IN THE HIGH COURT OF TANZANIA
(LABOUR DIVISION)
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

LABOUR REVISION NO. 69 of 2018
DENIS BWIRU ..... APPLICANT
VERSUS
BULYANHULU GOLD MINE LIMITED..... RESPONDENT

(Application from award of Commission for Mediation and Arbtration- CMA)
(Nnembuka K,Chairman)
Dated 22nd day of November,2018
in
Labour Dispute No. CMA/SHY/142/2017

.....

RULING

7th December, 2020 & 26th February,2021

MDEMU, J.:

In this application, the Applicant moved this Court to revise the award of the Commission for Mediation and Arbitration in Labour Dispute No. CMA/SHY/142/2017 .The application is under the provisions of Section 91(1)(a)(b),(2)(a)(b),(c) and 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 of 2010 and Rule 24(1),24(2)(a)(b)(C)(d)(e)(f) 24(3)(a)(b)(c)(d), and 28(1)(c)(d)(e) of the

Labour Court Rules, G.N. No.106 of 2007 and is supported by the affidavit of one Denis Bwiru, the Applicant.

Brief facts of this Labour dispute are as elaborated in the Applicant's affidavit. On 2nd of July,2008, the Applicant was employed by the Respondent as mining trainee and later was promoted to a position of miner within underground mining Department. During recruitment of his employment, the Applicant did undergo medical examination in which he was found to be physically fit to perform the functions and duties recruited for.

In the year 2013, the Applicant experienced mechanical lower back pain which lead him to attend treatment at the Respondent's mine site clinic and later on was referred to Muhimbili Orthopedics Institute (MOI) for further investigation and treatment. He was diagonized and found with mechanical lower back pain and mild cervical disc disease.

On 2014, the Respondent convened his own medical health review board which confirmed that, there was work related incapacitations. The Board on this recommended him to continue with treatment while the Respondent looks for alternative jobs and any possible means to accommodate his incapacitations. On 20th of May, 2017, the Respondent terminated him from employment for reasons of incapacity(ill-health). The

Applicant being aggrieved by that termination, referred the matter to the Commission for Mediation and Arbitration (CMA) alleging unfair termination, breach of contract and infringement of his rights to work and right to life.

The CMA determined the complaint and arrived to the conclusion that, the Applicant's termination was on fair grounds thus dismissing the entire complaints. The Applicant being aggrieved by that decision, lodged this labour revision praying for the following orders;

1. *That, this Honourable court may be pleased to call and revise the Arbitration proceedings in respect of labour dispute No.CMA/SHY/142 of 2017 by the Commission for Mediation and Arbitration (CMA) at Shinyanga.*
2. *That, this Honourable Court may be pleased to revise the Award issued under that Arbitration due to irregularities and order reinstatement of our employment and payments of all remunerations and other entitlements from termination date. If fail to reinstate, he must affect payment of 36 months remunerations*

being compensation for unfair termination of our employment due to incapacitation, payment 24 years remunerations as a remedy for breach of our contract and damage of our rights to work and to life.

3. *That, Honourable court may be pleased to grant any order that it consider just and convenient to grant.*

4. *Costs to be borne by the Respondent.*

This application was heard by way of written submissions where by Mr. Benjamini Dotto, Personal Representative submitted for the Applicant and Ms. Caroline Kivuyo, Learned Advocate, submitted through her written submissions, for the Respondent.

In the Applicant's submissions, Mr.Benjamini Dotto first prayed this court to adopt notice of application and the affidavit of the Applicant to form part of his submissions. He then submitted that, the Applicant was terminated from his employment on 20th May,2017 for incapacity(ill-health). In his view, the burden of proving fairness of reasons before terminating an employee for incapacity lies upon the employer. He added that, factors

stated in the provisions of Rule 19(1)(a)-(e) of the Employment and Labour Relations(Code of Good Practice)Rules, G.N.No. 42 of 2007, have to be observed. He further submitted that, the Arbitrator failed to consider in termination the following:- **One**, the Applicant was terminated from employment without any opinion or recommendations from his specialist Doctor contrary to the requirements of Rule 19(3) of GN. No. 42 of 2007. The Rule compels the employer to be guided by the opinion of a registered medical practitioner to determine the cause and degree of any incapacity.

Two, the Respondent did not go greater length to accommodate the Applicant's incapacity which resulted from work contrary to the provisions of Rule 19(2). **Three,** the Respondent did not also accommodate the Applicant with any alternative work. In this, he cited the case of **Geita Gold Mine Ltd v. Jumanne Bayasabe, Rev. No.225 of 2008** (unreported) stating that, the Respondent was not supposed to terminate Applicant while on treatment. **Four,** the Respondent didn't provide any compensation or pension to the Applicant as a remedy for loosing his job due to incapacity contrary to Rule 19(1)(e) of GN N. 42/2007. To him, this requirement is mandatory as was decided in the case of **Cosmas Yambi, Cyprian Simon**

Mbutto and 5 Others v Bulyanhulu Goli Mine Limited, Labour Application No.76 and 77 of 2015(unreported).

He further submitted that, basing on the above factors, the Respondent failed to prove before CMA if he had valid and fair reasons to terminate the Applicant's employment and also failed to comply with the provisions of Rule 21(5)(6)(7)(8) which required the Employer to call meeting with the employee who shall be allowed to have trade union representative in case there is termination. He cited the case of **Martine Oyier v Geita Gold Mine Limited, Labour Revision No.226 of 2008** (unreported) to support his point. He concluded that, the Arbitrator erred in law for holding that, the Applicant does not deserve to be compensated or reinstated because termination was fair in terms of procedure and substantively. He cited the case of **Pangea Minerals Limited v Joseph Mgalisha Bulabuza, Revision Application No.7 of 2020, Isaac Sultan v. North Mara Gold Mine Limited, Consolidated Labour Revision No.16 and 17 of 2018** (all unreported) to support his point on compensation.

In reply, Ms. Caroline Kivuyo, Learned Advocate for the Respondent prayed first counter affidavit and notice of opposition be adopted to form

part of her submissions. On the first factor that the employee was terminated without any opinion or recommendation from his specialist doctor; she submitted that, the evidence on record proved that the Respondent was guided by opinion of a registered medical practitioner in determining the cause and degree of incapacity as per exhibit D3 from Aga Khan Hospital. Furthermore, in exhibit D1, a Medical Review Board (*"the board")* was formed and among the members was Dr. Othman Kilomola from Muhimbili Orthopaedic Institution (MOI). To her, the Board investigated the capacity of the Applicant and reached a conclusion that, he has partial permanent incapacity.

On the second factor that the Respondent did not go to a great length to accommodate the Applicants incapacity; she submitted that, evidence on record especially in exhibit D1, is clear that, the Applicant was diagnosed with illness way back in 2013 and was given sick leave of four years. Furthermore, the sick leave was fully paid and also the Respondent paid all medical expenses of the Applicant throughout. To her, incapacity was accommodated above and beyond reasonable standards.

Submitting on the third factor that the Respondent didn't investigate and look for alternative job as recommended by the Applicant's Specialist

Doctors; she said that, on 7th October,2016, there was a meeting were the Applicant was represented. As per the testimony of Shukuru Mwinunu (DW2), all options put forward by the Applicant including alternative work as a CCTV operator, safety officer and Store dispatch were considered but none was found to suit the Applicant due to health restrictions. She distinguished the case of **Geita Gold Mining Limited v. Jumanna Bayase** (supra) cited by the Applicant because, the Respondent herein diligently followed all the procedures and involved the Applicant with his representative Nkai Samwel as per exhibit D-6.

As to the fourth factor on want of compensation or pensions by the Respondent; she submitted that, the Applicant was paid compensation for his incapacitation under the Workers Compensation Act, Cap.263. She added that, according to Exhibit D-9, the Applicant was paid Tshs.1,000,000/= which is above the statutory compensation of Tshs.108,000/=. On that note, the case of **Cosmas Leon Yambi and Others v Bulyanhulu Gold Mine Limited** (supra) **Cyprian Simon Mbuto and 5 Others v Bulyanhulu Gold Mining Limited, Consolidated Miscellaneous Labour Applications No.76 of 2005**

(unreported) cited by the Applicant are distinguishable because, the Applicant herein had been paid compensation for his incapacitation.

She further submitted that, the Respondent complied with Rule 21(5)(6)(7)(8) of G.N.No.42 of 2007 because, the Applicant was represented by Nkai Samweli Shukuru Mwainunu who was given opportunity to make his presentation and recommendations. Therefore, she concluded that, termination was fair both procedurally and substantively and she thus distinguished this case and the case of **Pangea Minerals Limited v Joseph Mgalisha Bulabuza,Revision Application No.7 of 2020**(unreported) cited by the Applicant.

In rejoinder, Mr. Benjamini Dotto reiterated his earlier position and emphasized that, the Respondent terminated the Applicant on 20th May 2017 without being afforded an opportunity to attend medical follow ups as it was recommended by his specialist Doctor. To him, it was proper for the Applicant to be reinstated or compensated accordingly.

Having considered submissions of both parties and thier affidavit, counter affidavit together with respective records; in paragraph 1(c) of the

affidavit of one Denis Bwiru, the Applicant, there are five main legal issues constituting grounds for revision. They are:-

i. *That, whether it is proper and fair for the Arbitrator to hold that, his employment was terminated fairly by the Respondent.*

ii. *That, whether it is proper for Arbitrator to hold that his contract of employment was not breached by the Respondent.*

iii. *That, whether it is proper for Arbitrator to hold that the Respondent is not responsible for any damage(tort) resulted from loss of his employment.*

iv. *That, whether it is proper for Arbitrator to hold that he do not deserve to be paid any compensation or to be reinstated.*

v. *That, whether the Arbitrator's holdings are based on any points of law or on his own findings and that he was biased.*

According to the legal issues just quoted above, I will start by citing the provisions of Rule 19(1) of the Employment and Labour Relations (Code of Good Practice) Rules in resolving then. The Rule provides that;

> *"An employer who is considering to terminate an employee on grounds of ill health or injury shall, take into account the following factors to determine the fairness of the reason in the circumstances;*
>
> *(a) The cause of the incapacity;*
>
> *(b) The degree of the incapacity;*
>
> *(c) The temporary or permanent nature of the incapacity;*
>
> *(d) The ability to accommodate the incapacity;*
>
> *(e) The existence of any compensation or pension.*

From the provisions just quoted above, the law is clear that, an employer who intends to terminate an employee on ground of ill health or injury shall take into account or comply with the above factors. Noncompliance will render any such termination unfair. This was also

stated in the case of **Said Mohamed Nzegere v. AARSLEFF BAM International, Labour Court Case Digest, 2014 -PART 1** at page 226 that, where termination is on the ground of sickness resulting to incapacitation, it is the duty of the employer to determine illness first before he proceeds to terminate on that ground. It was stated in that case that:-

> *"The act of the Applicant of NOT being in the capacity to perform his duties falls under the term and category of **INCAPACITY.** Thus, when the employer terminates the Applicant because of ill-health then the termination for incapacity based on ill health crops. Mainly there are three types of different INCAPACITY to wit, (i) incapacity due to poor work performance (ii) Incapacity due to ill health or injury (iii) Incompatibility as a form of incapacity."*

In the instant application, it is not disputed that, the Applicant got ill-health and he was terminated on that ground. What is disputed is on failure of the Respondent to provide any compensation or pension to the Applicant after termination of his employment as a remedy for loosing of his job due to that incapacity/ill-health. According to Rule 19 of the Employment and

Labour Relations (Code of Good Practice) Rules as cited above, if the incapacity is temporary, an employer must investigate the extent of the incapacity or injury, and that, if the period of the incapacity is unreasonably long, then the employer may consider all alternatives available before termination.

Furthermore, the law is clear with regard to fairness of procedure to follow due to incapacity -ill-health or injury that, the following have to be complied by the employer; **one**, investigation, **two**, Consultation, **three,** reasonable accommodation, **four**, alternative employment and **five,** an enquiry or hearing as provided for under **Rule 21 of the Employment and Labour Relations (Code of Good Practice).** The rule reads as follows:-

> *"21(1) The employer shall investigate an employee's incapacity due to ill-health or injury.*
>
> *(2) The **employee shall be consulted** in the process of the investigation and shall be advised of all the alternatives considered.*

*(3) The **employer shall consider the alternatives** advanced by the employee and, if not accepted, give reasons.*

(4) The employee is entitled to be represented by a trade union representative or fellow employee in the consultations.

(5) Prior to decision to determine the employment of an employee for ill-health or injury, the employer shall call a meeting with the employee, who shall be allowed to have a fellow employee or trade union representative present to provide assistance.

(6) The employer shall outline reasons for action to be taken and allow the employee and/or the representative to make representations, before finalizing a decision.

(7) The employer shall consider any representations made and, if these are not accepted, explain why.

(8) The outcome of the meeting shall be communicated for the employee in writing, with brief reasons.

Also, in Rule 7 of Employment and Labour Relations (Code of Good Practice) Rules regarding the question of procedure, it is stipulated that:

> *"In cases of alleged incapacity of an employee due to ill health or injury, a Manager should consult the employee to identify and analyze the problem. The manager should be guided by the opinion of a registered medical practitioner in determining the cause and degree of any incapacity and whether it is of a temporary or permanent nature."*

According to the legal requirement just quoted above, the issue here for determination is whether termination was fair and that the Respondent followed all procedures of termination regarding incapacity(ill-health) as enumerated above. As to the first factor that the Applicant Employee was terminated without an opinion or recommendation from his specialist doctor, the records of CMA at page 13 reads as follows;

> *"Katika shauri hili lililo mikononi mwangu, mlalamikiwa alizingatia mambo hayo na kwa mujibu wa kikao cha bodi ya Afya kilichofanyika siku ya tarehe*

25/6/2013 kwa Cosmas Yambi na tarehe 25/9/2013 kwa Denis Bwiru, ***kikiongozwa na Daktari bingwa wa mgongo (Relevant Medical Specialist)DKt.Othman Kiloloma kutoka Taasisi ya Mifupa (MOI)*** *ambapo sababu na kiwango cha ulemavu cha walalamikaji kiliweza kubainika kwa kila mmoja kwamba ulemavu wa kudumu(Partial Permanent Incapacity)." (emphasis supplied)*

As to the quotation above, it is clear that, the Respondent Employer got guided by the opinion of a registered medical practitioner in determine the cause and degree of incapacity. Among the members of that medical specialists was Dr.Othman Kilomola from Muhimbili Orthopaedic Institution (MOI). In this therefore, the Board investigated the incapacity of the Applicant and reached a conclusion that he has partial permanent incapacity. This factor is thus baseless as the decision got reached after taking into account recomandations of Medical practitioner.

As to the second factor that the Respondent did not go to great length to accommodate the Applicant's incapacity which resulted from work; the record shows that, the Applicant was diagnosed with illness way back in

2013. Following that diagnosis, he was given sick leave of four years. Furthermore, the said sick leave was fully paid. In addition to that, the Respondent paid for medical expenses of the Applicant the whole period. Regarding this, at Page 13 and 14 of CMA award it is provided that:-

> *"Kwa mujibu wa Ushahidi katika shauri lililopo mikononi mwangu, walalamikaji ni wagonjwa kwa muda mrefu na* ***tangu walipobainika kuwa na matatizo ya mgongo walikuwa katika likizo ya ugonjwa tangu mwaka 2013 mpaka walipoachishwa kazi mwaka 2017 takriban miaka minne Zaidi ya kiwango kilichotajwa*** *katika sheria ambacho ni siku 126 kif.cha 32(1)(2)cha sheria ya Ajira Na.6/2004.Na kwa* ***kipindi chote hicho mwajiri amekuwa akimhudumia pale alipotumia gharama zote*** *za matibabu bila ya walalamikaji kufanya kazi yoyote na hata mlalamikiwa hakuwa na nia mbaya na walalamikaji na alitimiza matakwa ya sheria."*
>
> *(emphasis mine)*

In this position of the Arbitrator, I am of the view that, the incapacity of the Applicant was accommodated beyond and above reasonable standards. The assertion of the Applicant that it was not, holds no water thus remain afterthought.

Regarding the third factor on failure of the Respondent to investigate and look for alternative job as recommended by the Applicants Specialist Doctors; at page 14 and 15 of the CMA award, the following is stated:-

> *"Katika shauri hili walalamikaji hawakuwa na taaluma ya ziada tofauti na kazi walizokuwa wanafanya na* ***hata kazi ambazo walihitaji kupatiwa mafunzo kwa mujibu wa vizuizi vya magonjwa yao ilionekana hazitawafaa, kwani miongoni mwa vizuizi ni kutokaa, kutotembea, na kutosimama kwa muda mrefu,kutonyanyua vitu vizito na kuepuka kuinama inama na hivyo kwa kifupi ni kwamba ajira mbadala ilikosekana."*** *(emphasis supplied)*

On that note, the Respondent strived to the best to locate alternative work to the Applicant in vain. There was no alternative job to suit the Applicant considering the health restrictions observed by his specialist and experience in such alternative jobs. The Respondent thus complied with that requirement thus, I do not find if a need arise to faulty the Arbitrator in his observation.

As to the fourth factor on provisions of compensation or pension, the record also is clear at page 13 of CMA award that:-

> *"Pia kwa mujibu wa kielelezo D-9 walalamikaji walilipwa fidia ya kuumia kazini Denis (Tshs.1,000,000) na Cosmas (Tshs.1,400,000) ambayo ni Zaidi ya kiwango kilichotajwa kwenye sheria ya fidia kwa wafanyakazi (Workers Compensation Act,Cap.263 R.E2002) kwani katika sheria hiyo kiwango cha juu ni shilingi 108,000/=."*

With the above quotation, it is clearly on record that, the Applicant was compensated to the tune of Tshs.1,000,000/= being compensation for his incapacitation which is above the statutory compensation of

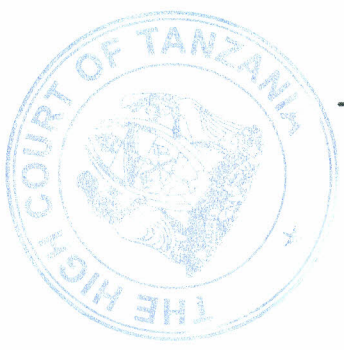
Tshs.108,000/- provided by the Law. For that reason, I am of the firm view that, the arbitrator considered compensation which the Respondent paid the Applicant. I do not agree with the Applicant that, there was no any compensation paid. Equally I do not agree with the Applicant, both in his affidavit and during submissions that termination of the Applicant, under the circumstances of this dispute was unfair. The Applicant was involved in looking for alternative job basing on recomendations of the Medical Specialist. His representative was also present and that the reasons (ill health) leady to termination was investigated

In my opinion, termination was thus fair, just and equitable substantively and procedurally. In consequence thereof, this application is hereby dismissed. No order as to costs.

Order accordingly.

Gerson.J.Mdemu
JUDGE
26/02/2021

DATED at **SHINYANGA** this 26th day of February, 2021.



Gerson J. Mdemu
JUDGE
26/02/2021