IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUGASHA, J.A., SEHEL, J.A. And KAIRO, J.A.)

CIVIL APPEAL NO. 322 OF 2020

VENERANDA MARO..... 1ST APPELLANT
WINFRIDA NGASOMA.....2ND APPELLANT

VERSUS

ARUSHA INTERNATIONAL CONFERENCE CENTRE.....RESPONDENT

(Appeal from the Ruling and decree of the High Court of Tanzania (Labour Division) at Arusha)

(Maige, J.)

dated the 10th day of January, 2019
in
Labour Revision No. 167 of 2015

JUDGMENT OF THE COURT

14th & 18th February, 2022

MUGASHA, J.A.:

The appellants, Veneranda Maro and Winfrida Ngasoma were both employed as medical personnel by the respondent, the Arusha International Conference Center (the AICC). The first appellant was employed as assistant nursing officer from 19/10/1983, whereas the second appellant was employed as a Medical Officer grade II from 29/10/1991. They both happened to be members and leaders of the Tanzania Nurses Association (TANNA) an association tasked with among others things, to act as an agent

to bargain for the rights of professional nurses. Acting in the capacity of TANNA, a complaint was lodged to the respondent in respect of delayed promotions and salary increments of the members at the AICC. The respondent's reply was that, since TANNA was not a recognized bargaining agent, the complaint should be channeled through Tanzania Union of Industrial and Commercial Workers (the TUICO). Thus, on behalf of TANNA, the complaints were forwarded to the Permanent Secretary, Ministry of Foreign Affairs and East African Cooperation vide a letter which was copied to the respondent.

The respondent perceived this as gross insubordination which in terms of section 37 of the Employment and Labour Relations Act CAP 366 R.E 2002 (the ELRA), was punishable by termination from the employment. As a result, disciplinary proceedings were initiated against the appellants as leaders of TANNA. Upon being required to answer charges levelled against them, they declined to make any response on ground that, they had authored the letter in question to the Permanent Secretary as leaders of TANNA and not in their personal capacity as employees of the AICC. As such, the disciplinary proceedings were conducted by the respondent in their absence, followed by termination from the employment.

Aggrieved by the respondent's decision, the appellants successfully preferred the matter to the Commission for Mediation and Arbitration (the CMA) which found the termination was both substantively and procedurally unfair, awarded the appellants 120 months' salary being compensation for the unfair termination. Undaunted, the respondent lodged a Labour Application No. 167/2015 before the High Court of Tanzania at Arusha seeking to have the decision of the CMA revised. Although the High Court did uphold the decision of the CMA on the termination being substantively unfair, however, it varied and reduced the sum of compensation awarded by the CMA to 48 months' salary.

Discontented, the appellants have preferred the present appeal to the Court challenging the decision of the High Court. In the Memorandum of Appeal, the appellants have fronted four grounds of complaint as follows:

1. *That, the High Court Labour Division erred in law and fact by interfering with the quantum amount awarded by the Commission for Mediation and Arbitration at Arusha contrary to the law.*
2. *That the High Court labour Division erred in law and facts in holding that "the award was excessive" whilst at the*

same time the court admits that the termination by the appellants was unfair and that there were various extenuating factors in support of the awarded compensation.

3. *That the High Court Labour Division misdirected itself in law by interfering with Commission for Mediation and Arbitration award without establishing as to whether the said arbitrator invoked wrong and or irregular principles in awarding the appellants One Hundred and Twenty (120) months as Compensation.*
4. *That the High Court erred in law and fact for failure to apply its discretion judiciously under the law and partly reach into an erroneous decision.*

At the hearing of the appeal, the appellants were represented by Mr. Innocent Mwanga, learned counsel, whereas the respondent had the services of Mr. Solomon Lwenge, learned Senior State Attorney and Mr. Xavier Ndalahwa and Ms Zamaradi, both learned State Attorneys. Parties adopted the written submissions filed containing arguments for and against

the appeal. Prior to the hearing, with leave of the Court, the respondent's counsel withdrew the preliminary objections earlier filed.

On taking the floor, Mr. Mwanga argued the three grounds of appeal together as the written submissions. He faulted the decision of the High Court in varying the decision of the CMA which awarded the appellants compensation amounting to 120 months' salary. On this he argued, the CMA's awarded compensation was above the prescribed minimum of 12 months' salary because: **one,** the termination was substantively unfair; and **two,** it is undisputable that the appellants had a good record of employment with long term service with the respondent. It was also submitted that, the award by CMA suffices as damages to remedy loss of income on account of unlawful termination on the part of the appellants considering that, CMA's award does not attract interest and it has not been paid out to the appellants for the past seven years. In this regard, it was the appellant's counsel argument that, it was a misdirection on the part of the learned High Court Judge to vary and reduce CMA's award without stating the factors which were not considered by the CMA and the reasons for the interference. To support his propositions, he cited to us the case of **THE COOPER MOTORS CORPORATION LTD VS MOSHI/ARUSHA OCCUPATIONAL HEALTH**

SERVICES [1990] T.L.R 96 and **RAZIA JAFFER ALI VS AHMED SEWJI AND FIVE OTHERS** [2006] T.L.R 433.

It was further argued that, in varying the award by the CMA, the learned High Court Judge did not exercise his discretion judiciously which resulted into an erroneous decision. He thus urged the Court to allow the appeal and reinstate the award by the CMA.

On the other hand, Mr. Lwenge as well adopted the written submissions filed by Advocate Kelvin Kwagilwa who earlier on represented the appellant before the High Court. In the said written submissions, it was contended that the learned High Court was justified to vary and reduce CMA's award having considered that: **one,** the appropriate quantum of compensation to be 48 months' salary in terms of section 40 (1) (c) of the ELRA; and **two,** the appellants' unwillingness to be reinstated in the employment which caused loss of remuneration. Finally, Mr. Lwenge urged the Court to dismiss the appeal because the decision of the High Court is justified.

Upon being referred to Rule 32 of the Labour Institutions (Mediation and Arbitration) Rules, 2007 (the Mediation and Arbitration Rules) which

gives an employee option to refuse reinstatement and if the blame on the appellants to refuse reinstatement was justified, surprisingly, Mr. Lwenge, supported the stance taken by the learned High Court Judge. Also when asked if the arbitrator had considered all the factors surrounding the unfair termination in terms of the criteria stipulated under Rule 32 (5) of the Mediation and Arbitration Rules, he had nothing useful to submit in that regard.

Having considered both written and oral submissions of the learned counsel, all the three grounds of appeal shall be determined together in line with the order adopted by the learned counsel in their written submissions containing arguments for and against the appeal. We have conveniently adopted such mode because basically, the appellants are faulting the High Court in varying the quantum of compensation for the unfair compensation which was granted by CMA. In that regard, while the appellants contend that the learned High Court did not properly exercise its discretion in reducing the sum to be compensated, the respondent contends otherwise arguing that the award of the CMA was justified.

Remedies for the unfair termination from employment are regulated by section 40 (1) of the ELRA and the Mediation and Arbitration Rules. While section 40 (1) of the ELRA vest upon the CMA and the Labour Court with discretion to make award of compensation which is not less than twelve months' remuneration, Rule 32 the Mediation and Arbitration Rules prescribes remedies for unfair termination, criteria and modality of making an award which necessitates the engagement of an employee as it stipulates as follows:

> *"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 employee.*

(d). the termination was unfair because the employer did not follow a fair practice.

(3). Re-engagement shall be subject to any terms of employment that the arbitration may decide.

(4). For the purpose of these rules re-instatement means that an employee shall be put back in the job unconditionally.

(5). Subject to sub-rule (2), an arbitrator may make an award of appropriate compensation based on the circumstances of each case considering the following factors-

(a). Any prescribed minimum or maximum compensation;

(b). the extent to which the termination was unfair

(c). the consequences of the unfair termination for the parties including the extent to which the employee was able to secure alternative work or employment.

(d). the amount of the employees' remuneration;

(e). the amount of compensation granted in previous similar cases

(f). the parties conduct during the proceedings; and any other relevant factors.

In the Republic of South Africa whose Labour legislation is almost similar to ours, in the case of **KEMP t/a CENTRALMED VS RAWLINS** [2009] 30

ILJ 2677, the Labour Court of Appeal considered the relevant factors as to whether the court should or should not order the employer to pay compensation to include:

> *"...whether the unfairness of the dismissal is on substantive or procedural grounds or both substantive and procedural grounds; obviously it counts more in favour of awarding compensation as against not awarding compensation at all that the dismissal is both substantively and procedurally unfair than is the case if it is only substantively unfair, or even lesser, if it is only procedurally unfair."*

On the quantum of compensation to be awarded, The Labour Relations Act 66 of 1995 of the Republic of South Africa prescribes the limits under section 194 which stipulates as follows:

> " *194 (1) – The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all circumstances, but may not be more*

than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.

(2) The compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal."

Here at home, it is settled law that the substantively unfair termination attracts heavier penalty as opposed to procedural unfairness which attracts lesser penalty. See: **FELICIAN RUTWAZA VS WORLD VISION TANZANIA**, Civil Appeal No. 213 of 2019, **PANGEA MINERALS LIMITED VS GWANDU MAJALI,** Civil Appeal No. 504 of 2020 and **SODETRA (SPRL) LTD V. MEZZA & ANOTHER** Labour Revision No. 207 of 2008 (all unreported). However, apart from prescribing 12 months' salary as the minimum sum to be awarded as compensation, our legislation is completely silent on the maximum sum to be awarded and that is why in the present matter the CMA's award was 120 months' salary. That said, we shall revert to this matter in due course.

Currently, although the law prescribes the minimum amount to be awarded as compensation for termination which is not less that twelve months' salary, it is settled law that the arbitrator or the Labour Court has discretion to decide on the appropriate award compensation which could be over and above the prescribed minimum. However, the discretion must be exercised judiciously taking into account all the factors and circumstances in arriving at a justified decision. Where discretion is not judiciously exercised, certainly, it will be interfered with by the higher courts. See: **PANGEA MINERALS LIMITED VS GWANDU MAJALI** (supra).

The circumstances upon which an appellate court can interfere with the exercise of discretion of an inferior court or tribunal are: **one,** if the inferior Court misdirected itself; or **two,** it has acted on matters it should 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. Confronted with akin situation in the case of **PANGEA MINERALS LIMITED VS GWANDU MAJALI** (supra), the Court said:

"...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."***

[Emphasis supplied]

In the present case it is not disputed that, the termination of employment of the appellants was substantively unfair and the law is settled that it attracts a heavier penalty as opposed to procedural unfairness. Therefore, the question to be answered is whether or not the discretion was judiciously exercised by the CMA in awarding the same and if the High Court did the same in varying and reducing the award.

We begin with the reasons given by the CMA in awarding the appellants compensation of 120 months' salary as reflected at page 728 of the record of appeal in the following terms:

"Kwa kuwa walaiamikaji hawapo tayari kurudishwa kazini. Tume inamuamuru mialamikiwa awalipe walalamikaji fidia

ya ajira ya miezi 120 kila mmoja. Hii ni kwa sababu uachishwaji kazi haukuwa halali, Walalamikaji waliachishwa kazi kwa sababu zisizo na ukweli na ikizingatiwa kuwa walalamikaji wote walikuwa na rekodi nzuri ya ajira na walifanya kazi kwa mlalamikiwa kwa zaidi ya miaka 20 kila mmoja (refer S. 40) © of ELRA 6/2004 pamoja na rule 32(5) of G.N. 67/2007 ambazo zinampa mamlaka muamuzi kuamua kiwango chochote cha fidia hata kuzidi ujira wa miezi kumi na mbili) kiwango hicho cha fidia ni halali kwa mazingira ya shauri hili.

Kuhusu haki zingine kwa mujibu wa S.44 of ELRA, 6/2004."

On the part of the High Court, apart from acknowledging that the termination was substantively unfair, it varied the CMA's award in the light of what is reflected at page 920 of the record of appeal as follows:

"Perhaps, the issue which I have to decide is what is the appropriate quantum of the compensation in the circumstances, section 40(1) (c) does not set out the guiding tests to be employed in assessing the quantum of compensation. The tests are set out in rule 32 (1) (2) and (5) of the Labour Institution (Mediation and Arbitration Guidelines) Rules GN.67/07. ***One of the factors to be considered is the probable loss of remuneration.***

> ***In this matter, the fairness of termination was not merely procedural. This would ordinarily attract an order for reinstatement without loss of remuneration. Indeed, that could have been the case but for the unwillingness of the respondents to be the reinstated due to the prevailing circumstances.*** *The termination of services of the respondents was in December 2012. The resolution of the dispute at the* ***arbitral tribunal*** *was in February 2014. There is a different of more than 14 months. Counting from the date of this decision, there is a difference of hardly five years. Throughout this period, the respondents have not lost any remuneration as of the date of termination. So that they are not denied such entitlements, an amount of 48 monthly salaries for each is appropriate in the circumstances. The quantum of 120 months' compensation for each of the respondent is therefore set aside and substituted with the amount of 48 months' salaries for each.*
>
> [Emphasis supplied]

Furthermore, at page 928 the learned Judge of the High Court made the following observation in reversing the award by the arbitrator as follows:

"Where the arbitrator decides to award compensation above the minimum, there must be justification. In this matter, the arbitrator justified the award on account of incontrovertible good employment records of the respondents. Although the relevance of the said factor in aggravating the quantum of compensation cannot be doubted, the common sense alone without the assistance of knowledge would dictate the paucity of the same to rationalise the departure from 12 to 120 months' salaries. ***Much could have been said to justify the same. I have thus no hesitation to hold that the assessment of the quantum of compensation was not rational.***

[Emphasis supplied]

From the following excerpts the following is evident: **Firstly,** the learned High Court Judge acknowledged and correctly so, that the guiding tests to be deployed in assessing the quantum of compensation are set out in rule 32 (1) (2) and (5) of the Mediation and Arbitration Rules. However, with respect, it was not justified for the learned Judge to blame the appellants to be responsible for loss of remuneration due to their

unwillingness to be reinstated in the employment due to prevailing circumstances when the matter was before the arbitrator. We say so because, although under rule 32 (1) of the Mediation and Arbitration Rules, where an arbitrator finds termination to be unfair, he may order the employer to reinstate, re-engage the employee or to pay compensation to the employee. However, under sub rule (2), he is barred from making such orders where the employee does not wish to be re-instated or re-engaged and if the circumstances surrounding the termination are such that a continued employment relationship would be intolerable. We reiterate that, an employee who declines to be reinstated or re-engaged should not be penalized for exercising a legally prescribed option.

Secondly, it was incumbent on the High Court Judge to consider if the arbitrator took into account all factors and circumstances in reaching at its decision and if it was justified and correct. This was ably done by the learned High Court Judge as opposed to the proposition by Mr. Mwanga who argued otherwise. We say because, apart from the learned Judge not disputing reasoning given by the arbitrator on incontrovertible good and long service of the appellants; he had reservations that on non-consideration of the factor on probable loss of remuneration which made him to observe that,

"much could have been said to justify the same". We agree with the learned High Court Judge because the concern he raise, in our considered view, brings into scene, the CMA's non-consideration of the extent to which the employees were able to secure alternative work or employment which is among the criteria to award compensation as prescribed under Rule 34 (5) (c) of the Mediation and Arbitration Rules. This was crucial considering that the appellants are medical professionals. Thus, in future we urge both the CMAs and the Labour Court to be guided by the criteria which is crucial in determining among others, what constitutes probable loss of remuneration for an employee who is terminated.

In the circumstances, since the learned High Court Judge found the reasons for appellants' termination unfair and invalid but for the lacking consideration of the factor of the probable loss to justify CMA's award; besides, the blame on the appellants to refuse reinstatement which we have stated not to agree, he was right in exercising his discretion judiciously ordering lesser compensation than that awarded by the CMA.

We have gathered that in the written submissions of the parties, the learned counsel placed heavy reliance on decisions of the Court propounding the guiding principles in assessing damages. With respect, we disagree. On

this, we borrow a leaf from the South African case of **VILJOEN VS NKETOANA LOCAL MUNICIPALITY** [2003] 24 ILJ 437 whereby, having considered that in labour disputes compensation for procedural unfairness also includes a punitive element it was held that:

> *"...compensation is not an award of damages in the contractual or delictual sense. It includes a penal element against the employer for failing to get the procedure right, as well as an element of solace to the employee, in the sense that the employee has lost the right to be given a procedurally fair dismissal which is entrenched in the LRA."*

We fully subscribe to said decisions considering that the ELRA prescribes the award of compensation pegged to the employee's monthly salary depending on the nature of termination that is, procedural or substantive. In the circumstances, the cases of **COOPER MOTOR CORPORATION** (supra) and **RAZIA JAFFER ALI** (supra) cited to us by the appellants' counsel are distinguishable because as earlier stated, they dealt with the principle of assessing damages and substitution thereof which is not the case in this labour matter.

Before concluding, we wish to address the following issue. Earlier on, we discussed the manner in which under the South African context, the criteria and limited scope of awarding compensation in cases of unfair termination is prescribed by legislation on the basis of what is just and equitable to be awarded as compensation. Unfortunately, this is not what obtains in our jurisdiction, despite having a labour legislation almost similar to that of the Republic of South Africa. In the absence of the prescribed maximum sum to be awarded as compensation in our jurisdiction, apart from creating uncertainty, jeopardy is bound to occur in guise of the exercise of discretion and probably, even in the present matter, the arbitrator was faced uncertainty in making the award. This is in our considered view, a matter worth consideration by the Executive and legislators so as to prescribe limitations in order to set a clear guide to both the labour Court and arbitrators on what constitutes an equitable and just compensation in case substantive and procedural unfairness.

In view of what we have endeavoured to discuss, as earlier intimated, the learned High Court Judge properly exercised his discretion having ordered lesser compensation than what was awarded by the CMA. We thus uphold the verdict of the High Court that the respondent be paid

compensation for forty-eight (48) months' remuneration for the substantively unfair termination. We find the appeal not merited and it is hereby dismissed.

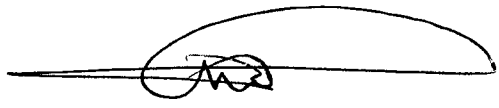
DATED at **ARUSHA** this 17th day of February, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

This Judgment delivered this 18th day of February, 2022 in the presence of Ms. Mariam Saad holding brief for Mr. Inocent Mwanga, learned counsel for the Appellants and Mr. Mukama Musalama, learned State Attorney for the respondent, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL