IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: NDIKA, J.A., RUMANYIKA, J.A., And MURUKE, J.A.)

CIVIL APPEAL NO. 53 OF 2021

KENYA KAZI SECURITY (T) LTD..... APPELLANT

VERSUS

RUKIA ABDALLAH SALUMU..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania (Labour Division)

at Mbeya

(Ngwembe, J.)

dated 24th day of April, 2019

in

Revision No. 22 of 2017

.....

JUDGMENT OF THE COURT

09th & 22nd February, 2024

RUMANYIKA, J.A.:

Rukia Abdallah Salum, ("the respondent") was a receptionist employed by Kenya Kazi Security (T) Ltd, the respondent, a company working in security industry in the land. However, her employment contract was terminated on 10/08/2012 after she was charged with and found guilty of gross negligence causing loss of a client's property. Aggrieved by the termination for being unfair, on 28/8/2012 she instituted Dispute No.

CMA/MBY/147/2013 in the Commission for Mediation and Arbitration for Mbeya, at Mbeya ("the CMA"). She succeeded in her claim. Again, on revision before the High Court of Tanzania at Mbeya (the court), the appellant lost the battle.

It was alleged that, while on duty on 11th May, 2011 she received a PRV machine ("the equipment") by UPS Courier Services to be delivered to Tanzania Breweries Limited-Mbeya, the appellant's client. However, she did not report her receiving of the equipment to any one of her seniors. Further, it was alleged that a moment later the respondent went out for lunch, leaving the equipment unattended. On her return, the equipment was missing until some months later when it was declared lost. The loss prompted the appellant to commence disciplinary proceedings against the respondent. In the end she was found guilty as charged, as hinted before. Consequently, she was terminated on 10th August, 2012. Aggrieved by this decision, the respondent unsuccessfully preferred a Labour Complaint before the CMA challenging both the procedure used and the reason for termination. She also complained against the penalty imposed by the CMA for being excessive in the circumstances. In its ruling, the CMA found the respondent's termination procedurally unfair but substantively fair. It

ordered her reinstatement without loss of remuneration, from the date of termination to the date of final payment.

Aggrieved, the appellant vainly assailed the CMA's decision vide Labour Revision No. 22 of 2017 in the High Court of Tanzania, at Mbeya. The High Court upheld the CMA's order of reinstatement of the respondent or a twelve months' salary compensation in default, along with some wages due and other terminal benefits as ordered by the CMA, from the date of termination to the date of final payment.

Still aggrieved, the appellant is before us challenging the High Court's decision, on appeal with four grounds;

1. *That the learned Judge erred in law and fact in awarding such compensation to the respondent which is not justifiable.*
2. *That, the learned Judge having found that the respondent's termination was substantively fair, he erred in law and fact in ordering a reinstatement or twelve months' remuneration as compensation in addition to the wages due and other terminal benefits.*

3. *That, the learned judge erred in law and fact for failure to properly evaluate the evidence on record, occasioning injustice to the appellant.*
4. *That, the learned Judge erred in law and fact in holding that the respondent's termination was procedurally unfair*.

At the hearing of the appeal, Messrs Shepo Magirari and Kamru Habibu Msonde learned counsel appeared for the appellant and the respondent respectively.

Mr. Magirari began by adopting the appellant's written submission filed on 25/03/2021. Expounding on the submission with respect to the 1st and 2nd grounds of appeal jointly, he contended that the order for reinstatement of the respondent or compensation of twelve months' salary was improper. For, it was inconsistent with the concurrent finding of the court and the CMA that the respondent's termination was only procedurally unfair which entitled her a lesser compensation. Mr. Magirari referred us to the provisions of Rule 32(2) and (5) of the Labour Institutions (Mediation and Arbitration Guidelines) GN No. 67 of 2007 Act to support his point. He asserted that the twelve months' salary compensation awarded by the court, if the appellant did not

choose to reinstate her, was unreasonably exorbitant. Further, Mr. Magirari contended that the law provided for a heavier compensation only where the termination is substantively unfair, which is not the case here. To reinforce his point, Mr. Magirari cited our decision in **Felician Rutwaza v. World Vision Tanzania**, (Civil Appeal No. 213 of 2019 [2021] TZCA 2 (2 February 2021:TanzLII) Where the Court endorsed the decision of the High Court in **Sodetra (SPRL) Ltd v. Njelu Mezza And Another**, Labour Revision No. 207 of 2008 (unreported) about the deserving reliefs where a termination is only procedurally unfair. In the latter case, the court held:

> *"...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****..."* (Emphasis added)

Mr. Magirari therefore implored us; one, to fault the High Court for ordering reinstatement of the respondent and two, to hold that, in any event the twelve months' remuneration compensation was on the higher side. He prayed for an order to allow the appeal. It is worth noting however, that in his submission essentially the learned counsel did not say anything material about the 3rd and 4th grounds of appeal.

Replying, Mr. Msonde adopted the respondent's written submission filed on 28/04/2021. At first, Mr. Msonde urged us to mark as abandoned the 3rd and 4th grounds of appeal which Mr. Magirari did not canvass in his submissions. As regards the 2nd ground that the court's order to reinstate the respondent or compensate her, first, Mr. Msonde asserted that the complaint is unfounded. For this relief is available at the discretion of the employer and or arbitrator, depending on the obtaining circumstances. While praying for that complaint to be dismissed, Mr. Msonde asserted that it is trite that courts shall grant no reliefs to the parties unsolicited. Two, that, even when the complaint was properly before the Court, which is not the case, in terms of Rule 32(1), (2) and (5) of the GN, the court properly exercised its discretion to order a reinstatement. Much as, Mr. Msonde argued, the appellant did not show that the learned judge wrongly exercised his discretion in arriving at the quantum in issue. He thus contended that the cases cited by Mr. Magirari have no binding effect on the Court.

We have considered the parties' written submissions and the counsel's rival contentions, the authorities cited and the more so, the entire record of appeal. The issue before us is whether reinstatement was correctly ordered.

On the first ground of appeal against the reliefs of compensation awarded, it is on record that initially, in the court the appellant assailed the order of reinstatement of the respondent relying on section 40(3) of the ELRA. It sounds to us thus, that the twelve months' salary compensation for the respondent whose termination was found substantively fair, was respectfully erroneous. The more so, where the compensation order ran together with all the wages due and such other terminal benefits ordered by the CMA. We subscribe to Mr. Magirari's adverse contention. While we are aware of a legal principle that each case has to be determined on its merits, we appreciate the discretionary powers of an arbitrator to order reinstatement or re-engagement of an employee, in this case, the respondent, just as its compliance by employer is discretionary. For, when discharging this duty, they have to warn themselves, as provided by section 40(3) of the ELRA:

> *(3)* ***Where an order of reinstatement or re-engagement is made by an arbitrator or Court and the employer decides not to reinstate or reengage the employee****, the employer shall pay compensation of twelve months wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment.* (Emphasis added)

It is the appellant's contention that the court's order of reinstatement of the respondent was invalid in the circumstances, and so was the alternative impugned quantum of the compensation.

We recall that, pursuant to section 37 of the ELRA, for a relief of reinstatement or compensation to be granted, the respective termination has to be substantively or procedurally unfair. Now that, in the present case the procedure for termination of the respondent was flawed, on that account rendering it unfair, the employee thus deserved a lesser amount of compensation. See- our decisions in **Pangaea Minerals Ltd v. Gwandu Majali**, Civil Appeal No. 504 of 2020 [2021] TZCA 414 (26 August 2021:TanzLII) and **Felician Rutwaza** (supra). In both cases, the Court quoted with approval the High Court's decision in **Sodetra (SPRL) Ltd** (supra).

Applying the rule in the preceding cases to the present case, it was incumbent upon the court to award the respondent less than twelve months' remuneration compensation. To say the least, the amount awarded was on the higher side and improper. The 1st, 2nd grounds of appeal succeed.

About the 4th ground, as to whether or not the termination was unfair for the reason of the procedure being flawed, we need not to belabour on it because Mr. Magarari did not carry it out further in his submissions. He dwelt on the quantum of compensation all through. So was the case for the 3rd ground. Therefore, both grounds are deemed abandoned.

However, we are settled in our mind that, though impliedly, the parties are agreed that the termination of the respondent's employment contract was only procedurally unfair, as the CMA found it and upheld by the court. What is essentially disputed is the quantum of compensation, which the appellant alleges to be on the higher side. We are aware of Rule 32(5) of the GN which sets the criteria for the determination of compensation, subject to the obtaining circumstances. It reads thus:

> *"32(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 minima or maxima compensation,*
>
> ***(b) The extent to which the termination was unfair,***
>
> *(c) The consequences of the unfair termination of the parties, including the extent to which the employee was able to secure alternative work or employment,*

(d) The amount of the employee's remuneration,

(e) *...(not applicable)*

(f) *...(not applicable)".* (Emphasis added)

It goes without any question thus, that the compensation awarded by the court is discretionary. We are mindful of a general legal position that very seldom than not, can the Court casually interfere with the findings of the court bellow, in this case the quantum at issue. See- **Mbogo And Another v. Shah** [1968] EA 93 and the Court's decision in **Mwita Muhere v. R** [2005] TLR 107. However, we are satisfied that in the circumstances of the case the appellant deserved a lighter penalty, as the Court held in **Felician Rutwaza** (supra). We agree with Mr. Magirari that the twelve months' salary compensation awarded by the court to the respondent was unjustified in the circumstances. Moreover, we are hasten to hold that, the rule in **Felician Rutwaza case** (supra) poses a double-coincidence effect; one, that no person, in this case the respondent, shall benefit from her wrongs, and two, that the duty of the court to protect the subjects, in this case the appellant from double jeopardy is paramount.

When all is said, the remaining question is whether the impugned compensation is viable for the Court to intervene. The answer is in the affirmative. This being a second appeal, the Court is obliged to step into

the shoes of the High Court to do the needful. Therefore, we substitute the court's order of a twelve months' salary compensation for an order of three months' salary compensation.

In the upshot, the appeal partly is allowed to the extent explained above. As the dispute arose from a labour matter, we make no order for costs.

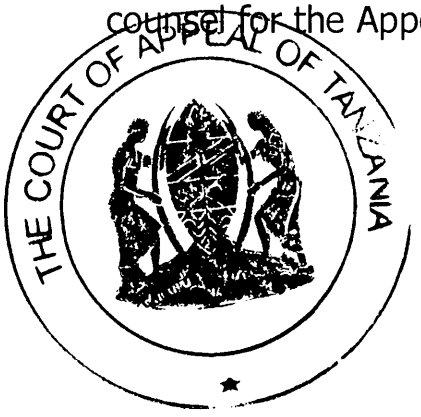
DATED at **MBEYA** this 21st of February, 2024.

G. A. M. NDIKA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

Z. G. MURUKE.
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of February, 2024 in the presence of Mr. Kamru Habibu Msonde, learned counsel for the Respondent, who also holding brief of Mr. Shepo John Magirari, learned counsel for the Appellant, is hereby certified as a true copy of the original.



E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL