

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF SHINYANGA  
HIGH COURT LABOUR DIVISION SHINYANGA**

**AT SHINYANGA**

**LABOUR REVISION NO. 18 OF 2020**

*(Originated from an award of the Commission for mediation and arbitration of Shinyanga  
CMA/SHY/191/2018 dated the 13<sup>th</sup> February, 2020)*

**PETER ONESMO NKANDA.....APPLICANT**

**VERSUS**

**PANGEA MINERALS LTD.....RESPONDENT**

**JUDGMENT**

*Date of the last Order: 2<sup>nd</sup> October, 2020*

*Date of the Ruling: 5<sup>th</sup> October, 2020*

**MKWIZU, J.:**

The Applicant herein is moving this Court to revise and set aside the award of the Commission for Mediation and Arbitration for Shinyanga in Labour Dispute No. CMA/SHY/94/2014. The application is brought under section 91 (1) (a), (b), 2 (a)(b) (c) and section 94 (1) (b) (i) of the Employment and Labour Relations Act, No. 6 of 2004 as amended by section 14 (b) of the written laws ( Miscellaneous Amendment) Act No. 3/2010 and Rules 24 (1), 2 (a), (b), (c), (d), (e), (f), 3 (a), (b), (c), (d) and 28 (1) (c), (d), (e) of the Labour Court Rules, G. N. No. 106 of 2007. It is supported by the applicant's

affidavit. Respondent opposed the application. He filed a notice of opposition accompanied with a counter affidavit sworn by Mr. Geoffrey Kange, respondent's advocate. By the leave of the court, the application was argued by written submissions. Applicants written submissions were prepared and submitted by Mr. Elisha Amos, learned advocate.

The facts leading to the revision at hand are as follows: Applicant was employed by the respondent as a Boiler Maker from 15<sup>th</sup> December 2007 to 13<sup>th</sup> September, 2014 when his employment was terminated for misconduct termed as endangering safety by driving without a valid license and failure to report accident within 24 hours.

Dissatisfied with the termination, applicant referred the dispute to the Commission for Mediation and Arbitration alleging that his employment was procedurally unfair. Applicant's CMA FORM No 1 contained prayers for reinstatement, payment of all his remunerations from the date of his termination, Notice pay and severance allowance. CMA determination of the complaint ended up awarding the applicant 10 months compensation for termination that did not follow the procedure.

Applicant is not happy with the CMA's award. He has come to this court for revision.

In support of the application Mr. Elisha Amosi counsel for the applicant argued that, arbitrator did not consider applicant's strong evidence hence arriving at inaccurate award which was given contrary to the clear provisions of section 40 (1) (a) (b) and (c) of the ELRA. Mr. Amos was of the view that the award of 10 months salaries compensation was contrary to the law which provides for 12 months compensation and other alternative provided for under section 44 (1) (a) (b) (c) (d) and (e) of the same Act like reinstatement, annual leave, transport allowances, and certificate of service. He invited this court to allow the revision.

On his party Mr. Geoffrey Kange supported the CMA award, he said, the CMA award gave an appropriate award under the circumstances of the case. He cited the case of **Nassoro Khatau v. Toyota Tanzania Limited** Revision No 192 of 2016 And **Terdcom Tanzania LTD V. William F. Green**, Revision No 28 of 2016 to bolster his position.



Mr. Kange contended further that applicant violated the safety procedure which are zero tolerant due to the facts that they endanger people's lives. In clear terms Mr. Kange said, applicant caused accident while driving without license and driving site permit and concealed the incident and therefore the 10 months award is reasonable under the circumstance.

On the claimed severance allowances Mr. Kange was of the view that, given the circumstances of the matter, section 42 (1) of the ELRA is inapplicable. In respect of unpaid leave, notice pay and repatriation costs, Mr. Kange submitted that there was no proof of the said claim and that exhibit C7 proved that applicant was paid the same, He also supported the arbitrators award and opposed reinstatement claim on the ground that the applicant had acted in violation of the safety regulations and therefore the reinstatement claim could not stand.

I have intensely considered the submissions by both counsels as well as the affidavits filed by the parties thereof. Reading between the lines, this revision tends to challenge the CMA's award particularly on the reliefs awarded.

As indicated above, having found that the applicant's employment was terminated without following procedures, the arbitrator awarded the applicant 10 months salaries without more. His decision had reasons. Here is part of the CMA's decision, I quote for convenience:

*"...naamuru mlalamikaji **alipwe fidia ya mishahara ya miezi 10** kwa mujibu wa kifungu cha 40 (1) cha sheria ya ajira, ...*

*Kuhusiana na madai ya malipo ya likizo na notisi na kiinua mgongo mlalamikaji hakuthibitisha mbele ya tume kama kweli anastahili, kimsingi nasi hastahili kulipwa na pia katika kielelezo C7 kinaonyesha kuwa aliisha lipwa alivyostahili..."*

The applicant's complaint is that going by section 40(1) of the ELRA, the applicant was entitled to 12 months' salary as compensation and other reliefs like, annual leave, notice pay, severance allowance as provided for under section 44 (1) of the Employment and Labour Relations Act.

The law is clear in the above stated section. It provides, the relief available to an employee whose employment is terminated unfairly as reinstatement, re-engagement or compensation. The said section reads:

*"...S. 40 (1) If an 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,"*

The above remedies are in the alternative, the word used is "or" meaning that the deserving party can only be awarded one of them depending on the circumstances of the case. In our case, the arbitrator having found that the respondent failed to follow the prescribed procedures before termination, he awarded the applicant 10 months compensation. The arbitrator was in error. Reading section 40 (1) (c) above, the compensation provided for is **"not less than 12 months"** meaning that the minimum compensation the arbitrator can award is 12 months. This is the position in the case of Multi



**Choice Tanzania Ltd vs Felix Nyari**, Revision No. 09 of 2018, High Court of Tanzania, Labour Division at Mbeya (unreported)

Applicant stress was on reinstatement, he argued that arbitrator should have reinstated the applicant and not awarding him compensation. I have given this claim a thorough scrutiny, the record is clear that applicant acted in violation of the respondent's safety rules and concealed the accident incident. It is obvious therefore that the parties' relationship has been tainted, the compensation order under the circumstances of this case, in my view was appropriately arrived at. The issue to decide upon is on the amounts awarded. As stated above, under section 40 (1) (c) the appropriate award would have been 12 months compensation. The award of 10 months was therefore erroneous, I set it aside and substitute it with that of 12 months compensation under the above cited provision of the labour law.

The second claim is severance allowance. Upon termination of contract by employer or employee for reasons other than misconduct, the employee is entitled to a seven days basic salary for each worked year, provided that the

employee has been employed for at least twelve months. This is per Section 42 of the ELRA. Section 42 (1) (2) and (3 (a) read.

*42-(1) For the purposes of this section, "severance pay" means an amount at least equal to 7 days' basic wage for each completed year of continuous service with that employer up to a maximum of ten years.*

*Pay*

*(2) An employer shall pay severance pay on termination of employment if-*

*(a) the employee has completed 12 months continuous service with an employer; and*

*(b) subject to the provisions of subsection (3), the employer terminates the employment.*

***(3) The provisions of subsection (2) shall not apply-  
(a) to a fair termination on grounds of misconduct;***

The applicant in this case was terminated for misconduct, consequently he is not entitled to severance pay.

Annual leave and notice pay, were among the claims put forth for consideration. The arbitrator refrained from granting these claims on the ground that applicant was paid on termination via exhibit 7. I have perused the said exhibit. The notice pay was not among the payment itemized for





payment to the applicant, I grant the same. The rest of the claim were properly disallowed.


In fine, the application is granted to the extent indicated herein. Each party shall bear its own costs.

Accordingly, so ordered.

**DATED** at **SHINYANGA** this 5<sup>th</sup> day of **October**, 2020.

  
  
**E.Y. MKWIZU**  
**JUDGE**  
**05/10/2020**

**Court:** Right of appeal explained.

  
  
**E.Y. MKWIZU**  
**JUDGE**  
**05/10/2020**