

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT MBEYA

REVISION NO.07 OF 2020

(Originated from the Award of the Commission for Mediation and Arbitration for Mbeya in Complaint No. CMA/MBY/CHY/114/2018)

BETWEEN

OTTER MINING LIMITED.....APPLICANT

VERSUS

MAJENGO ATHUMANI MOHAMEDRESPONDENT

JUDGMENT

Date of Judgment: 25/11/2020

A. J. Mambi, J.

This is an application for revision of the Commission for Mediation and Arbitration (CMA) at Mbeya Decision and award dated 14-04-2020 from the Complaint No. CMA/MBY/CHY/114/2018. The application was brought under Section 91(a)(b), (c) and Section 94 (1) (b) of the Employment and Labour Relations Act No.6 of 2002 and Rule 24(1) & (2) (a), (b), (d) (e) (f) and 3 (a) (b), (d) and Rule 28(1), (b), (c) of the Labour Court Rules G. N. No.106 of 2007.

The application is supported by an affidavit sworn by one **GODLIVER CLEVER BISGORO**. In the affidavit, the applicant faults the CMA awards, in his chamber summons supported by an affidavit, the applicant presented the following prayers to this court:

- 1. That, the Matter at the Commission for Mediation was time barred*
- 2. That, the award of the CMA was tainted by irregularities and error materials thereby causing injustices*

During hearing, the applicant was represented by the learned Counsel Mr. Mchome, while the Respondent was represented by the learned Counsel Mr. Msuya.

The applicant Counsel Mr. Mchome submitted that the dispute before the Commission for Mediation and Arbitration was time barred and the Commission ought to have dismissed it. He argued that since the dispute was filed on 05 October 2018 as it was on record in the CMA award, that dispute was filed outside the 30 days limitation period set under rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, 2007, GN 64 of 2007. He referred the decision of the court in **Tanzania Breweries Limited v. Edson Muganyizi Barongo & others**, Miscellaneous Labour Application No. 79 of 2014, High Court of Tanzania (Labour Division) at Dar es Salaam at page 16.

In his second ground the applicant contended that the award by CMA is tainted by material irregularity and error material to the merits of the subject matter of the case thereby occasioning

injustice. The learned Counsel submitted that in the evidence by the respondent before the CMA, implies that the respondent resigned because his employment was intolerable contrary from what complained before the CMA. He referred the decision of the court in **Matra Tanzania Ltd v. Joaquim P. Boniventure**.

In response, the learned Counsel for the respondent Mr. Faraja Msuya submitted that the respondents don't agree with grounds submitted by the applicant counsel. He argued that the records such as CMA proceedings at page 10 show that the applicant testified that the dispute arose on the 16th day of June, 2020. He argued that records at page 11 of the CMA's proceedings, applicants witness Lowell. A. Briscoe admitted that he was the immediate boss of Mr. Majengo. He averred that the matter at the CMA was not time barred. The learned Counsel contended that The Applicant in his written submission has not addressed on the evidence and what transpired at the CMA part from just focusing on the statement and the award. Mr. Msuya averred that the applicant contends that the respondent was aware that his employment has been terminated since August when he was denied Air Ticket to return at his duty station surprisingly by one Godliver Clever Bisgoro, who not only was not an immediate boss of the respondent but did not even testify at the CMA. The applicant has further cited a Non-existence Legislation. The learned Counsel in his submission has cited non-existed law that is the Electronic Evidence Act, No. 13 of 2015. He was of the view that the relevant law is The Electronic Transaction

Act, No. 13 of 2015 but the applicant cited the law that does not exist in Tanzania.

Mr. Msuya further submitted that it is not true that the CMA award is tainted with irregularity and error material. He argued that the Applicant is trying to misdirect this Honourable Court. He submitted that the respondent correctly wrote constructive termination as a mode of which he knew of his termination. He argued that the CMA addressed itself on the three main issues namely whether there was termination of complainant's employment, whether the termination of employment was lawful and substantively fair and to what reliefs the parties are entitled to.

The learned Counsel for applicant the Arbitrator correctly guided herself on the claims by the respondent and awarded the same within the ambits of the Labour Laws and Regulations after being satisfied by the evidence tendered that the respondent was unlawfully terminated from employment. He argued that the arbitrator confined herself on the legal entitlements of which the respondent is entitled that is twelve months' salary to the tune of USD 19,800, repatriation costs (bus fare) to the tune of USD 28.9, subsistence allowances from the date termination was contemplated till the date of repatriation, Notice pay USD 1,650, severance pay USD 444 and a clean Certificate of Service.

With regard to the applicant counsel submission that the reliefs to respondent were not proved, the respondent Counsel argued that this is not true, as the respondent proved this case. He argued that

the Evidence tendered by both parties was well analyzed by the CMA before the award was made.

I have keenly perused the documents and the whole file to satisfy myself on the issues raised by both parties. I have also gone through the submissions by both parties. In my considered view, the applicant's claims may form two main issues, that is whether the matter at the CMA was time barred or not. The other issue is whether the decision of the CMA was tainted by irregularities or not. My perusal from the records reveal that the application was brought timeously before the CMA within the legal requirements of 42 days. This means that the application is in any event was not time-barred. The claim by the applicant on the time limit has no merit. It is on the records that the dispute arose on the 6th of September 2018 and the respondent filed his complaint in time on the 05th October, 2018 within the required time limit.

The other issue is whether any irregularities or errors materials that led to injustice to any party. My perusal from the records and evidence at the CMA show that the respondent was unfairly terminated and the procedures for termination were not followed in line with the Employment and Labour Relations Act. I am aware that law is clear that the termination of employment by an employer will be unfair if the employer fails to prove, as provided under section 37 (2) of the Act. I also wish to refer the decision of the court in **ISSAS MAULID MANGARA & SALEHE KITAPWA vs.**

TANZANIA RAILWAYS LTD [2015] LCCD 57 where the court observed that:

“...procedural justice and substantive justice are two inseparable wings which fly together into which the absence of the other makes the other meaningless. Procedural justice acts as a complement to substantive justice; it gives life to substantive justice hence procedural justice cannot be overlapped under the umbrella of substantive justice.”

Having observed that the respondent was unfairly terminated, the question is, was the respondent entitled to be paid such reliefs ordered by the CMA? The applicant in his claim has briefly submitted that the CMA made fundamental errors and irregularities in its decision. The applicant Counsel was of the view that since the findings of the Arbitrator was tainted with irregularities this court needs to revise that decision. However, the applicant has not clearly indicated those irregularities apart from just focusing on the opening statement of the award.

My perusal from the records show that the arbitrator made the proper decision basing on the provisions of the law. There is no dispute as indicated by the records that the termination of the respondent by his employer was unfair and the legal procedures were not followed. The question to be asked is that the CMA having found that the respondent was improperly terminated from his employment, now what was the proper order? In my view the CMA made a proper order of awarding the respondent the compensation given the circumstance of the relationship between the employer

(applicant) and employee (respondent). I wish at this juncture to refer the relevant provision of the law. In this regard I will refer section 40 (1) of the Employment and Labour Relations Act, [Cap. 366 R. E. 2018] which read as follows:-

*“if the 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 month’s remuneration.”*

Reference can also be made to the provision of Rule 32 (1)(2)(a-d) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007 (G. N. No. 67 of 2007) which provides that:

“32 (1) 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

(2) the arbitrator shall not order re-instatement or re-engagement where:-

- (a) the employee does not wish to be re-instated or re-engaged*
- (b) the circumstances surrounding the termination are such that a continued employment relationship would be intolerable;*
- (c) It is not reasonably practical for the employer to re-instate or re-engage the employer; or*

(d) Termination is unfair because the employer did not follow a fair procedure”.

Reading between the lines the above provision of the law are clear that where an employee is unfairly terminated and the relationship between the employer and employee is intolerable, the only option is the employer to pay an employee the compensation that is fair in accordance with the provisions of the laws as rightly done by the CMA. Of course that discretion of ordering compensation must be judiciously done as the arbitrator did in the matter at hand. The position was also cemented by the court in **National Bank of Commerce vs. Aliamin Mbeo (Revision No. 55 of 2013, 10/09/14**, the Labour Court Case Digest of 2014, where the court precisely held that:

“Generally an Arbitrator has discretion to award or not to award any of the remedies provided under Section 40 (1) or (b) or (c) following a finding of unfair termination(emphasis supplied with)

Reference can also be made to the decision of the court Appeal in **Elia Kasalile and 17 others vs. Institute of Social Work, Civil Application No. 187/18 of 2018** where the court at page 16 held that:

“...the discretion to award any of the above stipulated three reliefs once it finds that the termination of employment is unfair. This being a judicial function, the discretion must judiciously be exercised. This is the position of the law as it now stands. It vests the arbitrator and the court

with the discretion to decide which remedy or relief fits certain circumstances.”(emphasis supplied with)

I have gone through the records with regard to the employment and termination of the applicant; I don't see any irregularity or any material error made by the CMA. Indeed the arbitrator went further to ward even the claims that were not pleaded by the respondents without any justification. My thorough perusal have observed that the CMA did judiciously used its discretion powers under section 40 (1) (c) of the Employment and Labour Relations Act No.6 of 2004. Indeed Section which deals with Remedies for unfair termination provides that:

(1) If 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*

(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 by an arbitrator or court and the employer decides not to reinstate or reengage the employee, the employer shall pay compensation of twelve months wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment”.

The above provision especially (2) (c) gives discretionary powers to an arbitrator to award pay compensation to the employee of not less than twelve months' remuneration.

All in all my perusal from the records reveal that the arbitrator made her decision with reasons.

In this regard I entirely agree with the respondent Counsel that the Arbitrator was right in her decision to order the employer to pay the employee the compensation for unfair termination. This means that complaint by the applicant that the arbitrator's decision was tainted by irregularities is devoid of merit.

In the premises and basing on the above reasoning, I have no reason to fault the findings reached by the CMA rather than upholding its decision. This means that I am in agreement with the decision and findings of the arbitrator for Commission for Mediation and Arbitration (CMA). I have indeed gone through all issues and complaints raised by the applicant and found the CMA properly addressed itself to all issues and rightly made a decision in its award.

In the event as I reasoned above, this application is non-meritorious hence dismissed. Given the circumstance of this case, each party shall bear its own costs.

A handwritten signature in blue ink, consisting of a large, stylized 'M' followed by a series of loops and a long horizontal stroke.

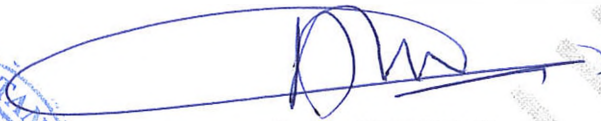
A.J. MAMBI, J
JUDGE
25.11.2020

Judgment delivered in Chambers this 25th day of November 2020 in presence of both parties.



A.J. MAMBI
JUDGE
25.11.2020

Right of appeal fully explained.



A.J. MAMBI
JUDGE
25.11.2020

Labour Court TZ.