IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A, SEHEL, J.A., And FIKIRINI, J.A.)

CIVIL APPEAL NO. 36 OF 2018

TUMAINI MASSARO.....APPELLANT

VERSUS

TANZANIA PORTS AUTHORITY..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania (Labour Division) at Dar es Salaam)

(Nyerere, J)

dated 14th day of July, 2017
in

Revision No. 177 of 2016

JUDGMENT OF THE COURT

11th & 31st August, 2021

SEHEL, J.A

The appellant, Tumaini Massaro was an employee of the respondent, Tanzania Ports Authority (TPA). He was employed on 2nd November, 1981 as marine pilot trainee. By the time of his termination on 11th January, 2013 he was as an oil terminal manager.

The facts that led to his termination are such that; he was charged with three offences, dishonesty to his employer as he lied to the

management concerning by-pass of flow meters, gross negligence because he failed to properly supervise the contract for selling of slops and sludge oil to M/S Singilimo Enterprises whose contract expired and gross inefficiency because he failed to properly advice his employer on the use of by-pass of flow meters, removal and disposal of slops and sludge oil. After the conduct of the disciplinary hearing, he was found guilty of two offences, gross negligence and gross inefficiency. He was thus terminated on those two grounds.

Aggrieved by such termination, he lodged a complaint before the Commission for Mediation and Arbitration (henceforth CMA). He complained that the termination was unfair because there was no valid reason for his termination, the procedure for termination was not followed, the terms and conditions of his employment were not considered and the explanation he gave was not considered by the disciplinary committee. After hearing the parties' evidence, the CMA's arbitrator found that there was no valid reason for termination of the appellant's employment and that the procedure used by the respondent to terminate him was unfair. In that respect, the respondent was ordered to compensate the appellant thirty-six

(36) months' salaries equivalent to TZS. 156,484,548.00. Further, the respondent was required to comply with the CMA's award within thirty (30) days from the date of its receipt.

The respondent was aggrieved by that decision. It thus filed a revision in the High Court of Tanzania, Labour Division at Dar es Salaam (the High Court) to assail it. It raised five grounds. However, the High Court in its judgment condensed them into three issues. The first issue which was canvassed was whether the respondent was terminated on valid reason. The learned Judge found that respondent being an oil terminal manager failed to take necessary measures to advice the management on the temporarily use of by-pass meters. Accordingly, she reversed the decision of the arbitrator and held that the respondent was terminated for valid reason.

The second issue which the learned Judge raised was whether the termination of the respondent's employment followed a fair procedure. The learned Judge observed that the main complaint of the respondent before the CMA was on termination letter which was signed by one Peter Gawile, Acting Director of Human Resources. He complained that Mr. Peter Gawile

had no authority to issue such termination letter to him. The learned Judge after scrutinizing the said letter, she found that the decision to terminate employment services of respondent was done by the Board of Directors of the appellant and not Mr. Peter Gawile who simply communicated the termination to him.

The last issue was whether the compensation of 36 months' salary is justifiable under the labour laws and practice. On this issue the learned Judge found that the arbitrator had powers to award more than 12 months' salary and that there were peculiar circumstances for the grant of compensation of 36 months' salary. She however, quashed and set aside the award.

Irked by the act of quashing and set aside the award of 36 months' salary, the appellant filed the present appeal comprising of five grounds of appeal. It transpired that he was late in serving the respondent with the memorandum and record of appeal. He sought leave to file the same and he also sought leave to file written submission out of time which was granted. Therefore, pursuant to Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) and in compliance with the

Court order, the appellant filed his written submissions. In the submissions, he abandoned four grounds of appeal and remained with one ground that:

"The Honourable Judge erred in law in quashing the award of thirty-six months compensation without giving reasons."

The respondent did not file any written submissions. Instead, it filed a notice of preliminary objection raising three points of law. Nevertheless, the said notice was withdrawn at the hearing of the appeal following a prayer made by the counsel for the respondent.

When the appeal was called on for hearing, Mr. Kichere Mwita Waissaka, learned advocate appeared for the appellant whereas the respondent had the services of Mr. Hangi Chang'a, learned Principal State Attorney who was assisted by Miss Sabina Yongo and Mr. Shija Charles, both learned State Attorneys.

Arguing the appeal, Mr. Waissaka first adopted the written submissions and submitted that the learned Judge erred in quashing and setting aside the arbitrator's award given that she had earlier on appreciated the arbitrator's power and the reasoning in awarding compensation of 36 months' salary. In order to fully understand this

complaint, we take the liberty to reproduce that part of the judgment of the High Court which appears from pages 396 - 397 of the record of appeal. Suffice to point out here that the learned Judge reproduced section 40 (1) of the Employment and Labour Relations Act, Cap. R.E. 366 of 2019 (ELRA) and quoted the case of the High Court of **Qatar Airways v. Elizabeth M. Kuzilwa**, Revision No. 218/2013 DSM Registry (unreported) then she said: -

> *"It is my understanding of law and practice on this aspect that, arbitrator had power to grant any of the above-mentioned remedies including damages unless is precluded from doing so by grounds articulated under Rule 32 (5) of the Labour Institutions (Mediation and Arbitration) Rules GN 67/2007. I am also alive with section 40 (1) (c) which provide compensation of not less than 12 months' salary. In a literal meaning section 40 (1) (c) of the ELRA arbitrator has power to grant more than 12 months' salary compensation but if only the facts of the case require that.*

In the instant case arbitrator awarded 36 months' salary compensation on grounds that the respondent had worked for a long period of time and also at the time the award was delivered,

respondent was 59 years old therefore it will be difficult for him to secure new employment. In my view, the arbitrator reasoning hold water as such are among the reasons this court grant compensation of more than 12 months."

From the above observation, Mr. Waissaka contended that while the learned Judge agreed with the arbitrator that the award of 36 months' salary compensation was legally sound because the appellant had worked with the respondent for a long time and he was an old aged man thus it would be difficult for him to secure employment, she refused to confirm the award. He added that there was no reason given for such a refusal. Mr. Waissaka further submitted that such a refusal was contrary to the dictates of the provision of section 40 (1) (c) of the ELRA. He therefore urged the Court to quash the decision of the High Court and allow the appeal.

Mr. Chang'a strongly opposed the appeal by arguing that the learned Judge did give reasons on quashing the arbitral award. To bolster his submission, he took us through the High Court judgment found at pages 384 to 398 of the record of appeal. He pointed out that after the learned Judge had discussed the issue as to whether the termination of the

appellant's employment was substantially and procedurally fair, she was satisfied that there were valid reasons in terminating the appellant's employment. He said, this is reflected at page 392 of the record of appeal. He further pointed out that at page 395 of the record of appeal, the learned Judge found that the arbitrator's decision was arrived wrongly since the appellant did not dispute that the disciplinary hearing was conducted. Mr. Chang'a submitted that it was for those reasons that led the learned Judge to conclude at page 396 of the record of appeal that the termination was substantially and procedurally fair and proceeded to quash the award of compensation of 36 months' salaries.

Mr. Chang'a further contended that section 40 (1) (c) of the ELRA does not apply to the appellant whose termination was found to be fair by the High Court. To cement his argument, he referred us to the case of **Serenity on the Lake Ltd v. Dorcus Martin Nyanda**, Civil Appeal No. 33 of 2018 (unreported) where the Court held that the respondent was not entitled to the compensation under section 40 (1) (c) of the ELRA since the legal procedure for terminating the respondent's employment was adhered to.

In rejoinder, Mr. Waissaka reiterated his earlier submission that the learned Judge ought to have given a reason to set aside the arbitrator's award. He also distinguished the facts in the case of **Serenity on the Lake Ltd** (supra) that the employee therein was on probation period whereas in the present appeal the appellant was a permanent employee who worked for a long time. He thus reiterated his earlier prayer that the appeal be allowed.

We have carefully considered the rival submissions by the parties and keenly gone through the judgment of the High Court found. At the very outset, we wish to state that we entirely agree with the learned Principal State Attorney that the High Court did give reason in its judgment in quashing and setting aside the arbitrator's award. The said reason is found at page 398 when she said: -

> "However, **followed findings of this court that the respondent termination was substantially and procedurally fair** the award of 36 months compensation is hereby quashed and set aside."

It follows that the learned Judge quashed the arbitrator's award because she had previously found that the termination of the appellant's

employment was substantially and procedurally fair. This rhymes well with the provisions of section 40 (1) of the ELRA which provides: -

> *"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 that the employee was absent from work due to the un fair 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."*

From the above provision of the law, it is crystal clear that the remedies provided under section 40 (1) (a) to (c) of the ELRA would be granted by an arbitrator or Labour Court only where it is found that the termination of the employment of an employee was unfair. But in the appeal before us, the termination was found to be substantially and procedurally unfair. In that regard, as rightly submitted by Mr. Chang'a, the order of compensation stipulated under section 40 (1) (c) of the ELRA

could not have been left to stand. Given the findings of the learned Judge, we are satisfied that she rightly quashed and set it aside.

It is unfortunate that Mr. Waissaka culled out some few paragraphs and sentences from the judgment and read them out of the context of the entire judgment to drive home his argument that there was no reason given by the learned Judge. It is a cardinal principle that a reason in a judgment has to be read in as a whole in the context of the issue that was before the court to have its true meaning and logic. The Supreme Court of India when discussing as to how one could ascertain *'a ratio decidendi'* and *'an obiter dictum'* in the case of **Director of Settlements, A.P & Others v. M. R. Apparao & Another**, (2002) 4 SCC 638 at http://indiankanoon.org/doc/703650/ had this to say: -

> *"... The statements of the Court on matters other than law, like facts may have no binding force as the facts of two cases may not be similar. But what is binding is the ratio of the decision and not any finding of facts.* ***It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence.*** *To determine whether a*

decision has 'declared law' it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision. ***A judgment of the Court has to be read in the context of questions which arose for consideration in the case in whlch the judgment was delivered.*** *An 'obiter dictum' as distinguished from a ratio decidendi is an observation by Court on a legal question suggested in a case before it but not arising in such manner as to require a decision."*

We find the above to highly persuasive to the present appeal. As a result, we are of the view that it was totally wrong for Mr. Waissaka to pick the last sentence of the learned Judge's decision and read it in isolation from the entire paragraph. Had he read the reasoning of the judgment holistically, he would have appreciated the course taken by learned Judge. On a holistic reading of the reasoning of the learned Judge we find nothing to fault her since she could not have confirmed the award of compensation of 36 months' salary after she had previously found termination was fair.

In the upshot, we find the present appeal lacks merit. It is therefore dismissed with no order as to costs as it arose from a labour dispute.

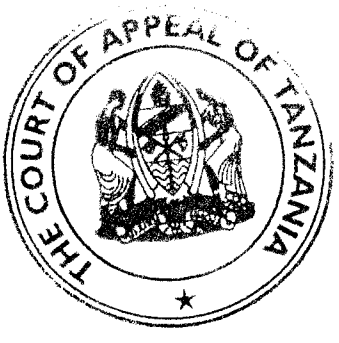
DATED at **Dar es Salaam** this 27th day of August, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The ruling delivered on this 31st day August, 2021, in the presence of Mr. Lukelo Samuel, learned Principle State Attorney holding brief for Mr. Mwita Waisaka, learned counsel for the applicant and Mr. Lukelo Samuel, learned Principle State Attorney for the respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRARC
OURT OF APPEAL