IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., KITUSI, J.A And MDEMU, J.A.)

CIVIL APPEAL NO. 38 OF 2021

BATI SERVICES COMPANY LIMITED..... APPELLANT

VERSUS

SHARGIA FEIZI.....RESPONDENT

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

(Muruke J.)

dated the 31st day of August, 2020
in
Revision No. 106 of 2019
.....

JUDGMENT OF THE COURT

23rd August & 5th September, 2023

MDEMU, J.A.:

Shargia Feizi, the respondent herein was employed by the Appellant as a Finance Manager. On 14th July, 2014 while on duty, unidentified armed robbers robbed from her TZS 40,000,000.00, the appellant's property and in the course, did shoot her. The respondent was thereafter granted sick leave for treatment at AMI hospital and later proceeded to South Africa for further treatment. Her health condition improved gradually and when required to resume her responsibility, she demanded salary adjustment from USD

6500.00 to USD 10.000.00 per month; relocation of office; reduction of working hours and removal of a security guard who was on duty when she was gunshot. The appellant did not heed to those demands. Following this, the respondent did not resume her responsibility at her work station. Disciplinary proceedings thus commenced but proceeded *ex-parte* and on 14th September, 2015 the respondent was terminated from employment.

At the Commission for Mediation and Arbitration (the CMA), the respondent was successful in a labour dispute filed by her. The CMA found her termination both substantively and procedurally unfair. The appellant contested, thus moved the High Court on revision which allowed it partly by reducing thirty-six months' salary compensation to twelve months, severance and notice pay. Aggrieved further, an appeal was filed in the following grounds:

1. *That, the honourable Judge erred in law in finding that the disciplinary hearing was impartial and against the rules of natural justice in absence of evidence to that effect.*
2. *In the alternative and without prejudice from the foregoing, the honourable Judge erred by finding that the managing director was present at the disciplinary hearing as a member of the hearing committee merely*

because the hearing form was wrongly filled and in absence of the evidence to that effect.

3. *The honourable Judge erred in law in awarding compensation of 12 months' salary for procedural unfairness where substantive fairness of termination was established.*
4. *The honourable Judge erred in law in awarding severance pay where substantive fairness of termination was established.*
5. *The honourable Judge erred in law in awarding notice pay where termination was following material breach of employment contract.*

On 23rd August, 2023 when this appeal was called on for hearing, the appellant company was represented by Ms. Miriam Bachuba, learned counsel whereas the respondent had the services of Ms. Blandina Harieth Kihampa, learned Counsel. At the inception of her submission in support of the appeal, Ms. Bachuba adopted the written submissions filed earlier on and thereafter submitted in grounds one and two of the appeal jointly that, the impartiality of the disciplinary committee may not be doubted merely on presence of the Managing Director who attended as a witness and not as a member to the disciplinary committee. She added that, his attendance in the committee as a senior official is a requirement of the Employment and Labour Relations

(Code of Good Practice) Rules, 2007 GN. No. 42 of 2007 (the Code of Good Practice). The learned counsel cited to us the case of **Metropolitan Properties v. Lannon** [1969] 1 Q.B 577 to bolster her assertion that, there was no bias occasioned in the disciplinary committee.

In respect of awards complained in grounds three, four and five of the appeal; the learned counsel was of the view that, having found termination to be substantively fair, that is, for valid reasons, then the award of compensation of twelve months' salary was at the high side and that three months' salary compensation would be convenient to redress the respondent. On this, she cited the following cases: **Stanbic Bank (T) Limited v. Iddi Halfan**, Civil Appeal No.139 of 2021; **Pangea Minerals Limited v. Joseph Mgalisha Bulabuza**, Civil Appeal No.282 of 2021 and **Veneranda Maro & Another v. Arusha International Conference Centre**, Civil Appeal No.322 of 2020 (all unreported). She thus urged us to reduce compensation by exercising court's discretionary power under the provisions of section 40 (1) and 37 (1) of the Employment and Labour Relations Act, Cap. 366. (the ELRA).

As to severance pay, her view was that, it is not awardable when termination is on ground of misconduct by the employee as stipulated under the provisions of rule 42 (3) (a) and 26 (2) (b) of the Code of Good Practice. She went on submitting that, even notice pay is not awardable in every termination as in certain instances, termination may be warranted without such an award.

In reply to the grounds of appeal, Ms. Kihampa submitted that, the Managing Director performed two roles in the disciplinary committee meeting. That is, he attended as a member and also as a witness. She found such roles to have an influence in the decision of the committee as such, impartiality of the committee remains questionable. Basing on this, she intimated that, the finding of the High Court regarding impartiality of the disciplinary committee was proper more so as bias need not be actual but any indication such as the presence of the Managing Director, as was in this case, is sufficient to prove presence of bias.

Regarding compensation of twelve months' salary, she submitted that, in terms of section 40(1) (c) of the ELRA, twelve months compensation is the minimum compensation statutorily awardable and any exercise of

discretionary power which should base on certain considerations and circumstances, may not be exercised in awarding compensation below the minimum prescribed by the statute. She thus observed that, as termination was substantively on fair reasons but procedurally flopped, then the High Court was justified to award twelve months' compensation. The learned counsel referred to us the following cases in that regard: **Felician Rutwaza v. World Vision Tanzania**, Civil Appeal No. 213 of 2019; **Peter Maghali v. Super Mills Limited**, Civil Appeal No.279 of 2019; **Veneranda Maro & Another v. Arusha International Conference Centre** (supra) and **Hussein Said Kayagila v. Bulyanhulu Goldmine Limited**, Civil Appeal No.508 of 2021 (all unreported). After citing these cases, the learned advocate urged us to consider circumstances for termination, that is absence of the respondent at work place particularly due to incapacitation resulting from gunshot. She singled out this ground and invited us to depart from the decision of this Court in **Felician Rutwaza** (supra).

She went on submitting regarding severance pay that, the respondent is entitled to severance pay in terms of section 42 (3) (a) of the ELRA and rule 26 of the Code of Good Practice. Regarding notice pay, her submission

was that, as termination was substantively fair but procedurally not fair, then the notice pay is payable to the respondent.

Rejoining to the respondent's counsel, Ms. Bachuba submitted that, mere listing of the name of the Managing Director in the disciplinary hearing proceedings does not make him a party nor have any influence in the decision of the committee. She thus implored us to award compensation below twelve months basing on the case of **Felician Rutwaza** (supra). She submitted so because, in her view, there is no legal principle restricting courts in exercise of their discretion to award compensation below the statutory twelve months' compensation. She concluded her rejoinder by submitting that, where termination is based on misconduct, both severance and notice pay are not awardable.

We heard rival arguments from the parties and upon our consideration of the entire record; two issues to look at are: **one**, as presence of the Managing Director of the applicant during disciplinary hearing proceedings is uncontested, the question is whether such presence had any influence in the outcome of the disciplinary hearing proceedings. This will answer grounds one and two of the complaint. **Two**, whether it was proper to award

twelve months' salary compensation in circumstances where termination was for valid reasons but on procedural unfairness. We will determine this alongside with the justification of entitlements to severance and notice pay where termination of employment, as in this labour dispute, was on valid reasons. This second limb will resolve grounds three, four and five of the appeal.

Beginning with the question of impartiality raised in grounds one and two of the appeal, parties are in consensus, and we also associate ourselves in that consensus that, in the disciplinary hearing as per the hearing form at page 146 of the record of appeal, the Managing Director, Mr. Benoit Durcarme is listed. Was he a member to the committee or a witness? Parties parted ways. The respondent's averment was that, he had multiple roles as a witness and a member, a fact which is contested by the appellant. The latter insists that, appearance of the Managing Director to the committee was for the purposes of giving testimony more so as no senior officer of the respondent would possess such information to explain to the committee. In our view, the issue shouldn't be on the role played, that is, a witness or a member or both but rather, what influence would that presence portray on impartiality of the disciplinary committee? At page 687 through 688 of the

record the High Court when deliberating on impartiality of the committee observed as follows:

> *It is my view that that in the disciplinary hearing, there was no impartiality. The presence of Managing Director as a member of the hearing committee and also the witness of the applicant interferes with the principle of natural justice. Taking into consideration that Mr. Benoit in his act on the recommendations of the Chairperson of the committee which were resulted from the same Disciplinary hearing, he participated as a member and a witness therein. It is my opinion that, fair hearing should not carry any doubt of unfairness, or biasness. There are various decision which restated the position of the case of* ***NBC Ltd Mwanza v. Justa Kyaruzi****. Rev. No 79/2009 which decided that, the procedures for termination shall not be observed in a checklist fashion, but the act of the Managing Director being a member of the Disciplinary Committee, applicant's witness and the one which decided to terminate the applicant by signing the termination letter, who just gives recommendations that was contrary to principles of natural justice, hence it vitiated the whole proceedings. This was also the position in the case of* ***Onael Moses Mpeku v. National Bank of Commerce,*** *Rev. No. 461/20219. Basing on that finding, I find no need to fault the*

arbitrator's finding that the procedures for termination of the respondent were unfair.

We have no cogent reason to doubt that finding. As observed by the learned Judge, Mr. Benoit in his capacity as the Managing Director is the one who formed the committee, initiated disciplinary hearing, was present at the hearing be it as a witness or member and is the one who implemented the disciplinary measures as recommended by the committee. These roles, in our view, by any standard, must have had an influence on the outcome of the whatever disciplinary measures proposed by the committee. We are in that observation because, as submitted by the respondent in his written submissions, the disciplinary committee charged with the conduct of disciplinary hearing was duty bound to examine the alleged disciplinary breaches against the appellant herein and subsequently adjudicate on them. This role could not be impartially discharged in the presence of the Managing Director. We are fortified, as observed in **Cooper v. Wilson** [1937] 2 K.B. 309 cited to us by the respondent's counsel that, the presence of the Managing Director at whichever capacity in the committee had an influence and lead to a possibility likely sufficient enough to deprive the committee of its mandate to make an impartial decision. On that account, we are unable

to agree with the appellant counsel's assertion that the committee was impartial given the foregoing circumstances.

We now turn to the award. In this one, we begin with the contested twelve months compensation awarded and contended by the respondent but discontented by the appellant. Whereas the respondent stated the twelve months compensation to be the statutory minimum upon termination on valid reasons but procedurally faulted; the appellant's view is that there is no law restricting the court to go below twelve months' compensation. We reproduce the relevant law, that is section 40 (1) of the ELRA as hereunder:

> *40 (1) Where 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 unfair 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.*

As stated above, parties gave two varied interpretations on the above section regarding discretion power of the court in awarding compensation. We should begin with the rule of construction to give plain meaning of the words used. See **Katani A Katani v. The Returning Officer, Tandahimba District & Two Others,** Civil Appeal No. 115 of 2011 (unreported). In the statute, our interpretation of section 40(1) (c) of the ELRA is that where there is a finding by the court or arbitrator that termination of an employee was unfair, the employer should be ordered to compensate the employee remunerations of not less than twelve months'. We therefore agree with the respondent that, discretionary power of the court to award compensation, in the circumstances of this labour dispute may not go below twelve months compensation. We hold so as termination is on fair reasons substantively but unfair in terms of the procedure. In **Veneranda Maro & Another v. Arusha International Conference Centre** (supra) at page 12 this Court had this to say with regard to the minimum twelve months' compensation:

> *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).*

Having said so, we do not find to be justifiable to fault the learned judge for she has not acted on extraneous matters which compelled her to arrive at a wrong conclusion. See **Hussein Said Kayagila v. Bulyanhulu Goldmine Limited** (supra). The respondent's termination was on fair reasons but the procedure followed particularly at the disciplinary committee was abused. We alluded earlier that, presence of the Managing Director in the proceedings for whichever capacity, had an influence in the outcome of the committee.

On those premises, we find it hard to take side with the appellant's counsel contention in application of the principles stated in **Felician Rutwaza** (supra) so that an award be of less than twelve months prescribed nor do we associate with the respondent's assertion to depart from that

decision in that the circumstances in the two are not similar. In **Rwetaza's case** (supra), reasons for termination were misconduct following involvement of the appellant in politics and gross dishonesty for faking academic certificate. In the instant labour dispute, the respondent was terminated on failure to attend work for five working days due to misunderstandings between the appellant and the respondent after the former's failure to heed to demands of the latter when asked to resume responsibilities. We therefore find nothing to fault the learned Judge in awarding twelve months' remuneration for terminating the respondent.

We now turn to determine notice pay. The learned Judge on revision did uphold the arbitrator's award on notice pay appearing at page 173 of the record. As observed in **Felician Rutwaza** (supra), reliefs of such a nature are awardable where termination is on invalid reasons which is not the case here. We therefore hold that, in terms of rule 8(2) (d) (ii) of the Code of Good Practice, the respondent was not entitled to notice pay. The fifth ground of appeal is with merits and is accordingly allowed.

Regarding the relief as to severance allowance, we have in mind the governing law, which is rule 26 (2)(b) of the Code of Good Practice. For ease of reference let the rule speak by itself as follows:

> 26 (2) *The employer is not required to pay severance pay if the employment is terminated-*
>
> *(a) Before the completion of the first year of employment;*
>
> ***(b) Faily on grounds of misconduct;***
>
> *(c) On grounds of incapacity, incompatibility or operational requirements and the employee unreasonably refuses to accept alternative work with the employer or alternative employment with any other employer. [Emphasis ours]*

In the instant labour dispute, as alluded to, the respondent was terminated on misconduct meaning that, her termination substantively was on fair reasons. In terms of the law as we reproduced above, the respondent is not entitled to severance allowance. We thus hold so and allow the fourth ground of appeal.

Having said all, this appeal is partly allowed to the extent of notice pay and severance allowance which, as alluded in the foregoing, the respondent is not entitled to. We uphold the decision of the High Court in respect of

compensation of twelve months remuneration. This being a labour matter, we do not make an order for costs.

DATED at **DAR ES SALAAM** this 5th day of September, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered this 5th September, 2023 in the presence of Mr. Kyariga N. Kyariga, learned counsel for the Appellant and Ms. Blandina Harrieth Kihampa learned counsel for the Respondent is hereby certified as true copy of original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL