IN THE HIGH COURT OF THE UNITED REPUBLIC

OF TANZANIA

(LABOUR DIVISION)

AT MUSOMA

LABOUR REVISION NO. 25 OF 2019

(Arising from the decision of the Commission for Mediation and Arbitration for Musoma in Labour Dispute CMA/MUS/187/2019)

NORTH MARA GOLD MINE LTD .....APPLICANT

VERSUS

KHALID ADBALLAH SALUM .....RESPONDENT

JUDGEMENT

Date of Last Order: 24th March, 2020
Date of Judgement: 16th April, 2020

KISANYA, J.:

The applicant herein, North Mara Gold Mine Ltd has filed an application for revision of the award of the Commission for Mediation and Arbitration (CMA) at Musoma. The ground for revision is articulated in paragraph 8 of the affidavit in support of the application which reads as follows:

> *"Whether it was proper and legal for the Hon. Arbitrator to award the respondents 48 months salaries, which is over and above the statutory minimum 12 months without justification."*

It is important to depict, albeit brief, what pressed the application at hand. The Respondent was employed by the applicant as a fuel operator at HME Department since 2008. His employment was terminated on 6th June, 2019 following the disciplinary proceedings conducted against him. He was found guilty of misconduct to wit, collusion to steal company property, committing any act amounting to dishonesty in performance of duty and dishonesty/ any other major breach of trust.

Dissatisfied with the said decision, the respondent referred a complaint to the Commission for Mediation and Arbitration at Musoma on 8th July, 2019. As the mediation failed, an arbitration was conducted before Soleka, H (arbitrator). It ended in favour of the respondent on 13th November, 2019. He was awarded with compensation of 48 months' salary. Aggrieved by the said award, the applicant has by way of chamber summons filed the present application on the ground stated hereinabove.

When this application was placed before me for hearing, Ms Caroline Kivuyo, learned advocate appeared for the applicant. On his part, the respondent was represented by Mr. Ernest Mhagama, learned advocate.

Submitting in support of the application, Ms Caroline argued that the CMA erred in awarding the compensation equal to 48 months' salary, which is over and above the statutory minimum provided for under section 40 (1)(c) of the Employment and Labour Relation Act, 2004 (EALRA), without assigning reason. The learned counsel contended that, the arbitrator was duty bound to give reasons for awarding

compensation which is above the statutory minimum of 12 months' salary. She cited the case of **Sodetra (SPRL) Ltd vs Njellu Mezza and Another**, Revision No. 207 of 2008, High Court of Tanzania, Labour Division at Dar es Salaam (unreported) to support his argument. Ms Caroline submitted further that there was justification of awarding compensation of 12 months' salary in the case at hand as the award was delivered 5 months and 7 days from the date of terminating the respondent. She therefore urged me to revise the award issued by CMA to compensation of 12 months' salary.

In response, Mr. Mhagama submitted that, the CMA was satisfied that the reasons for terminating the respondent was unfair. He averred that, the remedy for unfair termination is provided for under section 40 (1) of the EALRA. That, if the arbitrator decides to award compensation, it should not be less than 12 months' salary. Mr. Mhagama was of the view that, the law does not specify the maximum compensation. He cited the case of **Isaac Sultan vs North Mara Gold Mine Ltd**, Revision No. 16/17 of 2018 where this Court awarded compensation equal to 90 months' salary. The learned counsel argued further that, the reasons considered by the arbitrator in the case at hand is unfair and unreasonable termination of the respondent. That said, the Mr. Mhagama advised me to dismiss this application for want of merit.

Ms Caroline rejoined by reiterating that the arbitrator ought to have awarded compensation equal to 12 months' salary or justify for awarding compensation above the statutory minimum. She was of the view that the case of **Isaac Sultan** (supra) referred to by the respondent

is distinguishable to the case at hand because it involved a union leader alleged to have committed fraud and corruption and that, the labour dispute was pending in court for two years.

After carefully evaluating and examining the submissions by both parties and the record at hand, it is not in dispute that the Hon. Arbitrator reached a finding of unfair termination. Thus, the parties do not dispute the validity or fairness of substantial termination. The issue is on the remedy or relief to which the parties are entitled to. Pursuant to section 40(1) of the Employment and Labour Relations Act, 2004 (as amended), the relief available to an employee whose employment is terminated unfairly is reinstatement, re-engagement or compensation. The said section provides that:

> *"...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."*

It follows therefore that, upon finding that the termination is unfair, the arbitrator or Labour Court has discretion of awarding compensation to the respective employee. Such compensation should not be less than 12 months' remuneration of that employee. I am in agreement with Mr.

Mhagama that, the law does not set the maximum compensation to be awarded by the arbitrator or the Labour Court. 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), the above provision was interpreted as follows:

> *"The ELRA section 40(1)(c) provides for compensation of at least twelve months' salary. This is a minimum requirement and the law gives a room of increasing the amount."*

Although the law does not set the maximum compensation to be compensation, the award should be just and fair depending on the circumstance of each case. This position has been stated in many cases including, **Sodetra (SPRL) Ltd vs Njellu Mezza and Another** (*supra*), **Multi Choice Tanzania Ltd vs Felix Nyari**, (*supra*) and **Tanzania International Containers Terminal Services (TICTS) vs Fulgence Steven Kalikumtima and 7 Others,** Revision No. 471 of 2016, High Court of Tanzania, Labour Division at Dar es Salaam (unreported). For instance, in **Tanzania International Containers Terminal Services** *(supra)*, the Court held that:

> *"In line to the above, I am of the considered view that, it is the discretion of a Judge or Arbitrator to give an award that is considered just and fair depending on the circumstances of each case, though is restricted to comply by what is or are indicated in CMA FI"*

Similar position was stated in **Sodetra (SPRL) Ltd vs Njellu Mezza and Another** (*supra*) cited by Ms Caroline, where it was held that:

"..Further, a decision on compensation must have been intended to be discretionary in order to be fair and just to both parties...For example, the amount should differ between cases of substantive unfairness, where for other reasons reinstatement cannot be ordered and cases of procedural unfairness..."

Since award of compensation is discretionary, it should be exercised judiciously. Thus, as rightly argued by the learned counsel for the applicant, reasons for awarding compensation which is over and above the statutory minimum should be given. Again, the reason depends on the circumstances of each case. For instance, in **Multi Choice** (*supra*), the Court confirmed 36 months' salary on the ground that the termination was both substantial and procedural unfair, when it held as follows:

Mr. Byabusha argued that the reliefs were awarded without justification...Having ruled that the termination was both substantive and procedural unfair, I find no fault in the award issued by the Hon. Arbitrator for 36 months' salary. I thus confirm it accordingly."

In the matter hand, the Hon. Arbitrator was satisfied that the respondent had been terminated unfairly. He went on to order the applicant to pay compensation of 48 months' salary to the respondent. For easy of reference, I hereby reproduce what was stated by the Hon. Arbitrator:

"Hivyo, katika shauri hili mlalamikaji amenyimwa haki ya kufanya kazi na kujiingizia kipato kwa ajili ya kujikimu kimaisha, hivyo mlalamikaji ana haki ya kupewa haki yake ya kufanya kazi na kuwa

mahusiano yameshavunjika, na kwa kuwa mlalamikiwa ndiye alimwachisha kazi mlalamikaji isivyo halali ni lazima awajibike katika hilo. Hivyo kwa kuzingatia kuwa mlalamikaji amenyang'anywa haki ya kufanya kazi naamuru kuwa mlalamikiwa amlipe mlalamikaji fidia ya mishahara ya miezi 48 kwa kumwachisha kazi isivyo halali.."

From the above order, it is clear that the awarded compensation is over and above the statutory minimum specified under section 40(1) (c) of the EALRA. The applicant states that the reason for the said order was not given. However, the above quoted decision indicates that the arbitrator considered that, the respondent had been denied the right to work to earn income for living. Therefore, I am not in agreement with Ms Caroline that the Hon. Arbitrator failed to assign reasons of awarding the said compensation.

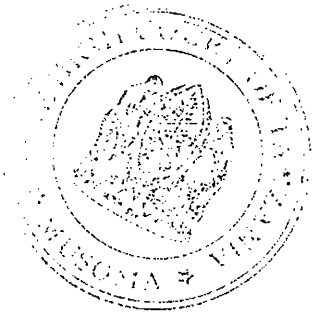
Further, the applicant has requested this Court to take into account that the said compensation was not fair because the award was issued five months from the date of termination. It is my considered opinion that the time taken to resolve the dispute is no a sole factor in awarding compensation. I have pointed out herein that, the Hon. Arbitrator considered that the termination was not fair and that, the applicant had been denied the right to work and earn income. This reason has not been challenged by the applicant. Thus, it was not established as to whether and or how the respondent was able to obtain another employment within 12 months requested by the applicant. This is when it is considered that the respondent was alleged to have committed offences of collusion to steal company property, committing any act

amounting to dishonesty in performance of duty and dishonesty/ any other major breach of trust. These are serious allegations which can affect the respondent to secure another employment.

Furthermore, I have taken into account that, in his complaint (Form CMA F.1), the respondent had requested for compensation of 100 months' salary. The arbitrator used his discretionary power under the law to order compensation of 48 months' salary basing on the circumstance of this case. Having considered the reasons assigned by the Hon Arbitrator, I find no need of faulting the said award.

That said and done, I hold that this revision has no merit to warrant this Court to revise the CMA award. I accordingly dismiss the revision application for want of merit and confirm the CMA arbitration award. I make no order as to cost because this is a labour matter. It is so ordered.

Dated at MUSOMA this 16th day of April, 2020.



E. S. Kisanya
JUDGE
16/04/2020