which absenteeism was upheld although it was not consecutive. Mr. Mushi submitted that, the Hon. Arbitrator has used Exhibit P-1 which is the notifying letter for not attending on Saturday, on the reason that there was no proof that it reached the Respondent Human Resources department. Even during cross examination, the complainant was asked but failed to prove that it reached the proper department. He added that the applicant violated her own terms and conditions of contract which she had signed and agreed to follow, as was discussed in the case of Kulwa Solomon Kalile v. Salama Ppharmaceutical Ltd, Labour Revision No. 155 of 2019z, High Court of Tanzania, at Dar es salaam, (unreported). It should be noted that the Respondent explored all possible alternatives to 7 accommodate the applicant, but it was not successful for the reason that the Respondent had very few branches for Sunday where the applicant can work on Sundays as was testified by the DW1. He thus, prayed for the CMA award to be revised and set aside. Replying for the application as to whether the Honourable Arbitrator erred in fact and in law by saying that procedures were not followed contrary to evidence on record and the law, Mr. Akyoo submitted that the Hon. Arbitrator did not error in facts and law by finding that the procedures were not followed. He stated that, the finding was not out of the blue but the same came out of exhibits tendered and admitted and the testimonies by the witnesses. He stated that, the Hon. Arbitrator referred to the Exhibit P-5 at page 17, the Disciplinary Code of the Applicant, the same provides that a Penalty of termination should not be passed until five working days allowed for appeal has lapsed. Mr. Akyoo continued to submit that, the respondent appealed within time as per the Exhibit P4, the termination had already been passed with effective date indicated as evidenced. In comparison, Exhibit C-9 "Termination of employment and Exhibit C-8, the date of appeal outcome, it shows the appeal was already overtaken by the effective 8 date of termination. He stated that the question here is, when did the employer made a final decision to terminate and when was the appeal decided? The answer is found on Exhibit C-9 and C-8 as it contravenes itself. Mr. Akyoo viewed that, the

applicant contravene both her Disciplinary Code and the law as the law provides that the appeal should be against the outcome of the hearing and not the action taken by the employer to terminate. Lastly, he added that, there is no way one can appeal without disciplinary hearing outcome. He stated that in this case, there was a final decision communicated to the Respondent before the outcome of the appeal contrary to the guidance and rights guaranteed by the Applicant's Disciplinary Code (Exhibit P5) as well as the law. Again, according to Rule 13. (1) of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 investigation ought be done, but the same was not complied by the Applicant, that was enough to prove that the procedure was not adhered. On reason for termination, Mr. Akyoo submitted that, the CMA Award from page 6 to page 13, Hon. arbitrator spent a lot to analyse and explain as to why the reason for termination was not valid. He averred that the respondent was absent from work for those 9 mentioned dates as alleged, but her absence was with justifiable reason well known to the Employer. Thus, the reason for absenteeism is well justified by Exhibits C-4, C-5, C-6, P1, and P3, plus the testimony of all witnesses. That, the respondent's reason for absence was very clear that it was on every Saturday since when she started working with the Applicant. She had been attending church services because she is a Seventh Day Adventist, hence she was exercising her constitutional right of freedom of worship as guaranteed by Article 19(1) of the Constitution of the United Republic of Tanzania of 1977 which provides that every person has the right to the freedom of conscience, faith and choice in matters of religion, including the freedom to change his religion or faith." It was further submitted that, at page 9 of the Award, the Hon. arbitrator analysed the evidence and the position of the law and came to the conclusion that, the reason for her absence was well known to the applicant and the same was confirmed by the testimony of DW2 that she was attending church for worship on every Saturday. He stated that, Rule 12 (1) of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007, as quoted by the Arbitrator that, for the reason to be valid, the rule or standard contravened must be reasonable, the evidence analysed by the Arbitrator shows that the rule contravened is against the Constitution, hence the reason for her absence was reasonable, in the same way that the absence on Saturday for worshipping was not a new thing to the applicant, as she was absent in every Saturday for about Ten

- (10) years she had been working with the applicant. Therefore, termination was not a proper sanction since the Applicant had a way to accommodate her by letting her work on Sundays, at other branches as she did before termination. Lastly, Mr. Akyoo submitted that, the respondent was charged for 11 days absence, it is his humble submission that, even if she could have been charged for 30 days absenteeism, but those days of absence could still be justifiable on the basis that the reason for termination was invalid. He further added that at page 13 of the Award as referred by the applicant, that the absent days referred by the Hon. arbitrator was just 4 days, he stated that, it is true that the days referred to in Exhibit C-9 were just 4 days and not 11 days as contended by the applicant. He insisted that, the reason for termination was invalid taking into an account that the freedom of religious is a constitutional right as stipulated and analysed in the 11 case of National Microfinance Bank

Plc Vs. Elizabeth Alfred Khairo, CIVIL APPEAL NO. 398 OF 2020 (Unreported) at page 16 it was held that;- "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 Saturday against the creed percept's of the Adventist religion, on the other hand. The appellant as the employer had a duty of finding a reasonable accomodation of the respondent and her constraining religion belief 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." Regarding reliefs, Mr. Akyoo submitted that, the remedy prayed by the respondent under CMA Form No. 1 as well as during the hearing at CMA, was not objected by the applicant. Therefore, raising the same at this stage is an after afterthought. On the reason that the respondent is ready to work and since the right to work is a constitutional right, he is of the view that the applicant had a position of accommodating the respondent to work on Sundays instead of Saturdays. Therefore, denying re-instatement is denying her constitutional right to work. 12 Having considered the submissions made by both parties, as well as the applicant's affidavit, the Respondent counter affidavit and CMA record, I draw up two issues for determination, fairness of termination both substantively and procedurally and appropriateness of the remedy awarded by the CMA as forming core contention in this application. Starting with the first aspect regarding the fairness termination, the applicant contended that the arbitrator erred in law in his findings by holding that there was no valid and fair reason for terminating applicants' employment, while it is undisputed that there was absenteeism. On such basis he is of the view that there was valid and fair reason of terminating respondent employment contract. On other side the respondent maintained that the arbitrator was right in his findings that the applicant's termination was unfair, as the alleged misconduct is unlawfully and discriminatory in nature. In addressing substantive fairness, reference is made to Section 37 of the Employment and Labour Relations Act, Cap 366 R.E 2019 which makes it unlawful for an employer to terminate the employment of an employee unfairly. The section places the burden to prove the 13 fairness of the reason and procedure to the employer. Section 37 (1) and (2) reads as follows: - "37 (1) It shall be unlawful for an employee to terminate employment of an employee unfairly, (2) A termination of employment by an employer is unfair if the employer fails to prove-

- (a) That the reason for termination is valid;
- (b) That the reason is a fair reason
- (i) Related to the employee's conduct, capacity or compatibility; or (ii) Based on the operational requirements of the employer, and
- (c) That the employment was terminated in accordance with a fair procedure." Not only that, the issue of reason for termination is well captured under International Labour Laws. Article 4 of ILO Convention also provides that: - "Article 4: The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operation requirements of the

undertaking, establishment or services." 14 From the above authority the validity and fairness of reason of termination is well captured by both municipal/local laws and international laws. On reason for termination, the applicant was terminated for allegedly committing misconduct (absenteeism). The applicant contended that, the respondent absconded for 11 days. This allegation was challenged by the respondent that her abscondment does not warrant termination on the reason that she was exercising her constitutional right of worship. I am alive to the position regarding consequence of absenteeism as provided under item 1 of the Guidelines of Disciplinarily Incompatibility Policy and Procedure (offences which may constitute serious misconduct leading to termination of an employee) in G.N No. 42 of 2007. The provision is to the effect that abscondment from work for more than five days without a justifiable reason constitutes a serious offence that warrants termination. On such legal stand, in relation to the disputed facts, the question placed before this Court is, did the respondent absence had a justifiable reason? If the question is positively answered, then the question regarding days of abscondment as contested by the litigants will be unraveled. 15 The right to worship is well preserved, not only in our constitution or our labour laws, but also is well provided under international law to the extent that no discrimination based on religion is highly scorned and indeed not tolerable. Section 79(4)(g) of the Employment and Labour Relations Act (supra) read together with Article 9 of the Constitution of United Republic of Tanzania, is to the effect that no employer shall discriminate an employee in any employment policy or practice on religion factor or ground. Internationally, Article 1 of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) defines discrimination to include any distinction, exclusion or preference made on the basis of religion among other factors which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. From the above authorities, I have no hesitation to hold that any employer's act which violates the right of the employee based on religion amounts to discrimination. In our instant application, it is vivid from exhibit P9 (Employer's policy) used by the applicant does not recognize Adventist day as a worship day to enable her accommodate respondent in her beliefs/religion. Regardless of that 16 there a clear testimony that, for long that has not been a problem as the respondent was allowed to practice her religion well for about ten years by the same employer. It is somewhat surprising learning how a person who had been well accommodated for about ten years, can be terminated based on the same factor of absence for her religious rituals well known to the other side? It is on record that, the respondent worked with applicant for about ten years and she never worked on Saturdays. She admitted writing a letter requesting to be exempted from working in Saturdays which was never replied to. But, provided she was not denied not attending work on Saturdays, she impliedly believed her request was accepted. She testified that, she was even at some point allowed to attend work on Sundays in some other braches which were working on Sundays. This fact was not countered by the applicant. That means it is true. In the case of Nyerere Nyague v R, Crim. Appeal No. 67 OF 2010, CAT it was held that:- "Unfortunately, the appellant did not cross examine PW1 on this to shake her credibility. As a matter of principle, a party who fails to cross examine a witness on a certain

matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said. (See Cyprian A. Kibogoyo v R Criminal Appeal No. 88 of 1992, 17 Paul Yusuf Nchia v National Executive Secretary, Chama Cha Mapinduzi And Another Civil Appeal No. 85 of 2005 (both Unreported) The question, that still remains is that, how could a decade tolerance on the fact be turned overnight to someone's detriment to the extent of violation of her right to work! With that in mind I agree with the respondent's argument that the reason for absence was well known to the applicant, thus, justifiable. As pointed out herein above, I have to say that the reason used in terminating respondent's employment was therefore unfair as it has all elements of religious discrimination. On that basis applicant's allegation regarding absconded days lacks legal stance. Regarding procedure, applicant's contention in this aspect is very specific and based on whether it was proper for the applicant to issue termination letter before the results of the appeal. According to Exhibit C8 (appeal outcome) and Exhibit C9 (termination letter of 30th March 2021) it is shown that the respondent was terminated before the final results of the appeal which was released on 28th April 2021. That means, the right to appeal was violated contrary to the law. Under item 9.13.1 of exhibit P9 (employers policy) it is provided that 18 affording an employee, the opportunity to appeal against a penalty is a fundamental right and principle of substantive fairness. Thus, as correctly argued by Mr. Akyoo, issuing termination letter before one exercising such fundamental principle based on the findings of the disciplinary committee was unprocedural. In our case, since respondent's termination was based on misconduct, after decision of disciplinary committee, an employee is afforded with an opportunity of appealing to the higher position of employer's management before termination (item 4 (12) of the Guidelines of Disciplinary Incompatibility Policy and Procedure (disciplinary hearing) in G.N No. 42 of 2007. This was not the case in the instant matter, because the termination letter was issued before right to appeal was exercised. In such circumstances, I have no hesitation to say that the respondent was terminated without observing procedure. Regarding remedy of reinstatement with no loss of remuneration awarded by the CMA, the applicant's counsel is of the view that, it was issued contrary to Rule 32 (1) (2) (b) of Labour Institutions (Mediation and Arbitration Guidelines) G.N. No. 67 of 2007. He argued that, relief is to be awarded depending on nature of the case. 19 And in the circumstances of our case, as long as the respondent is not ready to work on Saturdays while the employer policy (Exhibit C- 10 (Personnel Manual) specifically Part Three at page 21 item number 3.1.1, 3.1.2) includes Saturdays as working days and insists on the same, awarding reinstatement, makes continued employment relationship intolerable. That, the remedy of reinstatement should only be awarded when circumstances allows. He is therefore of the view that, the arbitrator should have used Rule 32(1) (2) (b) to order compensation rather than reinstatement. On the other hand Mr. Akyoo had a different view which he revealed by stating that the remedy that was prayed for in CMA Form No. 1 is reinstatement and that is what was testified on and finally granted without objection by the other side. Labour laws are not silent on what is to be awarded in case the arbitrator or Labour Court finds a termination is unfair, The issue of remedies available is governed by section 40 (1) of Cap 366 RE 2019 which states that; "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 20 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.
- (2) An order for compensation made under this section shall be in addition to, and not a substitute for, any other amount to which the employee may be entitled in terms of any law or agreement.
- (3) Where an order of reinstatement or re-engagement is made is made by an arbitrator or Court and the employer decides not to reinstate or re-engage the employee, the employer shall pay compensation of twelve months wages in addition to wages due and other benefits from the date to unfair termination to the date of final payment.” According to the above provision, the arbitrator is mandated to grant any of the above reliefs giving regard to circumstances of each case. The arbitrator did not grant the award of reinstatement without a reason. The reasons he advanced include that the respondent has only banking profession which makes her future employment elsewhere difficult or impossible. Also that, as a right to work is her constitutional right not reinstating her constitutes denying of her enjoyment of constitutional right. The above reasoning is correct and reasonable; I therefore, find no reason to fault CMA on the same. 21 The job security being a hallmark of the whole system of exercising one’s constitutional right to work in terms of the holding in the case of Augustine Masatu Vs. Mwanza Textile Ltd, Civil Case No. 3/1984, I assert that, the respondent should be allowed to enjoy this special right that was violated of flimsy and discriminatory reason of religion. This is especially because she is still young, hardworking as proved by the applicant herself. Therefore the remedy of reinstatement stood more suitable than the rest. If the employer is not comfortable with it, she should resort to the position under section 40(3) of ELRA quoted above. Based on the above findings, this application is found lacking merits. It is consequently dismissed. CMA award is upheld. Being a labour matter, I make no order as to costs. M. P. OPIYO, JUDGE 13/10/2023 22

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