IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MWARIJA, J.A., KITUSI, J.A. And MGEYEKWA, J.A.)

CIVIL APPEAL NO. 282 OF 2021

PANGEA MINERALS LIMITED .....APPELLANT

VERSUS

JOSEPH MGALISHA BULABUZA ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Labour Division at Shinyanga)

(Mkwizu, J.)

Dated the 28 day of August, 2020

in

Revision No. 7 of 2020

JUDGMENT OF THE COURT

14th July & 04th August, 2023

MGEYEKWA, J.A.

The appellant, Pangea Minerals Limited, challenged the award of the Commission for Mediation and Arbitration ("the CMA") before the High Court of Tanzania at Shinyanga (Mkwizu, J.) in Revision No. 7 of 2020. In that decision, the High Court disallowed the revision by the appellant, against the award of the CMA dated 31st December, 2019 which had held that the respondent's termination from employment was substantively and procedurally unfair.

It is necessary to set out the essential facts of the case at the beginning. They go thus, on 1st June, 2011, the respondent was recruited by Pangea Minerals Limited as an Equipment Operator trainee based at Buzwagi Mine, Kahama District within Shinyanga Region. Three years later following the respondent's complaints of lower back pain, the employer facilitated him to attend medical check-ups and treatments. The respondent was examined by a Neurosurgeon expert at Muhimbili Orthopaedic Institute (MOI). After various tests, he was diagnosed with mild protruded disc in L4 - L5 and L5 - S1. As his condition was deteriorating, he was reviewed by the OT surgeon at TMJ Hospital. Still, his condition did not improve.

Following the unsuccessful medical treatments, the employer decided to investigate the ill-health of the respondent further whereas on 25th March, 2017, the meeting of the Medical Review Board ("the Board") evaluated the ill-health of the respondent and found that the respondent's pain was progressive and his lower pain persisted though he was off duty. The Board considered the review done by a Neurosurgeon at MOI and mine site clinic doctor, hence, recommended to the employer to conduct a Redeployment Committee Meeting to look for an alternative job, and the respondent's relevant part of his incapacitation be dealt with as per the company's policies for work-related issues.

Following the first Board's meeting, on 26th May, 2018, the Redeployment Committee ("the Committee") held a meeting, and a report in respect of the respondent's ill health status was prepared. The Committee considered the recommendations by the medical doctor who gave a brief history of the respondent medical condition. The said doctor referred to the Board's meeting held on 26th January, 2016 which revealed that the respondent had Mild Degenerated Disc Disease L4/L5 and his medical condition was partial permanently incapacitated which was work-related. Thereafter, the appellant proceeded to investigate the respondent's ill-health condition, which culminated in a second Board's meeting held on 17th November, 2017 to review the respondent's health. Dr. Edwin Liyombo, ENT specialist examined the respondent and recommended that he had normal hearing ability.

Upon exploring other alternative jobs within his department, the manager advised that at the moment there were no any alternative duties. The Committee went further to explore alternative jobs within other departments and the Human Resource Officer informed the Committee that at the moment there was no any vacancy, as all vacancies involved sitting or movement. The respondent had informed the Committee that, he felt pain while sitting for a prolonged period and the only relief was for him to lie

which will hinder him to resume to his duties. Guided by those findings, the Committee approved the respondent's termination on medical grounds which was a work-related medical condition. Acting on the Redeployment Committee's recommendation, on 30th May, 2018, the appellant terminated the respondent on medical ground.

Aggrieved by the respondent's decision, the appellant successfully referred the matter to CMA *vide* Labour Dispute No. CMA/SHY/KHM/ 264/2018 claiming that his employment was unfairly terminated and prayed for orders of reinstatement, payment of all remunerations and terminal benefits. The CMA found the termination was both substantively and procedurally unfair, and awarded the respondent 30 months' salary being compensation for unfair termination, subsistence allowances, and terminal benefits.

Being aggrieved by the CMA decision, the appellant challenged the CMA award before the High Court (Mkwizu, J.). In her judgment, the learned Judge essentially agreed with the CMA's findings that there were no valid reasons for terminating the respondent's employment. She further concurred with the CMA's findings that the respondent was not promptly informed about the termination and the termination was not communicated to the

respondent in writing. On page 254 of the record of appeal, the learned Judge sustained the arbitrator's award and dismissed the appeal in its entirety.

The appellant has preferred the present appeal to the Court seeking to assail the decision of the High Court on two grounds of grievance; namely:

1. *The High Court erred in law in applying the prescribed criteria for fairness of the procedure in determining the fairness of the reason for termination.*

2. *The High Court erred in law in holding that a medical final report was required before the termination of the Respondent's employment.*

At the hearing of the appeal before us, the appellant was represented by Ms. Caroline Kivuyo, learned counsel assisted by Mr. Faustine Malongo, learned counsel whereas Mr. Gervas Geneya, learned counsel, represented the respondent. Before the hearing, Ms. Kivuyo withdrew her intention to argue the additional ground appearing on page 7 of the written submission filed on 18/6/2021 in support of the appeal. The written submission were countered by the learned counsel for the respondent through his written submissions in reply filed on 25/6/2021. The same were respectively adopted by both learned counsel. We extend our gratitude for their invaluable

submissions. The substance of their clarification has assisted us in the course of composing this judgment.

On taking the floor, Ms. Kivuyo opted to submit first on the second ground. The learned counsel faulted the learned Judge in holding that, a final medical report was required before the termination of the respondent's employment. She asserted that the appellant considered the requisite factors in determining the fairness of the reasons for termination such as the cause of incapacity, the degree of incapacity and the temporary or permanent nature of the incapacity in terms of rule 19 (1) (a) (b) and (c) of the Employment and Labour Relations (Code of Good Practice) Rules, Government Notice No. 42 of 2007 ("the Code"). She was convinced that the employer complied with Rule 19 (3) of the Code which states that:-

> " *The employer shall be guided by an opinion of a registered medical practitioner, in determining the cause and degree of any incapacity and whether it is of a temporary or permanent nature."*

The learned counsel went on to submit that, based on the above provision of the law, the employer, in the instant case, was guided by the opinion of a registered medical practitioner. She added that, despite the appellant's reliance on the opinion of a medical practitioner, the first

appellate court, added another requirement contrary to the law by imposing the requirement of a final medical report.

Ms. Kivuyo continued to state that the learned Judge considered it mandatory to issue a final medical report before termination of the respondent's employment on the ground of incapacity while the said requirement is not prescribed under rule 19 of the Code. To bolster her contention, she referred the Court to page 249 of the record of appeal. She further asserted that, Dr. Othman Said attended the Health Board Meeting and in his investigation on work-related illness, based on the respondent's sickness and noted that his degree of incapacity was permanent. She added that, Dr. A. George recommended that the respondent's illness incapacitated him permanently and Dr. Edwin Liyombo, an ENT specialist, confirmed that the respondent's hearing was normal. To reinforce her argument, she referred the Court to pages 31 and 37 of the record of appeal.

The learned counsel further asserted that, as per the findings of the second Committee's meeting there was no any suitable job for the respondent's incapacitation. Hence there was no any other alternative job for him and his condition hinder him to resume any duty and the respondent admitted that, he cannot resume work. To build up her argument, she

referred the Court to the respondent's own averments as contained in his explanation appearing on page 205 of the record of appeal. In the premises, she urged the Court to allow the second ground of appeal.

Turning to the first ground, Ms. Kivuyo contended that, incapacity due to ill – health is one of the reasons provided for under the Code for terminating employment contracts. She submitted that the grounds for the fair reason are stipulated under section 37 (1) (b) (i) of the ELRA and the Code. She sought reliance from rules 19 and 21 of the Code which provide for fairness of the reasons for termination and the procedure to be used in such termination respectively.

She went on to submit in line with G.N. No.42 of 2017 and stated that there is a clear distinction between the criteria for fair reasons and procedure. She added that, in any dispute concerning unfair termination on the ground of incapacity due to ill health, the CMA or the Labour Court has to determine two distinct aspects namely; if there is fair reason and whether a fair procedure was followed in reaching the decision for termination. The learned counsel centered her argument on pages 247 to 250 of the record and contended that, the learned Judge determined the first issue, whether the applicant proved the reason for termination of the respondent's

employment. In her findings, she relied on rule 21 (2) and (3) of the Code and held that "..*there is nothing showing the efforts made to invite for other alternative jobs or seek respondent's opinion or suggestion on the available opportunities*". She valiantly argued that rule 21 (2) and (3) of the Code apply to the fairness of procedure and not the fairness of reason. She stressed that the High Court erroneously applied prescribed criteria for fairness of the procedure to confirm the arbitrator's award instead of applying the criteria prescribed for determining the fairness of the reason for termination.

With regard to whether or not the procedure was fair, Ms. Kivuyo in her oral submission was certain that the appellant complied with all procedures in terminating the respondent as the appellant conducted a meeting, minutes were prepared and the respondent confirmed that he could not resume to work. Hence the employer found that termination is the only alternative because there was no any acceptable alternative. Referring to exhibits MK.3 and MK.5, she asserted that the respondent spend 418 days out of duty and yet the appellant paid him full salaries, compensation funds, and life insurance benefits to the tune of TZS. 38,000,000/=.

The learned counsel had a serious contest on the award, she faulted the CMA for awarding 30 months' salaries being compensation in a case where the appellant had a valid reason for terminating the appellant. In her view, the compensation was way too beyond the actual award. In the same vein, she urged us to allow the appeal and set aside the CMA award of 30 months' salaries being compensation for unfair termination and substitute the same with 12 months.

On the opposite side, Mr. Geneya chose the same style of submission as done by Ms. Kivuyo. He started to argue the second ground and from the outset, Mr. Geneya defended the High Court decision as sound and reasoned. In his written submissions, he contended that the learned Judge was right to hold that a medical report was a mandatory requirement before terminating the employee's employment. To reinforce this argument, the learned counsel cited to us Rule 19 (3) of the Code. He cemented that the temporary and permanent incapacity depends on the possibility of the employee recovering or not from the sickness and he maintained that the respondent's health was improving. Reliance was on the Neurosurgeon recommendations.

In his view, the appellant was required to obtain a final medical report from the respondent's Neurosurgeon Doctor before convening the Committee's meeting and terminating the respondent's employment due to incapacity. He added that the final medical report would have helped the appellant to decide whether it was fair and proper to terminate the respondent's employment due to incapacity or to continue accommodating him depending on the temporary or permanent incapacity.

Submitting on the first ground, Mr. Geneya contended that the appellant's counsel conception is baseless for failure to understand the reasoning and holding of the first appellate court. He submitted that in her holding, the learned Judge relied on rule 21 (2) and (3) of the Code, and considered the five factors in determining the fairness of the reasons for terminating an employee in terms of rule 19 (1) (a) – (e) of the Code. He stressed that the first appellate court was right to determine the fairness of the reason by stating that there were no efforts made to consider other alternative jobs or seek the respondent's opinion or suggestion on the available opportunities. The respondent's counsel went on to submit that, the first appellate court considered factor (d), the ability to accommodate the incapacity but he argued that, it is the employer's responsibility to look for an alternative job.

With regard to the award, he defended the CMA award as fair and sound. In alternative, he invited the Court to reinstate the respondent since there were no any justifiable reasons for terminating him.

On the strength of the above submission, the learned counsel implored the Court to dismiss both grounds of appeal for being destitute of merit.

In her rejoinder, Ms. Kivuyo stressed that the appellant explored other job alternatives within other departments. However, there were no any suitable jobs for the respondent since performance of all duties involved sitting and moving around. She added that the appellant exhausted all options but in accordance with the circumstances, there was nothing to be done than to terminate him from employment.

Regarding sick leave, relying on section 32 (1) and (2) of the ELRA, she asserted that the sick leave circular requires the employer to pay an employee full wages for 63 days and half wages for another 63 days. The records show that the appellant paid the respondent beyond the maximum amount. She reiterated that, rule 19 (3) of the Code does not require a final medical report in terminating an employee. On the prayer by Mr. Geneya to

reinstate the respondent, Ms. Kivuyo simply argued that this matter cannot be entertained by this Court because there is no any cross-appeal before us.

We have considered the written and oral submissions by both learned counsel, the grounds of appeal shall be determined in the same manner and style adopted by both learned counsel in their arguments; that is, by determining the second ground of appeal then the first ground will come last.

As indicated earlier, the second ground assails the reliability of the Board's recommendations (Exh. MK 2.1) and the recommendation of the Committee (Exh. MK 3.2) which formed the appellant's basis for terminating the respondent. The issue in controversy which calls for our painstaking consideration is *whether or not the appellant proved reasons for the termination of the respondent's employment.*

The law relevant for termination of employment based on the ground of ill -health is contained in rule 19 (1) of the Code and sections 37 (1), (2) (a) (c), (4) and 99 (1) (a) of the ELRA. For easy reference, we undertake to reproduce it hereunder. It reads:

"19 -(1) An employer who is considering terminating an employee on grounds of ill health or injury shall take into account the following factors to determine the fairness of the reason in the circumstances-

(a) The cause of the incapacity;

(b) The degree of the incapacity;

(c) The temporary or permanent nature of the incapacity;

(d) The ability to accommodate the incapacity;

(e) The existence of any compensation or pension".

It is noteworthy that termination on the ground of ill health is considered substantively unfair where the employer fails to conduct an inquiry and where no investigation has been made as to the cause of that ill health. The evidence is plain that following the respondent's long-standing illness, the appellant decided to investigate it whereas the Board (Exh.MK.2.1) specifically on pages 31 and 38 of the record proved the respondent's incapacity that, he had been out of job consecutively for 179 days, but had no improvement and he had both red and yellow flags which obscure his progress. The Board recommended a Committee's meeting to determine whether the employee would be able to perform his duties or perform alternative duties.

Bearing in mind the factors stipulated under rule 19 (1) of the Code in terminating an employee on ground of ill –health, we entirely agree with Ms.

Kivuyo's submission that the employer assessed the extent of the respondent's medical condition and its impact on the respondent's ability to fulfill his duties. The appellant also considered to accommodate the respondent's incapacity by trying to adjust the respondent's job environment that would enable him to have access in employment. However, the appellant's efforts proved futile. Hence on 26th May, 2017 the Committee convened a meeting. The respondent was represented by Mr. Denis Dodogoro. In their deliberation, they considered the duration of the illness, the likelihood of a reasonable recovery time and the recommendations by the medical doctor, the employee's emphasis on his medical condition, the patient's department manager, the patient employee's views, and vacancies availability across the site. Then, they came up with a solid recommendation that the employee be terminated on medical ground.

On our part, we are of the view that the respondent's medical condition prevented him from performing the essential functions of his job and because he could not resume work due to his ill-health condition, his termination was due to a fair reason.

More so, we have taken into account the employer's undue hardship, in a situation where the employee is absent due to a long-standing illness, it

causes significant operational difficulties, and henceforth, it may be considered a legitimate reason for termination.

Next for consideration is the confronting issue on which the parties locked horns, *whether or not a final medical report is a requirement in terminating an employee*. We hinted earlier that the first appellate court discounted the medical practitioner's report for not being a final medical report but also implausible as it was not reliable to justify the respondent's termination. The record reveals that, before terminating the respondent, the appellant accommodated the respondent's incapacity by offering him further medical attention and treatment. However, the outcome revealed that he was incapable of working. After being satisfied that the respondent was permanently incapacitated, guided by the opinion of a registered medical practitioner, the appellant terminated the respondent from employment. Their assessment which promulgated the respondent's termination was in accordance with Rule 19 (3) of the Code. That rule provides that:

> *"(3) The employer shall be guided by an opinion of a* ***registered medical practitioner, in determining the cause and degree of any incapacity and whether it is of a temporary or permanent nature."***

The rule we have quoted was referred to by the Court in **Bulyanhulu Gold Mines Limited v Paschary Andrew Stanny**, Civil Appeal No. 281 of 2021, (unreported) in which we demonstrated that: -

> *"In our opinion, particularly in view of the contest between the learned advocates for the parties, the most relevant sub rule of rule 19, is sub rule (3) of the Code. The rule requires an employer who wishes to terminate an employee to be guided by an opinion of a registered medical practitioner."*

Guided by the above holding of the Court and Ms. Kivuyo's submission, there is no gainsaying that the opinion of a registered medical practitioner was a crucial factor upon which the employer was to make its final decision of whether or not to terminate the employee. On the other hand, we do not agree with the learned Judge's findings and Mr. Geneya's contention that the final medical report is the main basis for the employer to terminate the employee's employment. Mr. Geneya's submission collapsed in the face of the law since there is no such requirement under rule 19 of the Code. Therefore, we hold that the reasons for termination were complied with.

For the aforesaid findings and reasons, we hold that the appellant had valid reasons to terminate the respondent based on his ill- health.

We now turn to consider the first ground of appeal which seeks to challenge the Judge's findings when she applied the prescribed criteria for fairness of the procedure in determining the fairness of the reason for termination. In determining the first issue; *whether the applicant (appellant) proved the reason for termination of the respondent's employment*, the learned Judge was required to base her decision on rule 19 of the Code. Mr. Geneya's submission on this ground of appeal is with respect, incorrect. Had he read between the lines, he could have noticed that the holding of the learned Judge contained a mixed grill of reasoning. With respect, as rightly submitted by Ms. Kivuyo, on page 250 of the record, the learned Judge misapplied the criteria prescribed under rule 21 of the Code to determine the fairness of the reason for termination instead of rule 19, which as shown above, provides the facts to be considered in terminating an employee on medical ground.

On the other hand, decorously, we do not agree with Ms. Kivuyo's submission that the whole procedure in terminating the respondent was fair. It is noteworthy that the fairness of the procedure for termination based on ill health or injury is guided by the Code specifically rule 21 (1) to (8) which the employer is required to follow before terminating the employee. For easy orientation, we find it beneficial to reproduce it as hereunder: -

" *(1)The employer shall investigate an employee's incapacity due to ill health or injury.*

(2) The employee shall be consulted in the process of the investigation and shall be advised of all the alternatives considered.

(3) The employer shall consider the alternatives advanced by the employee and, if not accepted, give reasons.

(4) The employee is entitled to be represented by a trade union representative or fellow employee in the consultations.

(5) Prior to decision to terminate the employment of the employee for ill-health or injury, ***the employer shall call a meeting with the employee, who shall be allowed to have a fellow employee or a trade union representative present to provide assistance***

(6) ***The employer shall outline reasons for action to be taken*** *and allow the employee and/ or representative to make representations, before finalising a decision.*

(8) ***The outcome of the meeting shall be communicated to the employee i****n writing, with brief reasons". [Emphasis added].*

Going by the above provision of the law, we find that the procedure for termination was partly contravened. The employer did not call a meeting prior to the termination of the respondent's employment. Hence, the appellant contravened the requirement stipulated under rule 21 (5), (6), and

(8) of Code. On the other hand, after looking closely at rule 21 of the Code, we agree with Ms. Kivuyo's submission that, the appellant followed some of the procedures in terminating the respondent from employment, such as; investigating the respondent's incapacity due to ill-health, the respondent was consulted in the process of investigation, the appellant exhausted accommodations options and the respondent was entitled to be represented if he so wished. Therefore, it is our settled view that the procedure in terminating the respondent was partly unfair.

Turning to the CMA award, the learned counsel for the parties had butting heads on the award. Ms. Kivuyo found the award too high while Mr. Geneya defended the CMA award as reasoned and fair. The record shows that the respondent prayed for a compensation of 24 months' remunerations, inversely, the CMA awarded him a compensation of 30 months' remunerations. In determining the CMA award, we have considered the fact that the arbitrator is required to make an appropriate award by having in mind that in labour cases, issuance of compensation is not to punish the employer but rather to compensate the loss incurred by the employee.

In the matter at hand, the appellant took the initiative to make the respondent's life environment conducive by paying him life insurance to the tune of TZS. 38,000,000/= and when the respondent was granted time off work due to medical reasons, he was paid more than he deserved. The appellant paid him salaries of 418 days while the provision of section 32 (1) and (2) of the ELRA, entitled him full wages for 63 days and half wages for the second 63 days. We have also considered the fact that the remedies flowing from unfair termination are not mandatory for an arbitrator to order compensation of more than 12 months remuneration. We are saying so because the unfairness of termination is on procedural ground, therefore, obviously, it counts less in favour of awarding 30 months' compensation since the termination is partly procedurally unfair than in the case, if it is both substantively and procedurally unfair.

Moreover, we are aware that the arbitrator has a discretion to decide on the appropriate 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 as we observed in **Veneranda Maro and another v Arusha International Conference Centre**, Civil Appeal No. 322 of 2020

and **Pangea Minerals Limited v Gwandu Majali**, Civil Appeal No. 504 of 2020 (both unreported).

The reason given by the CMA in awarding the respondent compensation of 30 months' salary as reflected on page 127 of the record of appeal was that the termination of the respondent was both substantively and procedurally unfair. The High Court acknowledged that the termination was substantively and procedurally unfair. Had it been the case at hand we would have the same view since termination which is substantively and procedural unfair attracts heavier penalties as opposed to procedural unfairness alone which attracts lesser penalties. In the case at hand, the termination of the respondent is substantively fair and partly procedurally unfair. Therefore, we have legal justification to revise the award of 30 months remuneration.

Having said so, we decline the prayer made by Mr. Geneya, to reinstate the respondent. We occasionally discussed the tenor and import of section 32 (1) and (2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules GN. No. 67 of 2007 that, reinstatement can only be ordered if both substantive and procedural unfairness were proved. It would be unrealistic, in the matter at hand, to reinstate the appellant while termination was substantively fair.

For the reasons we have endeavoured to assign, we find the respondent's termination substantively fair and partly procedurally unfair. Therefore, we proceed to revise the 30 months remuneration and substitute the same with 12 months remuneration. The appeal is partly allowed. This being a labour-related matter, we make no order as to costs.

It is so ordered.

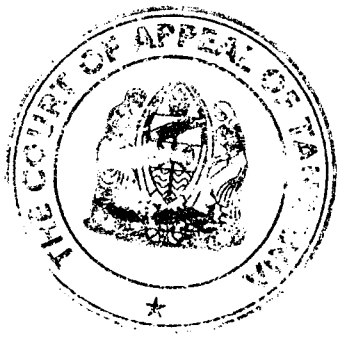
DATED at **SHINYANGA** this 03rd day of August, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 04th day of August, 2023 in the presence of Mr. Shabani Mvungi holding brief of the Faustin Malongo for the Appellant and Mr. Gervas Geneya, learned counsel for the Respondent is hereby certified as a true copy of the original.



R. W. Chaungu
DEPUTY REGISTRAR
COURT OF APPEAL