IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: MWARIJA, J.A., KEREFU, J.A. And KENTE, J.A.)

CIVIL APPEAL NO. 508 OF 2021

HUSSEIN SAID KAYAGILA .... APPELLANT

VERSUS

BULYANHULU GOLD MINE LIMITED .... RESPONDENT

JUDGMENT OF THE COURT

8th November, 2022 & 13th March, 2023

KENTE, J.A.:

The appellant Hussein Said Kayagila is a former employee of the respondent company Bulyanhulu Gold Mine Limited. He was employed as a machine operator in the respondent's underground Mining Department effective from 4th December 2013 to 31st October, 2018 when his contract of service was terminated on the grounds of ill-health. Upon termination of his employment contract, the aggrieved appellant lodged a complaint with the Commission for Mediation and Arbitration (the CMA) seeking to be reinstated or paid thirty six months' salary being compensation for unfair termination of his employment contract. Moreover, the appellant claimed from his erstwhile employer monetary compensation equal to 120 months' remuneration to make indemnity the damage he allegedly

suffered due to the loss of employment following what he called "permanent disability" while in the course of performance of his employers' assignments. The claim for 120 months' remuneration was predicated on the respondent's alleged failure to pay him his dues under the life insurance compensation scheme.

For its part, the respondent denied the claim contending that, it had lawfully terminated the appellant's contract of service in accordance with the applicable laws. After hearing the parties, the CMA held that, the respondent had advanced good cause for terminating the contract of service between her and the appellant but, in doing so, it had not fully complied with the law requiring her to observe procedural fairness in terminating its employee's employment contract. For that reason, judgment was entered for the appellant as claimed under the 1st item of the claimed reliefs. However, the appellant was awarded only six months' remuneration as compensation. The claim for 120 months remuneration was rejected as the CMA found that, the appellant ought to have submitted it to the Director General of the Workman's Compensation Fund to which he was advised to refer his grievances. All in all, the appellant was awarded a total of TZS.9,865,872.05 being compensation for unfair termination of his contract of service.

Dissatisfied, the appellant applied to the High Court at Shinyanga (in Revision No. 54 of 2020) seeking revision of the decision and award by the CMA. However, the application to the High Court was unsuccessful, hence the present appeal.

In this appeal, the appellant is complaining in the first ground of appeal that, in upholding the decision by the CMA, the High Court judge erred in law by wrongly interpreting the provisions of Rule 19 together with its sub-rules of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 in view of the particular circumstances obtaining in this case. In the second ground of appeal, the appellant faulted the two courts below for wrongly interpreting section 40 (1) (c) of the Employment and Labour Relations Act (Cap. 366 of the Laws) (the ELRA) and Rule 32 (5) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007 (hereinafter the Rules) by awarding him six months' salary as compensation for unfair termination of his employment contract contrary to the requirements of the law.

Submitting in support of the first ground of appeal, Mr. Evod Mushi, learned counsel who appeared before us to argue the appeal on behalf of the appellant contended that, in terminating the appellant's contract of service, the respondent did not consider if it had the ability to

accommodate him in line with rule 19 (1) (d) and (2) of the Labour Relations (Code of Good Practice) Rules, 2007. Mr. Mushi's argument was premised on the undisputed fact that the appellant's incapacity was caused by the nature of the duties assigned to him by the respondent, a fact which was conceded by the respondent and subsequently confirmed by the two lower courts. Since rule 19 (2) requires an employer who is anticipating to terminate the contract of service of an employee who is injured at work or incapacitated by illness in the line of his duties as it were in the instant case, to go to the greater length to accommodate the injured or incapacitated employee, it was Mr. Mushi's further contention that, the above-cited sub-rule deals with substantive fairness and therefore, having violated this rule, the respondent was guilty of both substantive and procedural unfairness. In consequence, the learned counsel strongly faulted the two lower courts for not making a judicial finding to that effect. Mr. Mushi's argument was based on his other contention that it was not established through the respondent's evidence that the appellant was permanently incapacitated as not to deserve re-engagement or re-instatement.

On the opposite side, in the reply submissions on behalf of the respondent, Ms. Caroline Kivuyo, learned counsel who was being assisted

by her learned friend Mr. Faustine Malongo, referred the Court to the appellant's own averments as contained in his affidavit appearing on page 205 of the record of appeal. The learned counsel centred her argument on paragraph 10 of the said affidavit and submitted in consequence that, in his application for revision before the High Court, the appellant did not canvas the grounds appearing under paragraphs 10 (b) and (c) of his affidavit which challenged the High Court for respectively not ordering the respondent to give further medical attention and treatment to the appellant instead of terminating his contract of service and affirming the decision by the CMA which held that indeed, it had no jurisdiction to entertain the appellant's tortious claims arising out of this labour dispute.

To keep this labour dispute in a proper perspective, we must observe that, up to this point, it does not appear to us that the parties to this appeal are at issue on the above-mentioned two points. In the circumstances, it occurs to us that the reply submissions made by Ms. Kivuyo on that aspect, are surely just an oversight. The appellant's grounds of complaint were very clear and the submissions made by Mr. Mushi expounding on them were perfectly understandable. While we agree that the appellant had raised several grounds of complaint before the High Court, we can not say that by merely raising those grounds he

had canvassed them with any serious vigour during the hearing of the application as to form the subject of judicial determination by the High Court. In the circumstances, we are inclined to conclude that, Ms. Kivuyo was not justified to challenge Mr. Mushi on what was entirely a none-issue. For that reason, we need not say more on this argument which is clearly misconceived.

Going forward, it may well be observed that, in view of the final conclusion that we have reached on this matter, we shall straightaway consider the second limb of the appeal raised in the memorandum without determining whether the termination of the appellant's contract of service was both substantively and procedurally unfair as alleged by Mr. Mushi. As stated before, in the second ground of appeal, it was contended that the learned High Court Judge erred in awarding monetary compensation for unfair termination amounting to only six months' remuneration contrary to the dictates of the law. Mr. Mushi contended that, having found that the respondent had not followed the laid down procedure in terminating the appellant's contract of service, the learned judge of the High Court strayed into error when he ordered the respondent to pay compensation to the appellant amounting to six months' salary only contrary to section 40 (1) (c) of the Employment and Labour Relations Act

(Chapter 366 of the Laws) (the ELRA). Directing his mind to this provision of the law, the learned counsel submitted that, it sets the minimum amount of compensation for unfair termination which can be awarded by the CMA or the Labour Court. We had no difficult time understanding Mr. Mushi's analogy of equating section 40 (1) (c) of the ELRA with the Minimum Sentence Act which provides for the imposition of predefined minimum sentences in respect of specified offences no matter what the unique circumstances of the offender or the offence are.

The cumulative effect of Mr. Mushi's arguments is that, the learned High Court Judge was wrong to award compensation to the appellant amounting to his monthly salary for the period of six months instead of the minimum twelve months as prescribed by law. According to Mr. Mushi, the learned judge of the High Court had no power to order for the appellant's compensation of a lesser sum than the amount prescribed under section 40 (1) (c) of the ELRA.

On her part, Ms. Kivuyo was of the quite different stance. She submitted very briefly that, in a proper case like the one now under consideration, a Labour Court or the CMA can award compensation for unfair termination of a sum less than the twelve months' salary. In support of her position, the learned counsel relied on our recent decision

in the case of **Felician Rutwaza v. World Vision Tanzania**, Civil appeal No. 213 of 2019 (unreported). She was also fortified in that argument by rule 32 (5) of the Rules which gives discretion to an Arbitrator in awarding appropriate compensation, to take into account the circumstances of each case. Particularly, Ms. Kivuyo relied on rule 35 (5) (b) and (f) which respectively allow an arbitrator, in making an appropriate award of compensation, to consider the extent to which the termination was unfair and to also take into account other relevant factors. In view of the fact that both the CMA and the High Court were unanimous that the respondent had complied with all the requirements of the law except rules 19 (6) (e) and 21 (2) which were not fully complied with, the learned counsel contended that, the High Court was justified in sustaining the six months' compensation awarded by the CMA. She also argued that, the arbitrator and subsequently the learned High Court Judge had taken into consideration the fact that the appellant had been paid some other benefits.

To start with, it behoves us to observe at the outset that, it goes without saying that, the law governing all questions of compensation for unfair termination of contracts of service is the ELRA. The rules cited by Ms. Kivuyo are subsidiary of the Principal Act. Section 40 (1) (c) provides

expressly that, where the arbitrator or the Labour Court finds a termination to have been unfair, it may order the employer to pay compensation to the employee whose contract of service was terminated an amount of monetary compensation of not less than twelve months' remuneration. The question which is central in this case and forms the fulcrum on which the rival arguments by the learned counsel turned, is whether the award of compensation for six months' remuneration was appropriate in accordance with the law and the circumstances obtaining in this case.

While we are mindful of our decision in **Felician Rutwaza** (supra) upholding the decision by the High Court ordering compensation for unfair procedural termination of the appellant's contract of service for only three months' remuneration, we note a significant difference between the cited case and the case now under consideration. As we shall hereinafter demonstrate, the two cases do not present similar facts and circumstances. In the case of **Felician Rutwaza** (supra), termination was found to be procedurally unfair but substantively fair, following the employee's proved acts of misconduct in the shape of engagement in politics thereby breaching the terms of employment contained in the clearly understood employment manual and the presentation of fake

academic certificates to his employer, an act of gross dishonesty. To the contrary, in the case under consideration, the appellant's contract of service was terminated by reason of ill-health which is more or less a case of *force majeure.* What is more, is an axiomatic fact that, in the instant case, as the crow flies, the appellant's ill-health was attributable to the works assigned to him by his employers. It must therefore be obvious that the case of **Felician Rutwaza** (supra) is materially distinguishable from the instant case by virtue of each case's peculiar facts. Indeed, one cannot seriously draw an analogy between, on one hand, the termination of a contract of employment due to misconducts by the employee and on another hand, termination due to the employee's ill-health. The foregoing fact is all the evidence anyone needs to appreciate that indeed, the appellant deserved much more than what was awarded to him.

For the foregoing reasons, we find ourselves in agreement with Mr. Mushi that, indeed the two courts below strayed into error when they awarded the appellant compensation for unfair termination for a paltry six months' remuneration. We take the foregoing view irrespective of the discretion given to the arbitrator in terms of the earlier cited rules 32 (5) and 35 (b) and (f) of the Rules. For, while we are live to the need for an appellate court like ours to always be reluctant to review the exercise of

discretion by trial courts, we feel obliged to observe as did Nathan Isaacs a British Educational psychologist (1895 - 1966) that, to say that a matter is one involving judicial discretion means no more than that judges should act thoughtfully. In the words of Lord Mansfield in **Rex v. Wilkes** (1770) 4 Burt. 2257 cited in **Povey v. Povey** [1971] W.L.R. 381 and also quoted with approval by this Court in the case of **Tanzania Electrical Supply Company (Tanesco) v. Independent Power Tanzania Limited (IPTL) and Two others** [2000] T.L.R 324:

> *"Discretion, when applied to a court of justice means sound discretion guided by law. It must be governed by rule, not by humour: it must not be arbitrary and fanciful; but legal and regular."*

Having examined the record, and upon considering all the arguments and submissions, we are satisfied that the appellant's grievances were not misplaced. We entertain no doubt that, the fact that his contract of service having been terminated because of a condition of illness which was an occupational hazard directly linked to the respondent's mining works, he deserved a much kinder compensation than what he was awarded.

We accordingly allow the appeal and set aside the six months remuneration awarded to the appellant by the CMA and upheld by the

first appellate court. In its stead, we award him compensation for unfair termination of his contract of service amounting to twenty (20) months' remuneration. Needless to say, the amount of TZS.9,865,872.05 which was awarded to the appellant as remuneration for six months, shall be deducted from the total amount awarded by this Court if it has already been paid to him.

Only to the above stated extent, the appeal is allowed. We make no order as to costs, this being an appeal arising from a labour dispute.

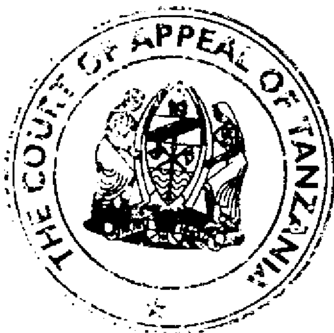
DATED at **DAR ES SALAAM** this 9th day of March, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 13th day of March, 2023 in the presence Mr. Evold Mushi for the appellant, and Ms. Caroline Lucas Kivuyo, learned counsel for the Respondent is hereby certified as a true copy of the original.



E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL