IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: MUGASHA, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CIVIL APPEAL NO. 504 OF 2020

PANGEA MINERALS LIMITED..... APPELLANT
VERSUS
GWANDU MAJALI.....RESPONDENT

(Appeal from the Ruling and Order of the High Court of Tanzania (Labour Division) at Shinyanga)

(Makani, J.)

dated the 14th day of December, 2018
in
Labour Revision No. 34 of 2016

JUDGMENT OF THE COURT

23rd & 26th August, 2021.

MUGASHA, J.A.:

In this appeal, the appellant is faulting the decision of the High Court which was made in favour of the respondent against unfair termination. A brief background to the matter is to the following effect: The respondent was employed by the appellant as a senior mechanical filter from 01/11/2008. He was also a chairperson of the Branch of Trade Union for Mining Workers (TAMICO) at the place of work. Following misunderstandings between the parties, the respondent tendered resignation and subsequently instituted a complaint at the Commission for Mediation and Arbitration (the CMA) claiming constructive termination on ground that the appellant made

continued employment intolerable to the effect that, he was unfairly treated; denied salary increments and promotion; accused of concentrating mostly with the affairs of TAMICO and employer's failure to comply with contractual terms and conditions among others. He claimed to be paid compensation of not less than 36 months' remuneration for losing employment. In addition, he claimed to be paid repatriation costs in terms of attachment "A" as indicated at page 13 of the record of appeal.

The CMA was satisfied that the appellant made working condition intolerable to the respondent, which was tantamount to constructive termination. As such, it ordered that the respondent be paid 18 months' salary in terms of section 40 (1) (c) of the Employment and Labour Relations Act (CAP 366 R.E. 2002) (the ELRA). Undaunted, the respondent lodged a Revision application to the High Court seeking review of the CMA's award. The respondent was successful having won as the learned Judge of the High Court granted the following reliefs to the respondent: -

(a) Compensation of thirty-six (36) months' salary as prayed.

(b) Travel costs for four of the applicant's dependants to Dodoma as prayed.

(c) *Costs for transport of the applicant's personal effects to Dodoma as prayed.*

(d) *Daily subsistence allowance to the employee (not his dependants) from the date of termination to the date of payment.*

(e) *Severance allowance as prayed.*

The appellant has now come to this Court challenging the verdict of the High Court in a 5-point memorandum of appeal as hereunder reproduced: -

1. *The High Court erred in law in holding that the Respondent suffered several damages and hardship which was not alleged and proved in the Commission for Mediation and Arbitration.*
2. *The Honourable High Court Judge erred in law and in fact in substituting the Commission for Mediation and Arbitration award of 18 months salaries with 36 months salaries without valid justification.*
3. *The High Court erred in law and in fact in ordering that the Respondent is entitled to be paid travel costs for the Respondent and his dependants and transportation of personal effect to Dodoma.*

4. *The High Court erred in law and in fact in ordering that the Respondent is entitled to be paid daily subsistence from the date of termination to the date of payment.*
5. *The High Court decision is not supported by evidence adduced at the Commission for Mediation and Arbitration.*

At the hearing, the appellant was represented by Mr. Faustine Anthony Malongo and Ms. Caroline Lucas Kivuyo, both learned counsels. The respondent had the services of Mr. Bakari Chubwa Muheza, learned counsel. To bolster their arguments for and against the appeal, learned counsel adopted the written submissions earlier filed. In the course of hearing the appellant's counsel abandoned the 5th ground of appeal and we marked it so.

The appellant's counsel argued the first and second grounds together in which the High Court is faulted to have varied the award of the CMA basing on extraneous considerations on the alleged sufferings by the appellant which were neither pleaded nor proved at the CMA or the High Court. On this it was argued that, while the CMA judiciously exercised its discretion in making the award on ground that the employer made employment intolerable, the High Court varied the CMA's award basing on the post effects of the termination which was not a subject before the CMA. To support his propositions, he referred

us to the case of **ELIA KASAILE AND OTHERS VS INSTITUTE OF SOCIAL WORK**, Civil Application No. 187 of 2018 (unreported) where the Court is said to have interpreted the general discretionary powers in determining compensation which is specifically provided under section 40 (1) (c) of the ELRA.

Pertaining to the 3rd ground, the High Court is faulted to have ordered that the respondent be paid travel costs for his dependants and personal effects. It was the appellant's counsel argument that since the respondent was paid a cash sum of TZS. 155,000/= and had adduced no contrary evidence on the sum being not sufficient, the appellant was absolved from liability in terms of section 43 (1) of the Act. Therefore, it was the appellant's counsel argument that the order by the High Court that the respondent be paid travel costs of four dependants and personal effects to Dodoma is unjustified. Finally, and which addresses the fourth ground of appeal, it was argued that since the respondent was paid repatriation costs, he was not entitled to any subsistence allowance as found by the learned High Court Judge. Ultimately, the learned counsel urged the Court to allow the appeal, quash the decision of the High Court and reinstate the award of the CMA.

On the other hand, the appeal was opposed by the respondent whose learned counsel's reply to the appellant's submission was to the effect that: The decision of the High Court in varying the award of the CMA is justified because, the learned Judge considered circumstances surrounding the case in concluding that the respondent who suffered damages is entitled to salaries of 36 months. To back up this proposition, the case cited was **ACCESS BANK TANZANIA VS RAPHAEL DISMAS** [2015] 1 LCCD 53. He distinguished the case of **ELIAS KASALILE AND OTHERS** (*supra*) on ground that, it is irrelevant because the Court refused to deal with the question of discretionary powers as a ground of review. He as well added that, the High Court in exercising discretion to award compensation, is not barred from interfering with the award of CMA.

Pertaining to the complaint for payment of repatriation costs, it was contended that the sum of TZS. 155,000/= paid to the respondent was not sufficient to cater for the entire repatriation costs and as such, the intervention by the learned Judge of the High Court that repatriation costs be paid was justified. Thus, it was finally submitted that, in the absence of full payment on the repatriation costs, the respondent could not move to the place of recruitment and therefore,

he was entitled to be paid subsistence allowance as correctly found by the High Court.

We are aware 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.*

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), 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 (now R.E. 2019). Having referred to among others 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:

> *"Thus, for the purpose of section 25 (2) of the TRAA, we think, 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 applied in the labour case of **CGM TANZANIA LIMITED VS JUSTINE BARUTI**, Civil Appeal No. 23 of 2020 (unreported). We shall thus be accordingly guided by among other the said principle in determining the present appeal in particular the third ground of complaint which is in relation to the sufficiency or otherwise of the repatriation costs. Section 43. -(1) of the Employment and Labour Relation Act, regulates what constitutes repatriation costs in the following terms:

"Section 43(1); *Where an employee's contract of employment is terminated at a place other than where the employee was recruited, the employer shall either-*

(a) Transport the employee and his personal effects to the place of recruitment,

(b) Pay for the transportation of the employee to the place of recruitment, or

(c) Pay the employee an allowance for transportation to the place of recruitment in accordance with subsection (2) and daily subsistence expenses during the period, if any, between the date of termination of the contract and the date of transporting the employee and his family to the place of recruitment."

In the light of the cited provision, when an employee's contract is terminated at a place other than where the employer was recruited, the employer is obliged to cover costs for transport. That being the case, the transport costs for the employee, his dependents and his personal effects are statutory entitlements as claimed by the respondent in Attachment 'A' which was part of the pleadings before the CMA. While it is not disputed that the respondent was paid only TZS. 155,000/=, however, the respondent is on record to have

challenged the sum not being sufficient having not covered transportation costs for his dependents and of his personal effects from Kahama to Dodoma. The appellant before the CMA did not dispute the claims of transport costs claimed by the respondent in Attachment 'A'. That being the case, this ground of appeal deviates from being point of law to a factual issue because the issue is on the sufficiency of the amount paid by the appellant to the respondent.

Apparently, the adequacy or otherwise of repatriation costs was not determined by the CMA. However, at page 163 of the record of appeal, it was addressed by the High Court as follows: -

> *"It is apparent from the above quoted provisions that since it was established by the CMA that the termination of the applicant was constructive then, he was entitled to severance pay, transport and leave pay as provided for under sections 42, 43 and 44 of the ELRA. According to the termination letter (annexure 15) dated 04/07/2013 the applicant was paid salary up to 20/07/2013, 77 leave days earned but not taken and repatriation fee to Dodoma TZS 155,900/= in cash. It is obvious that the applicant was not paid his severance pay, notice pay, transportation of the employee's family and his personal effects*

to Dodoma or allowance for transportation and subsistence allowance for him and his family. Failure by the CMA to order payment of these benefits to the applicant was not proper and contrary to the law. Subsequently, the applicant is entitled to all the terminal benefits that he has not been paid according to the law."

Finally, the High Court at page 197 of the record, ruled among others the following:-

"(b) Travel costs for four of the applicant's dependants to Dodoma as prayed.

(c) Costs for transport of the applicant's personal effects to Dodoma as prayed".

In the circumstances, in the absence of any complaint that there was a mishandling of the evidence on the matter and we found none, the sufficiency or otherwise of the payment of repatriation costs was well addressed by the High Court and it being a matter of fact and not of law, it cannot be entertained by the Court. Thus, since it was determined by the High Court, it ends there and this renders the complaint in the 3rd ground not merited and it is hereby dismissed.

Next for consideration is ground 4 whereby the appellant is faulting the High Court in ordering that the respondent is entitled to

be paid daily subsistence allowance from the date of termination to the date of payment. It is settled law that, the rate of subsistence allowance pending repatriation, is calculated on the basis of daily salary of a monthly salary for the whole period the respondent awaits payment of repatriation or travel expenses. See the case of **JUMA AKIDA SEUCHAGO V. SBC (TANZANIA) LIMITED,** Civil Appeal No. 7 of 2019, **ATTORNEY GENERAL V. AHMED YAKUTI & 2 OTHERS**, Civil Appeal No. 49 of 2004.

In the instant case, as the respondent was not paid the repatriation costs in full, he could not move to Dodoma leaving behind his dependants and personal effects in Kahama. Thus, as correctly found by the High Court the appellant is liable to pay the respondent the subsistence allowance pending payment in full of the repatriation expenses. Thus, the 4th ground of appeal is bound to fail and it is hereby dismissed.

As to the 1st and 2nd grounds, as earlier stated, the complaint is on the quantum of compensation and parties locked horns on the variation of the CMA's award by the High Court. We are aware that, section 40 (1) of the ELRA gives the arbitrator and the Labour Court discretion to make award of compensation which is not less than twelve months' remuneration. It is settled law that the discretion must

be judiciously exercised and if not, the higher court can interfere with the same.

In the South African case of **DR D.C. KEMP t/a CENTRALMED AND MB RAWLINS**, Case No. JA 11/06, the Labour Court of Appeal of South Africa considered the extent to which discretion can be exercised by the Labour Court in reviewing the decision of arbitrator's exercise of discretionary powers:-

> *"... the arbitrator or the Labour Court has a discretion to decide on the appropriate amount. The parameters do not hinder the choice; it merely sets the outer limits beyond which the arbitrator or the Labour Court may not go. Within the limits, however, the arbitrator or the Labour Court may make any decision which it considers to be the correct one.*
>
> *.... When dealing with a discretion however ..., the Court must consider if the arbitrator or the Labour Court properly took into account all the factors and circumstances in coming to its decision and that the decision arrived at is justified..."*

Here at home, the Court considered circumstances upon which an appellate court can interfere with the exercise of discretion of an inferior court or tribunal to be: **One,** if the inferior Court misdirected itself; or **two,** it has acted on matters it should not have not have acted; or **three,** it has failed to take into consideration matters which it should have taken into consideration and **four,** in so doing, arrived at wrong conclusion. See**: CREDO SIWALE VS THE REPUBLIC**, Criminal Appeal No. 417 of 2013 and **MBOGO AND ANOTHER VS SHAH** [1968] EA 93.

In **SODETRA (SPRL) LTD V. MEZZA & ANOTHER** Labour Revision No. 207 of 2008, it was held by the High Court that;

> *"...a reading of other sections of the Act gives a distinct impression that the law abhors substantive unfairness more than procedural unfairness, the remedy for the former attracts a heavier penalty than the latter..."*

Subscribing to the stated proposition above, in the interpretation of section 40 (1) (c) of the ELRA in the case of **FELICIAN RUTWAZA VERSUS WORLD VISION TANZANIA**, Civil Appeal No. 213 of 2019, the Court stated that;

> *"We respectfully subscribe to the above interpretation, for we think it is founded on*

logic and common sense; it reflects a correct interpretation of the law. Under the circumstances, since the learned Judge found the reasons for the appellant's termination were valid and fair, she was right in exercising her discretion ordering lesser compensation than that awarded by the CMA. We sustain that award".

In the case at hand, there is no contention on the substantive unfairness which amounted to constructive termination. This, according to Rule 7(3) of the Employment and Labour Relation Act, (Code of Good Practice) GN No. 42 of 2007 was similar to unfair termination of employment. While the arbitrator awarded 18 months' compensation the High Court reversed it and awarded 36 months. The test here is whether the discretion was judiciously exercised. At page 99 of the record of appeal the CMA treated it as follows: -

"Hoja ya mwisho, ni nafuu ipi inastahili kwa kila upande. Mlalamikaji kwa mujibu wa CMA F. 1 aliomba kulipwa fidia ya mishahara ya miezi 36. Kama hoja iliyotangulia ilivyojibiwa na kubalni kuwa mlalamikiwa alifanya ajira ya mlalamikaji kushindwa kuvumilika na hivyo kupelekea mlalamikaji kuacha kazi. Kwa msingi huo ninaamuru kuwa mlalamikiwa amlipe mlalamikaji mishahara ya miezi kumi na

nane (18) kwa mujibu kifungu cha 40(1) (c) cha Sheria ya Ajira na Mahusiano Kazini Na. 6 ya 2004.

> *"40. (1) kama Muamuzi au Mahakama ya Kazi itathibitisha kuwa uachishwaji kazi si halali, Muamuzi au Mahakama inaweza kumwamuru mwajiri: -*
>
> *(c) kumlipa mwajiriwa fidia ya ujira usiopungua miezi kumi na mbili" (Msisitizo umeongezwa)."*

At page 165 of the record of appeal, apart from the High Court acknowledging the intolerable working conditions caused by the appellant, it faulted the CMA in granting 18 months' salary as compensation and made the following finding at page 165 of the record of appeal as follows:-

> "*...the applicant claimed to have suffered a lot because his employment was cut short, he suffered health problems and his objectives in life and the education of his children were shaken. The issuance of compensation is pegged on the fact that the sum of money would be awarded would put a party who has been injured, or suffered in the same position as he would have been if he had not sustained*

the wrong which he is now getting compensation..."

We agree with the appellant's counsel that reasons given by the learned High Court were indeed extraneous and were in relation to the post termination which was never addressed be it at the CMA or the High Court. It was incumbent on the learned High Court in revising the decision of the CMA to consider if the arbitrator took into account all factors and circumstances in arriving at its decision and if the decision was justified. We are fortified in that regard, because sitting in revision, the High Court was required to consider if the arbitrator made a proper evaluation of all the facts and circumstances and whether or not the decision was judicially a correct one.

In the present matter, we have gathered that, not all the factors and circumstances were considered by the arbitrator in arriving at the compensation payable to the respondent. The appellant's deliberate denial of promotion and salary increments were not considered by the arbitrator though listed as among the concerns which adversely affected the respondent in this case of substantive unfairness whose remedy attracts a heavier penalty than procedural unfairness. In this regard, besides the extraneous reasons she gave which as earlier stated which we to not agree, since the learned Judge found the

respondent's termination was substantively unfair, she properly exercised her discretion ordering greater compensation than that awarded by the CMA. We thus uphold the verdict of the High Court that the respondent be paid compensation for thirty six (36) months' remuneration for the constructive termination.

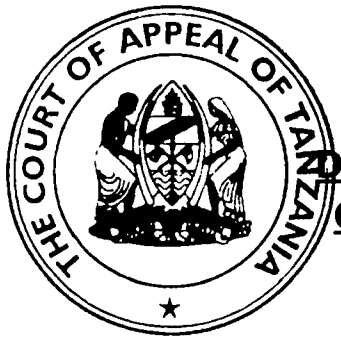
DATED at **SHINYANGA** this 25th day of August, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

This Judgment delivered this 26th day of August, 2021 in the presence of Mr. Faustine Mwalongo learned counsel for the Appellant and Mr. Audax Costantine holding brief of Mr. Bakari Chubwa Muheza, learned counsel for the Respondent, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL