

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MOSHI**

**(CORAM: MUGASHA, J.A., MWANDAMBO, J.A., And MAIGE, J.A.)**

**CIVIL APPEAL NO. 357 OF 2020**

**FLAVIO NDESANJO .....APPELLANT**

**VERSUS**

**SERENGETI BREWERIES LTD ..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Moshi)**

**(Twaib, J.)**

**dated the 27<sup>th</sup> day of November, 2019**

**in**

**Labour Revision No. 05 of 2019**

**.....**

**JUDGMENT OF THE COURT**

*19<sup>th</sup> & 27<sup>th</sup> September, 2023*

**MAIGE, J.A.:**

The appellant was until 16<sup>th</sup> January, 2017 ( the termination date), in the service of the respondent as a store assistant. Her service was terminated allegedly for misconduct. Dissatisfied, she commenced a referral before the Commission for Mediation and Arbitration at Moshi (the CMA), to challenge the fairness of the termination of her service. At the end of the arbitration, the CMA found that the termination was unfair both

substantively and procedurally. It thus awarded 150 month's salaries as compensation for unfair termination of service, one month salary in lieu of notice, severance allowance, 28 month's salaries from the date of termination to the date of the award and 20,000,000.00 as nominal damages.

Being aggrieved, the respondent applied for revision to the High Court, Labour Division at Moshi (the Labour Court) questioning the correctness of CMA's determination of the fairness of termination, the quantum of compensation for unfair termination and other reliefs.

The Labour Court entirely concurred with the CMA on the fairness of termination of the appellant's employment and differed with it on determination of the amount of compensation for unfair termination and the so called nominal damages. With regards to compensation for unfair termination, the Labour Court was of the view that, in so far as the amount awarded was beyond the 12 month's salaries prescribed under section 40(1) ( c ) of the Employment and Labour Relation Act (ELRA) , the CMA ought to have assigned reasons therefor and the decision should have been founded on evidence. Having said that, it quashed and set aside the

award of compensation for unfair termination and nominal damages and substituted them with an award of 12 month's salaries.

This time around, it is the appellant who has been aggrieved and hence the present appeal. She has, in the memorandum of appeal, raised three grounds to fault the decision of the Labour Court. During hearing, however, the second ground of appeal was abandoned. The two grounds which remain, in our view, raise one issue namely; whether the Labour Court was justified in quashing and setting aside the award of compensation for unfair termination and nominal damages by the CMA and substituting it with an award for payment of an amount which is equal to 12 month's salaries.

Both parties were duly represented at the hearing of the appeal. The appellant was represented by Mr. Lecktony Losiyo Ngeseyan, learned advocate whereas his learned friend, advocate Luka Elingaya represented the respondent. Each of the counsel had, before the hearing, filed written submissions which, at the hearing, were fully adopted with some clarifications. We commend the counsel for their well-focused submissions which have been of much assistance in the composition of this judgment.

We have appropriately considered the rival submissions and reviewed the record. It would appear to us that, whether the CMA can award compensation for unfair dismissal beyond twelve month's salaries is not in dispute. Equally so, for the question as to whether in exercise of such discretion, the CMA has to assign reasons. The controversy is, whether the Labour Court was right in holding that the award of such amount was not without reason and whether the reduction of the same to the minimum amount of compensation was justified.

We shall first address the question in relation to the award of nominal damages which was quashed in its entirety because it was not founded on any evidence. In his submission, the learned counsel for the appellant did not address the issue. He spent much time arguing the issue of reduction of the compensation for unfair termination to an amount equal to twelve (12) month's salaries. This aspect cannot detain much of our precious time. The reasons being that in her referral to the CMA, the appellant's cause of action was apparently unfair termination. The remedies for such a cause of action are expressly provided for under section 40 of the ELRA. In the said provision, the amount of compensation is quantified by monthly salaries. In our view, loss of reputation cannot

attract a separate relief under unfair termination in terms of the provision just referred. It can perhaps be the basis for raising the quantum of compensation for unfair termination beyond the minimum amount of twelve month's salaries. Otherwise, it can form a separate tortious action. In any event, the Labour Court was right in holding that no evidence was adduced to support such a claim.

We now proceed to determine the issue in connection with the reduction of the quantum of compensation for unfair termination from 150 months salaries to twelve months salaries. For the appellant, Mr. Ngeseyan submitted that, contrary to the expression by the Labour Court, the CMA justified its departure from the minimum amount under section 40(1) (c) and the reasons are on the record. The factors considered by the Arbitrator in giving such award, he submitted, are well within the purview of the provisions of rule 32 of G.N. No. 67 of 2007. He submitted, therefore that, in reducing the quantum of compensation for unfair termination on the wrong proposition that it was not justified and without assigning reasons why the reduction was to such extent, the Labour Court incorrectly applied its revisional powers under rule 28(1) of the Labour

Court Rules. At the end, he urged us to allow the appeal and reverse the decision of the Labour Court in its entirety.

Mr. Elingaya started his submission in reply by citing the provision of section 91(2) (c) of the ELRA which vests powers in the Labour Court to set aside an arbitral award if the same is unlawful, illogical or irrational. The Labour Court, he submitted, rightly reversed the arbitral award to the extent of compensation for unfair termination and damages on account that it was not based on reasons and not founded on evidence.

He submitted further that much as the Arbitrator had discretion to award compensation over and above the minimal amount, such discretion has to be exercised judiciously. Reference was made to the Court's decisions in **Regional Manager, TANROAD Kagera v. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007 and **Tanga Cement Company Limited v. Jumanne Massanga and Another**, Civil Appeal No. 6 of 2001 (both unreported).

Youthfulness, he submitted, cannot be a rational ground for determining the amount of compensation as a young person is more likely to secure employment. In any event, he added, there was no evidence to

the effect that the appellant failed to secure employment for the reason of unfairness of termination of her employment.

It is common ground that, the appellant's award of 150 months salaries by the CMA was based on the provision of section 40 (1) (c) of the ELRA which provides in effect that; where the arbitrator or Labour Court establishes that the termination of service was unfair, it may instead of giving an order for reinstatement or reengagement, award the unfairly terminated employee compensation of not less than 12 month's salaries. Parties are in agreement that, under the respective provisions, the arbitrator may subject to justification, award compensation beyond 12 month's. In its decision, the Labour Court held in the first place that, the decision of the CMA to give an award above 12 month's salaries was without reason. However, it was not correct because the record reveals that the CMA assigned reasons for the departure in the following words:

*"Also, taking into account the youthfulness of the complaint and how the unfair termination has affected him in securing another employment; it is my firm opinion that the award of 150 months' salaries as compensation for unfair termination of his employment is justifiable and fair in the current circumstance....."*

The CMA, it would appear, justified the award of compensation beyond the 12 month's salaries on account of the appellant's loss of remuneration. That is one of the factors which may be considered in determining the appropriateness of compensation under rule 32(5) of Labour Institutions (Mediation and Arbitration Guidelines), Rules, G.N. No. 67 of 2007. Other factors include; the extent to which the termination was unfair; any prescribed minimum or maximum compensation; the amount of the remuneration; the amount awarded in previous similar cases; parties conduct during the proceedings and any other relevant factors. We entertain no doubt, therefore that, the reasons assigned by the CMA to justify an award beyond twelve month's was within the legally acceptable parameters.

The counsel for the respondent submitted that there was no evidence to support the claim. With respect, we cannot agree with him for three main reasons. **One**, unfairness of termination of the appellant's service, according to the decisions of the CMA and Labour Court, was both in substance and procedure. This would justify departure from the minimum. See for instance, **Felician Rutwaza v. World Vision**



**Tanzania**, Civil Appeal No. 213 of 2019 (unreported) in which the Court subscribed to the following statement of the Labour Court:

*"..a reading of other sections of the Act gives a distinct impression that the law abhors substantive unfairness more than procedural unfairness, the remedy for the former attracts a heavier penalty than the latter..."*  
*[Sodetra (SPRL) v. Mezza & Another, Labour Revision No. 207 of 2008 (unreported)]*

**Two**, the appellant's contract of service was permanent. This means that if she was not unfairly terminated and everything remained constant, she would have probably been in service until the age of compulsory retirement. In effect therefore, the termination has accounted for loss of remuneration to her which is relevant in assessing the appropriateness of the quantum of compensation. In **Veneranda Maro and Winfrida Ngasoma v. Arusha International Conference Centre**, Civil Appeal No. 322 of 2020 (unreported) dealing with a similar issue, we observed:

*"We agree with the learned High Court Judge because the concern he raised, in our considered view, brings into scene, the CMA's" non-consideration of the extent to*

*which the employee were able to secure alternative work or employment which is among the criteria to award compensation as prescribed under Rule 32(5) (c) of the Mediation and Arbitration Rules. This was crucial considering that the appellants are medical professionals”.*

**Three**, as the record reveals, the appellant was in the service of the respondent as a store assistant. Ordinarily, such work may require a certain degree of trust. The nature of the misconduct the appellant was accused of, may probably cause some challenges for her to secure an alternative employment.

In view of the above discussions, we think there was justification for the appellant to be awarded compensation beyond the minimum statutory amount. There was however no justification why the CMA awarded such a huge amount. We are, therefore, obliged to consider what appropriate award of compensation for unfair termination would in the circumstances suffice.

In consideration of the factors above discussed and the circumstances of the case, we find that an award equal to 24 month's salaries is fair and appropriate. Therefore, we quash and set aside the

decree of the Labour Court in relation to compensation for unfair termination and substitute it with an award of the sum equal to twenty four (24) month's salaries.

Thus, the appeal is merited and it is allowed to the extent as afore stated.

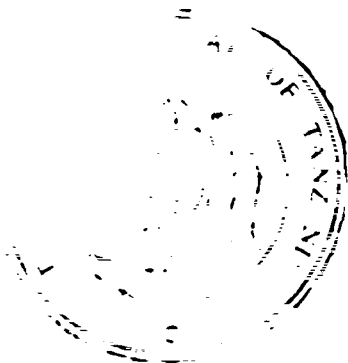
**DATED at MOSHI** this 27<sup>th</sup> day of September, 2023

S. E. A. MUGASHA  
**JUSTICE OF APPEAL**

L. J. S. MWANDAMBO  
**JUSTICE OF APPEAL**

I. J. MAIGE  
**JUSTICE OF APPEAL**

The Judgment delivered this 27<sup>th</sup> day of September, 2023 in the presence of Mr. Mandela Mziray, learned Counsel holding brief for Mr. Lecktony Losiyo Ngeseyan, learned Counsel for the Appellant and also for Mr. Luka Elingaya, learned Counsel for the Respondent is hereby certified as a true copy of the original.



  
D. R. LYIMO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**