IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KITUSI, J.A. And RUMANYIKA, J.A.)

CIVIL APPEAL NO. 224 OF 2019
BALTON TANZANIA LIMITED ..... APPELLANT
VERSUS

1. **VICTORIA GALINOMA**
2. **ASUBISYE MALOLO MWAKATOBE .....RESPONDENTS**

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

(Wambura, J.)

dated 14th day of June, 2019
in
Revision No. 287 of 2018
.....

JUDGMENT OF THE COURT

18th February & 22nd day of April, 2022

RUMANYIKA, J.A.:

All began on 30/06/2017 in the Commission for Mediation and Arbitration of Dar es Salaam at Dar es Salaam (the CMA) following the termination by Balton Tanzania Ltd (the appellant) of the employment of Victoria Galinoma and Asubisye Mololo Mwakatobe, the 1st and 2nd respondents respectively. They worked with the

appellant in the positions of a Credit Controller and Technical Sales Manager for Communication respectively.

On 4/5/2018, the CMA found that the termination by retrenchment contravened s. 37 of the Employment and Labour Relations Act, Cap.366 R.E. 2019 (the ELRA) for being substantively and procedurally unfair. The CMA ordered re-engagement of the respondents. On revision, the High Court (Wambura, J.) upheld the award on 14/06/2019. Additionally, pursuant to s. 40 (1) (a) of the ELRA the High Court awarded them a good number of other compensations. The appellant was unhappy with the High Court's decision, hence the instant appeal.

The appellant has lodged six grounds. However, the grounds revolve around three points which we think are sufficient to dispose of the appeal. The points are: (i) The High Court improperly evaluated the evidence on record on the reason and procedure for termination of the respondent's employment (ii) The High Court's decision was against the weight of the evidence on the record and (iii) the High Court's compensatory order was not justified.

At the hearing, Messrs. Herman Majani Lupogo and Sosten Mbedule, learned counsel appeared for the appellant and the respondents respectively.

To start with, Mr. Lupogo dropped ground number (i) He adopted the appellant's written submissions and submitted that following the business decline that threatened its collapse, the appellant cut the running costs by merging some departments among other measures, all in vain. Then it consulted, offered retrenchment package and finally retrenched some employees including the respondents on 5/6/2017. As they were unhappy, the respondents successfully referred the dispute to the CMA. The learned Counsel submitted further that as the appellant was aggrieved by the award, it preferred a revision to the High Court which gave the respondents a more generous compensatory award namely; (i) monthly salaries from the date of termination to the date of the CMA's award (ii) twelve months' salaries compensation or re-engagement as the appellant may deem convenient to it (iii) additional three months' salaries for the whole period that the respondents would be looking

for other jobs and (iv) payment to the 2nd respondent 1% of all works and benefits entitled to him from the date of termination to the date of the CMA's award. The award is subject of this appeal as indicated earlier.

The learned counsel further submitted that had the High Court properly evaluated the evidence on record and properly interpreted s.40(1) (a)-(c) of the ELRA, it would have held that the appellant had no option other than to retrench the respondents, instead of ordering the respondents' re-engagement. Counsel cited the decisions of the High Court, Labour Division in the cases of **Denis Wambura v. Mtibwa Sugar Estate Ltd**, Labour Revision No. 3 of 2014 and **Said Mohamed Nzegere v. Aarsleef Ban International,** Labour Revision No. 17 of 2019 (2014) LCCD (unreported) faulting the High Court Judge for awarding compensation beyond what was pleaded in the CMA's Form No. 1 and proved by the respondents.

Replying, Mr. Mbedule submitted that the appeal lacks merits because; (a) the appellant had not challenged the CMA's decision in

the High Court that the termination of the respondents' employment was unfair but against the orders of compensation only. He submitted, therefore, that this Court has jurisdiction only on the issues raised by the parties and determined by the High Court. If anything, he submitted, the appellant's counsel was satisfied by the CMA's award. Mr. Mbedule also submitted that the appellant should have challenged the decision in the High Court not for the first time in this Court. Substantiating his point, the counsel cited the case of **Melita Naikiminjal & Loishilaari v. Sailevo Loibanguti** [1998] TLR 121. He added that in line with s. 40 (1) of the ELRA, the High Court reasonably ordered compensation as shown at pages 267 – 269 of the record. He further cited this Court's decision in **Pangea Minerals Ltd v. Gwandu Majali,** Civil Appeal No. 504 of 2020 (unreported).

In his rejoinder, Mr. Lupogo submitted that the judge should not have ordered compensation simultaneously with re-engagement because the order amounted to double jeopardy and double payment to the appellant and the respondents respectively.

Having heard the parties and considered their respective submissions and the evidence on record, the central issue before us is no longer whether, be it by retrenchment or in any other form the respondent's termination was fair, but whether the compensation ordered by the High Court was justified. We were impressed by Mr. Mbedule's submissions that the appellant only disputed the reliefs granted by High Court and therefore the parties are estopped from introducing new matters at the appeal stage, given the appellant's previous concession. Again, he submitted that at the time, also representing the appellant, Mr. Lupogo at page 277 of the record of appeal appreciates the CMA's discretion. The record reads thus:-

> "... *As for the 1st issue we believe the arbitrator had used the arbitral powers provided for under s. 40(1) (b) of the ELRA as well as Rule 32(1)(2) of Labor Institutions Act (Mediation And Arbitration) Guidelines, No. 67 of 2017 which provide for reliefs for unfair termination.*
>
> *Under s. 40(1) of the ELRA the Arbitrator may order re-engagement and Rule 32(1) of the Labor Court Rules, 2007 states the same.*
>
> *It is the discretion of the Arbitrator to grant such remedy..."*

It is very unfortunate that contrary to the rule in the case of **Melita Naikiminjal & Another** (supra), as reflected in grounds 1, 2 and 4 of the appeal, which bars new matters at an appeal stage, the claim of unfair termination of the respondents was before us newly introduced and an afterthought. These grounds need no more consideration by us. They are dismissed.

As said before, Mr. Lupogo faults the High Court Judge for ordering re-engagement and compensation simultaneously. With respect, we wish, at this point to address Mr. Lupogo's proposition as being incorrect. Actually observing the provisions of s. 40 (1) (a) – (c) of the ELRA, the High Court Judge ordered re-engagement and compensation as alternatives. The order reads as follows:

> ***"2 Applicants (the present respondents) to be awarded 12 month's salary (sic) as compensation instead of re-engagement at the discretion of the employer..."***

From the above immediate quotation therefore, the issue of the respondents getting double payment should not have even been raised.

It does not need overemphasis to hold that when giving awards, the courts have discretion under s. 40 (1) (c) of the ELRA. On that one there is a long list of authorities including **Pangea Minerals Limited** (supra) cited by Mr. Mbedule. The question whether or not the relief granted by the Court was prayed in the CMA's Form No. 1 and proved by the employer as also complained of by Mr. Lupogo's, on different occasions we held that the courts are not precluded from granting such reliefs. We read the decision of the High Court, Labour Division in **Said Mohamed Nzegere** (supra) which held that an arbitrator or the High Court, as the case may be, has the discretion to award an unfairly terminated employee any relief including those ones not pleaded in the referral CMA Form No.1, but certainly that decision is not binding on us. However, as we held in an unreported case of **Magnus K. Laurean v. Tanzania Breweries Limited**, Civil Appeal No. 25 of 2018, whenever the need arises, once established and proved, some non-discretionary statutory entitlements such as terminal benefits and a certificate of

service are grantable, even if had not been claimed in the said referral form. That is pursuant to section 44 (1) and (2) of the ELRA.

In the upshot, the appeal is allowed to the extent stated above. Accordingly, on account of them having been not claimed by the respondents, we set aside the orders for the additional three months' remuneration and 1% of all works also ordered by the High Court in favour of the second respondent. Since the appeal arises from a labour dispute, we make no order for costs.

DATED at **DAR ES SALAAM** this 21st day of April, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of April, 2022 in the presence of Mr. Sosten Mbedule, learned counsel for the respondents, who is also holding brief for Mr. Lupogo Herman, learned counsel for the Appellant, is hereby certified as a true copy of original.

THE COURT OF APPEAL OF TANZANIA

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL