IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

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

CIVIL APPEAL NO. 213 OF 2019

FELICIAN RUTWAZA. .....APPELLANT

VERSUS

WORLD VISION TANZANIA .....RESPONDENT

[Appeal from the decision of the High Court of Tanzania (Labour Division) at Bukoba]

(Madam Justice S. A. N Wambura)

dated the 23rd day of February 2018

in

Labour Revision No. 1 of 2018

JUDGMENT OF THE COURT

8th December, 2020 & 2nd February, 2021

MWANDAMBO, J.A.:

Felician Rutwaza, the appellant herein, is before the Court faulting the decision of the High Court (Labour Division) sitting at Bukoba which quashed the award of the Commission for Mediation and Arbitration (the CMA) it made partly in his favour in a labour dispute against unfair termination.

Briefly, the appellant was an employee of the respondent. He had a two years employment contract running from 1st September 2014

through 31st August 2016. Almost halfway its duration, the respondent terminated the contract vide letter dated 29th September 2015 (exhibit P10) on account of alleged misconduct on the part of the appellant citing two grounds namely; involvement in politics and gross dishonesty for an alleged submission of fake academic certificates. However, the appellant successfully challenged the termination for being unfair both on substantive and procedural grounds. Through CMA form No. 1, the appellant asked the CMA to award him compensation and an order for reinstatement into employment.

The CMA found no satisfactory evidence of misconduct on the part of the appellant to warrant termination on any of the grounds cited by the respondent. Besides, the CMA found the respondent guilty of flouting the procedure in terminating the appellant without affording him the right to be heard. Having sustained the claim, the CMA awarded the appellant an assortment of reliefs ranging from compensation, salaries for the unexpired term of the contract and subsistence allowance all amounting to TZS 126,030,000/=.

Aggrieved, the respondent challenged the award made by the CMA by way of revision before the High Court. To a large extent, the High Court (Wambura, J.) quashed the impugned award particularly on the

findings in relation to the substantive unfairness of the appellant's termination holding that there was sufficient evidence proving that the appellant had engaged in politics thereby breaching the employment manual (exhibit D2). Likewise, the High Court sustained the respondent's complaint on the appellant's gross dishonesty manifested by presentation of fake academic certificates. However, that court concurred with the CMA that the respondent breached the rules of natural justice by terminating the appellant without affording him the opportunity to be heard. Put it differently the High Court found the appellant's termination on substantive ground as fair but unfair on procedural grounds. Ipso facto, the lower court's holding on the fairness of appellant's termination on substantive grounds had a bearing on the reliefs the CMA awarded in his favour. It made a substantial interference thereon particularly on compensation, salaries for the unexpired term and subsistence allowance.

The High Court faulted the CMA for awarding 12 months' salaries compensation in a case where the respondent had valid reason for terminating the appellant. It thus reduced it to 3 months' salaries. In the same vein, the learned High Court Judge found no legal justification for condemning the respondent to pay the appellant for unexpired term of

his contract parallel with compensation holding that it was contrary to the spirit of section 40 (2) of the Employment and Labour Relations Act, [Cap. 366 R.E 2019] ("the ELRA"). The High Court concurred with the CMA that the appellant was entitled to payment of subsistence allowance from the date of the impugned termination to 4th April 2016 when the respondent paid him repatriation expenses. However, it took the view that the appellant was entitled to subsistence allowance equivalent to his daily salary as against per diem which had been ordered by the CMA. It thus ordered payment of TZS 4,864,794/= as subsistence allowance for six months during which the appellant awaited payment for his repatriation.

In sum, the High Court ordered the respondent to pay the appellant TZS 7,294,794/= on top of what he had already been paid. Naturally, the order did not amuse the appellant and hence the instant appeal predicated on four grounds.

Ground three is dedicated to an issue of law and so we prefer to dispose it ahead of the rest. The appellant faults the High Court for granting leave to the respondent leading to the filing of Labour Revision No. 1 of 2018 contrary to the law. During the hearing, the appellant who appeared in person, unrepresented, contendedthat the High Court

improperly granted leave to the respondent to file Labour Revision No. 1 of 2018 which was already time barred. He impressed upon us that the High Court shouldhave dismissed the application before it for being time barred.

Mr. Nuhu Mkumbukwa, learned advocate appeared for the respondent. He urged us to dismiss this ground for being baseless. We respectfully endorse his submission to which the appellant had nothing in rebuttal. It is trite that section 91(1) (a) of the ELRA sets time limit of six (6) weeks for applying for revision from the award of the CMA.The record shows (at page 135), that the CMA handed down its award on 1st July 2016. The respondent filed her revision (No. 9 of 2016) on 27th July 2016 well within six weeks from the date of the award. However, due to some technical defects, the High Court struck out that application on 9th November 2017 with an order for filing a fresh one within fourteen (14) days to which the respondent complied on 13th November 2017 vide Labour Revision No. 8 of 2017. By reason of the failure by the respondent to attach a copy of the order granting leave to refile that application, the High Court found it wanting at the instance of the appellant. Yet again, it ordered the respondent to refile a proper

application which she did on 18th January 2018 vide Labour Revision No. 1 of 2018.

In view of the foregoing, we find no basis in the appellant's argument that the application in Labour Revision No. 1 of 2018 the subject of this appeal was time barred for the alleged improper grant of leave to refile it after the High Court had struck out the previous application.

As rightly submitted by Mr. Mkumbukwa, the Labour Division of the High Court was right in exercising its discretion granting leave to refile a proper application. In our view, that Court acted consistent with Rule 3 (1) and 55(1) of the Labour Court Rules, 2007 G.N. No. 106 of 2007 (the Rules) made under section 55 (1) of the Labour Institutions Act, [Cap. 300 R.E.2019]. The former rule provides that the Labour Court shall be a court of equity whilst the latter empowers it to adopt any appointed procedure for any matter not provided for. Better still, rule 55(2) of G.N. No. 106 enjoins the Labour Court to act in a manner it considers expedient in the circumstances with a view to achieving the objects of the Act and, or the good ends of justice. There is no complaint that the High Court acted inconsistent with the objects of the Act neither is there any suggestion that it acted for any purpose other

than meeting the good ends of justice. Neither is there any indication that the High Court exercised its discretion injudiciously. In the upshot, we dismiss ground three for lack of merit, which takes us to ground one.

The appellant's complaint in ground one is that the High Court erred in holding that the respondent proved that there were fair and valid reasons for his termination from employment. It is the appellant's further complaint that the respondent terminated his contract on the basis of suspicions and doubts it had. Apparently, he focused his attack on the ground involving his engagement in politics. He had no complaint whatsoever against the other reason for his termination; gross dishonesty sustained by the High Court.

The appellant's bone of contention was that the respondent failed to discharge its burdenof proving that he had engaged himself in politics in the course of employment. On the contrary, the appellant argued that he contestedfor councillorship after his termination from employment and not before. The appellant faulted the learned Judge of the High Court for relying on statements made during mediation as a basis for her decision holding as she did that there was proof that the appellant had engaged himself in politics in contravention of the employment manual.

Mr. Mkumbukwa argued in reply that contrary to the appellant, the termination, vide letter dated 29th September 2015,was a result of his engagement into politics by contesting as acouncilor. The learned advocateinvited us to accept that since the councillorship was an elective post entailing a long process before he was nominated by his party and eventually appointed by the electoral body, it could not have been possible for him to have been nominated and appointed after his termination from employment. He thus urged us to dismiss this ground.

The appellant submitted in rejoinder that the duty to prove that he engaged in politics during employment was on the respondent which she failed to discharge.

Our starting point in determining this ground is exhibit D2 which lists down serious offences which can justify termination. One of such offences is involvement in political activities which may interfere with work or interests of the respondent. It was common ground that the appellant contested for councillorship through Chama Cha Mapinduzi during the 2015 general elections and was elected as such. The only dispute was whether the appellant's involvement in political activities began after his termination from employment on 29th September 2015. The appellant was adamant that he was appointed to contest for

councillorship post and started his campaigns on 16th October 2015. The CMA accepted that proposition which was not shared by the High Court. Relying on the proceedings during mediation forming part of the record in the revision and this appeal, the High Court was satisfied that the appellant had admitted his involvement in politics as early as 1st July 2015 and got appointed by the National Electoral Commission on 1st August 2015 to contest for Ikondo ward, Muleba District as shown at page 26 of the record. It thus held that there was a fair and valid reason justifying the appellant's termination.The appellant invited us to hold that that was irregular because the High Court was not justified in relying on statements made during mediation.

We have no doubt that the appellant had in mind rule 17(1) of the Labour Institutions (Mediation and Arbitration) Rules, G. N. No. 64 of 2007. That rule bars any person from referring to anything said during mediation at any subsequent proceedings unless parties agree in writing. To that extent the appellant is right. Ordinarily, the proceedings of the abortive mediation ought not to have been made part of the record before the High Court and so any reference to it was, with respect, improper. Be it as it may, we think the outcome would have been similar independent of the appellant's admission during mediation.

We say so considering the submissions made by Mr. Mkumbukwa to the effect that the appellant's election as a councilor entailed a long process of intra party nominations, appointment by the electoral commission, campaigning and election. We are aware and indeed we take judicial notice of the election process in our country under the relevant laws. In our view, it could not have been practically possible for the appellant to have started involving in politics immediately after his termination and complete the process of nomination and appointment as a contestant for councillorship in just two weeks. The learned High Court Judge had similar misgivings and we think she was justified.

At any rate, had we sustained the appellant's complaint and agreed with him that there was no evidence of him involving himself inpolitics, he would still have anotherhurdle to surmount in assailing the decision of the High Court on the fairness of the termination. We alludedearlier that the High Court sustained the respondent's reasons for termination not only on the appellant's involvement in politic but also on gross dishonesty. The appellant did not challenge that finding in this appeal; it remains intact. In the event, like the learned High Court Judge, we are satisfied thatthe respondent had valid and fair reasons for terminating the appellant's contract for gross misconduct by reason of

his involvement in politics in contravention of the employment manual and for gross dishonesty. It will now be plain that the respondent terminated the appellant's contract on the basis of gross misconduct which the High Court found proved on the required standard and not on any degree of suspicions or doubts as contended by him. In the upshot, we dismiss ground one for being bereft of merit.

In ground two the appellant faults the High Court for quashing the CMA award and substituting reliefs which lacked legal backing. The appellant's main contentions were on the items the High Court disallowed as part of his reliefs after his impugned judgment namely; payment of one month's salary in lieu of notice, leave entitlement, subsistence allowance pegged on TZS 120,000.00 per day from the date of termination to the date when he was repatriated to his place of recruitment. Similarly, he faulted the High Court for quashing the award on the underpayment in repatriation expenses from the place of work; Katerero ADP to his place of recruitment. The appellant was adamant that he was entitled to all those reliefs which the CMA found to be lawfully due to him but the High court disallowed them. With particular emphasis and undeniably not surprising, the appellant argued forcefully that there was no basis for denying him subsistence allowance pegged

on per diem of TZS 120,000.00 he used to get whilst outside duty station for which there was no dispute. He criticized the High Court for relying on the Employment and Labour Relations (General) Regulations, 2017 which were not in force on the date of his termination as a basis of determining the subsistence allowance payable to him.

Mr. Mkumbukwa combined his submissions in ground 2 and 4 understandably so because they are interrelated. For ease of reference, ground 4 the appellant faulted the High Courtfor not awarding him a minimum amount of compensation provided by the law. For a start, the learned advocate had no serious contest on the appellant's entitlement to payment of one month's salary in lieu of notice. He was likewise man enough to concede that the cutoff point for the purpose of computation of subsistence allowance was 4th April 2016 the date on which the appellant acknowledged payment of repatriation costs. The learned advocate had serious contest on the rest of the items including underpaid repatriation costs, quantum of subsistence allowance and salaries for the unexpired term of contract.

With regard to the subsistence allowance, the learned advocate argued that the High Court rightly disturbed the award by CMA for being legally misconceived. Whilst conceding that at the time of the labour

dispute there was no specific legal provision prescribing the rate of subsistence allowance to an ex-employee awaiting repatriation, this Court had already provided an interpretation of the subsistence allowance as evident from decided cases particularly; **Attorney General v. Ahmed Yakuti,** Civil Appeal No. 49 of 2004, **Paul Yustus Nchia v. National Executive Secretary, Chama Cha Mapinduzi & Another,** Civil Appeal No. 85 of 2005, **Attorney General & 2 Others v. Eliud Massawe & 104 Others,** Civil Appeal No. 82 of 2002and **Juma Akida Seuchango v. SBC (Tanzania) Limited,** Civil Appeal No. 7 of 2019 (all unreported).

As to payment of salaries for the unexpired term, Mr. Mkumbukwa was emphatic that this was not only un-pleaded but also it amounted to double payment considering that the appellant was paid compensation for unfair termination. He also argued that apart from the fact that payment for the unexpired term is not backed by law, there is no guarantee that the appellant would have worked up to the end of his contract.In relation to compensation, the learned advocate submitted that the High Court was right in reducing the amount from 12 months' salaries to 3 months considering that the termination was found to be fair on substantive grounds. Counsel argued that the learned Judge had

discretion to do so on the strength of section 40 (1) of EALR read together with the Employment and Labour Relations (Mediation and Arbitration) Guidelines, 2007. He sought reliance from **Sodetra (SPRL) Ltd v. Njelu Mezza & Another,** Labour Revision No. 207 of 2008 (unreported)in support of lesser compensation where the unfairness of termination is on procedural ground only and vice versa. The learned advocate implored the Court to dismissboth grounds for being destitute of merit.

The appellant directed his argument in rejoinder on subsistence allowance and entitlement to a balance on repatriation costs. He had two arguments in relation to subsistence allowance. One, existence of evidence that he used to get TZS 120,000.00 per day as outstation subsistence allowance. Two, there was no dispute on the payment and no challenge was made against it. He distinguished the application of **Paul Yustus Nchia**'s case (supra) to the instant appeal. With regards to repatriation,the appellant joined issue with the respondent'slearned advocate on the amount payable arguing that he was terminated at Katerero and so computation of his repatriation expenses should have been made from that place to his place of recruitment which was not the case.

Having heard the competing arguments from both the appellant and the respondent's learned advocate we shall now discuss the key aspects in dispute. We find it convenient to start with the complaint on compensation which was the appellant's bone of contention in ground 4. The learned Judge discussed the remedies flowing from unfair termination in the light of section 40 (1) (c) of the ELRA and held (at page 225 of the record) that it is not mandatory that in all cases of unfair termination, the arbitrator should order compensation of not less than 12 months' remuneration. In the context of the case in which the unfairness of the termination was on procedure only, guided by some decisions of that court, the learned Judge reduced compensation from 12 to 3 months. With respect, we agree with her entirely. In **Sodetra (SPRL) Ltd v. Mezza & Another** (supra) referred to by Mr. Mkumbukwa, the High Court (Rweyemamu, J.) interpreted section 40 (1) (c) thus:

> *"...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..." (at page 10)*

Were spectfully 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.

Next we shall deal with the issue of payment for the unexpired term of contract. The learned High Court Judge rejected it on the ground that the appellant could not serve two masters at the same time. During the hearing, the appellant impressed upon us that councillorship was not a paid job and so, if we understood him correctly, he was not serving two masters in exchange of remuneration. Be it as it may, we share similar views with the High Court that a person in breach of the employment manual could not benefit from his wrong doing. At any rate, as rightly submitted by the learned advocate for the respondent, such was but a double payment considering that the appellant was awarded compensation for unfair termination. Additionally, such payment is not one of the remedies for unfair termination under section 40 (1) of ELRA.

Another hotly contested relief was subsistence allowance. Mr. Mkumbukwa conceded that the appellant was entitled to payment of subsistence allowance for the period he waited to be repatriated to his place of recruitment. He also conceded that the cut-off point was the date on which the appellant was paid his repatriation costs. The appellant burnt a lot of energy impressing upon us that the rate of subsistence allowance must be computed from the out of station allowance he used to get; TZS 120,000.00 per day.

Guided by the authorities some of which were relied upon by the learned Judge in her judgment and others cited to us by Mr. Mkumbukwa, we find no reason to fault the award of subsistence allowance for the period the appellant waited to be repatriated to his place of recruitment pegged on his daily salary. From the cases placed before us particularly; **Attorney General v. Ahmed Yakuti & 2 Others** (supra), the issue regarding the rate of subsistence allowance pending repatriation has long been settled, that is to say; it is calculated on the daily salary of a terminated employee paid on a monthly basis. It evident from our reading of **Juma Akida Seuchago v. SBC (Tanzania) Limited** (supra), that the issue on the rate of subsistence allowance had been settled and the learned Judge was right in quashing

the amount awarded by the CMA and substituting it with a rate pegged on daily salary payable on monthly basis for the whole period the appellant awaited payment of repatriation expenses.

Next we discuss the reliefs in relation to repatriation, leave and payment in lieu of notice. Happily, Mr. Mkumbukwa conceded that there was no evidence that the appellant had been paid his leave for the year 2015. He also conceded that he was entitled to payment of one month's salary in lieu of notice. Without any ado, those remedies flow from any unfair termination of an employment contract. We allow those reliefs in favour of the appellant.

Regarding repatriation, the record shows (at page 35) that after the termination, the respondent paid the appellant a sum of TZS 236,000.00 for repatriation from Katerero ADP to Muleba. The appellant admitted having seen in his bank account that amount on 4th April 2016 although, according to him, he was not sure what it was meant to cover. In the end, he agreed that the sum was meant for his repatriation. Despite the above, the appellant came up with another version during hearing contending that the payment fell short of the amount he was actually entitled to. We think we need not unduly belabour on this, for we are satisfied that the claim is neither here nor there. The learned

High Court Judge rightly rejected that there was under payment on this item and we find no reason to fault her.

In the light of the foregoing, the appeal stands dismissed in grounds 1, 3 and 4 and partly allowed in ground2 to the extent indicated.

Each party shall bear his own costs.

DATED at **DAR ES SALAAM** this 25th day of January, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

This Judgment delivered on 2nd day of February, 2021 - linked via video conference at Bukoba in the presence of the appellant in person and Mr. Anestus Stewart holding brief of Mr. Nuhu Mkumbwa, learned counsel for the respondent, and is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL