IN THE HIGH COURT OF TANZANIA
(LABOUR COURT DIVISION)
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA
LABOUR REVISION NO.54 OF 2020.

HUSSEIN SAID KAYAGILA.....APPLICANT

VERSUS

BULYANHULU GOLD MINE LIMITED ..... RESPONDENT

(Application from decision of Commission for Mediation and Arbitration-Shinyanga)

(Lucia Chrisantus-Arbitrator)

Dated the 2nd day of July, 2020

In

(CMA/SHY/KHM/114/2019)

.....

RULING

12thJuly&13thAugust,2021

MDEMU, J.:

This application has been filed by the Applicant by way of notice of application and chamber summons in terms of the provisions of sections 91 (2)(a)(b)(c), 94(1)(b) of the Employment and Labour Relations Act, No. 6 of 2004(the ELRA), Rules 24(1) (2) (3) and 28(1)(c)(d)(e) of the Labour Court Rules, G.N. No. 106 of 2007.

In the chamber summons, the Applicant prays for this Court to revise and set aside the whole award of the Commission for Mediation and

Arbitration (the CMA) in labour dispute No. CMA/SHY/KHM/114/2019 delivered on 2nd July, 2020. The application is supported by an affidavit affirmed by one Hussein Said Kayagila, the Applicant on 10th of August, 2020.

In a nut shell, the Applicant was an employee of the Respondent as Operator from 4th of December,2013 to 31th October, 2018 when he was terminated on ground of incapacity (ill health). Aggrieved by reasons and procedure for such termination, the Applicant referred a labour dispute to the CMA, which, in the final analysis, decided in his favor. The Respondent was ordered to pay the Applicant six months' salaries as compensation. That was on 2nd of July, 2020.Being aggrieved, on 12th of August, 2020, the Applicant filed the present application.

On 3rd June, 2021, this court ordered hearing of this application be by way of written submissions. Parties complied. Mr. Bakari Chubwa Muheza filed his written submissions on 17th of June, 2021 arguing on the first issue that, the award of six months' salary compensation to the Applicant for unfair termination was not justifiable. In his view, the Applicant applied for 36 months' salary compensation as per CMA F1 for unfair termination being an alternative following the Respondent's failure to reinstate him. He added that, as per the provisions of section 40(1)(c) of the ELRA, the minimum

compensation is twelve (12) months remunerations. He thought therefore the arbitrator had to consider this because the Applicant worked with the Respondent for almost 5 years and got injured/ill-health while at workplace. In this he cited the case of **Gwandu Majali v. Pangea Minerals Limited, Labour Revision No.34 of 2016** where at page 9 of the ruling the case of **Access Bank Tanzania Ltd vs. Raphael Dismas (2015) 1 LCCD 53** was referred to support his point.

As to the second issue on further provisions of medical treatment; he submitted that, the Applicant's health problems started in the end of 2016 and proceeded to get medical treatment to 2018 when he was terminated. He added that, an employee injured at work while performing his duties, have to be given medical treatment by the employer for 96 months.

Regarding the third issue on jurisdiction of CMA to entertain a matter on tort for injury sustained at workplace; his view was that, the CMA has jurisdiction under the provisions of section 88(1)(b)(ii) of the ELRA as amended in 2010 by Act No.3 of 2010.He added that, the Arbitrator was wrong in failing to order compensation to the Applicant basing on incomplete arrangement for payment between the Applicant, the Respondent and WCF. He thus prayed this application be granted.

Replying to the Applicant's written submissions, Mr. Joseph Nyerembe filed his written submissions on the 1st of July 2021. Submitting on the first issue on the six-months' salary compensation, his view was that, the Arbitrator mainly faulted for not looking alternative job. He thus thought, compensation of six months suffices because the Applicant had been paid other benefits as per the provisions of section 40(1)(a) of ELRA and Rule 32(5)(f) of the Labour Institutions (Mediation and Arbitration Guideline) Rules, 2007.

He added that, the Applicant was paid Tshs. 7,103,428 from insurer for partial permanent disability suffered and Tshs. 10,581,44 by WCF as payments for incapacity he sustained. To him, the stated payments compensated the Applicant for loss of employment which resulted from incapacity he suffered. He cited the case of **Sodetra (SPRL) Ltd v. Njellu Mezza and Another, Rev.No.207 of 2008** to support his point. As to the case of **Gwandu Majali** cited by the Applicant, Mr. Nyerembe distinguished it because reasons for termination in that case was wholly unfair that's why the Applicant was compensated 36 salaries, unlike in the instant case where the termination was mainly fair and legally justifiable as the Applicant was sick and had not recovered. He concluded in this that, the Applicant was paid

other entitlements as insurance and WCF in connection to his incapacity leading to his termination from employment.

On the second issue, he submitted that, the Arbitrator was right in not ordering the Respondent to provide further medical treatment to the Applicant. His view was that, the issue was not raised and or proved at the CMA. As to the provisions of section 62 of the Workers Compensation Act Cap.263, his concern was that, the duty to provide medical costs lies on the Director General of WCF and not the employer.

As to the third issue of whether the CMA had no jurisdiction to entertain a case of tort for work injury sustained at workplace, he stated that, the Applicants complaint on compensation for tort was the alleged underpayment of both life insurance compensations paid by the insurer and WCF compensation. He thus urged that, compensation assessment is regulated by the Workers Compensation Fund(WCF) in terms of the Workers Compensations Act, Cap.263 while insurance compensation is regulated by Tanzania Insurance Regulatory Authority (TIRA) in terms of the Insurance Act No.10 of 2009.Under the premises, he added that, the said claims did not fall within the CMA mandate. He further added that in terms of Section 14 of the Labour Institution Act,2004, the CMA decision making powers is

limited to labour disputes referred to it in terms of any labour law. He summed up that, the Arbitrator was therefore right to refuse to determine the said claims. He concluded that, according to the testimony of DW1, DW2 and DW3 the Applicant was compensated by Workers Compensation Fund (WCF) and insurer.

Rejoining, Mr. Bakari Chubwa Muheza reiterated his submissions in chief and added that, the Applicant under item 5 of the attachment to the CMA F1 Dated 5th of May,2019 arising from item 4 of CMA F1 (outcome of mediation), the Director General of WCF has no duty to provide medical treatment to the Applicant according to section 62 of the Workers Compensation Act. That was the end of parties' submissions.

I have carefully taken into considerations the parties' submissions together with the cited cases and the entire record of the CMA. In determination of this application, I find the following issues to be relevant for determination: **one**, whether the six-month salary compensation is reasonable, **two**, whether the Honorable Arbitrator was right in not ordering the Respondent to provide further medical treatment to the Applicant and **three**, whether the CMA had no jurisdiction to entertain a case on tort for work injury sustained at workplace.

Starting with the question of six-months' salary compensation, section 40(1) (c) of the ELRA in respect of compensation for unfair termination provides for the minimum compensation of 12 months' salary. The section reads as hereunder for clarity: -

40(1) If an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer

(a) N/A

(b) N/A

(c) to pay compensation to the employee of not less than twelve months' remunerations.

Reading this section, it appears that, where compensation is the only remedy opted by the employer, then it has to be of (12) months' remuneration or beyond. As to whether or not is mandatory, it have to be considered along with Rule 32(5) of the Labour Institutions (Mediation and Arbitration Guidelines), Government Notice No. 67 of 2007. In this, there are circumstances to consider when awarding compensation for unfair termination. The rule provides as follows: -

"(5) Subject to sub-rule (2), an Arbitrator may make an award of appropriate compensation based on 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 for the parties, including the extent to which the employee was able to secure alternative work or employment;

(d) the amount of employee's remuneration;

(e) the amount of compensation granted in previous similar cases;

(f) the parties' conduct during the proceedings; and any other relevant factors."

Given the provisions as quoted above, one of the factors to consider in award of compensation is the extent to which the termination was unfair. This in my view, will determine the amount to be compensated. In the instant application, the Applicant prayed for compensation of 36

months' salary payment following his termination from work. The arbitrator on the other hand awarded the Applicant a compensation of six (6) months' salary payment. The record shows that; the Applicant was unable to secure another job in consequence of unfair termination. At page 22 of the award on this point is recorded as follows:

'Hakuna ubishi kuwa mlalamikaji hali yake ya kiafya haijatengemaa na hawezi kufanya ile kazi ambayo alikuwa akiifanya.

And at page 24 of the award, it is recorded that:

Kuhusu kusitisha ajira, ni halali kulingana na kwamba mlalamikaji katika muda wote aliokuwa akitibiwa hakuweza kupona hadi ajira yake inasitishwa alishindwa kuweza kufanya kazi lakini kazi mbadala haikutafutwa na hii haikuwa halali kwa upande mmoja au mwingine.

From the outset, in terms of the provisions of section 37(2)(a) of ELRA, there were valid reasons to terminate the Applicant on the findings that, he was unable to work(incapacitated). This means that, the Applicant was terminated on the ground of incapacity.

The next question is how did the employer accommodated the disability before resorting to terminate the employee. This question is pertinent for it is procedural and it is in it that the amount of compensation may be paged to, more so after a declaration on valid reasons towards termination. In this, Rule 19 of the Employment and Labour Relations (Code of Good Practice) GN No. 42 of 2007 provides that:

> *An employer who is considering to terminate an employee on grounds of ill health or injury or injury, shall take into account the following factors to determine the fairness of the reasons 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 pensions*

In the above, the CMA observed, which I entirely agree that, illness of the Applicant resulted into incapacity of a permanent nature, the degree of which the Applicant will no longer work with the Respondent. How did the Respondent Employer accommodate the incapacity? In the award from

page 24 through page 27, specific at page 27, the following observation was made:

> *Hivyo basi utaratibu haukufuatwa wote kwa kuwa mambo niliyoyaeleza hapo juu, mlalamikiwa alishindwa kufuata utaratibu huo kwa namna moja, lakini pia kwa namna nyingine, mlalamikiwa aliweza kufuata utaratibu kwa asilimia chache.*

From the above observation, it is obvious clear that, the Respondent made consultations with the Applicant and had a deliberation on how to accommodate the incapacitation, which, in my view, the alternative job was inclusive. This partial compliance was such that, at the meeting, the Respondent never submitted list of jobs available. It is in evidence therefore that the Respondent's act may not attract heavier penalty as would be had it been reasons towards termination were invalid. In the case of **Felician Rutwaza vs World Vision Tanzania, Civil Appeal No.213 of 2019** (unreported) at page 15, where the court referred the case of **Sodetra (SPRL) ltd v. Mezza and Another**, the provisions of section 40 (1) (c) was interpreted as follows: -

*In **Sodetra (SPRL) Ltd vs. Njellu Mezza & Another***

(supra) refered to by Mr. Mkumbukwa, the High Court (Rweyemamu J.) interpreted section 40 (1)(c) thus:

...a reading of other sections of the Act gives distinct impression that the law abhors substantive unfairness more than procedural unfairness, the remedy for the former attracts a heavier penalty than the latter.....(at page 10)

In the instant application, there was valid and fair reason to terminate the Applicant on incapacity. Partial compliance of the procedural law, in my view, may not attract heavier penalty. I have no reason therefore to interfere with the award as the Arbitrator considered substantively (termination on illness) was valid but procedurally, not properly manned. I am of the view therefore that, the Arbitrator's was right in exercising his discretion ordering compensation of six (6) months' remunerations.

As to the second issue of whether the Arbitrator was right not to order the Respondent to provide further medical treatment to the Applicant, the provision of section 62 of the Workers Compensation Act, Cap.263 provides that: -

The Director General shall, for a period of not more than two years from the date of an accident or the contracting of an occupational disease pay the reasonable cost incurred by or on behalf of an employee in respect of medical aid necessitated by the incident or disease.'

Dealing with this undertaking, at page 27 of the CMA award the Arbitrator observed as hereunder: -

"Katika hili pande zote zinakili kwamba kuna malipo ambayo Insurance imeshafanya na mlalamikaji amekwisha pokea,pia kuna malipo ya WCF.

Pia mlalamikaji ameeleza kutoridhika na malipo hayo kwa kuwa kwa jinsi alivyoumia ni kiasi kikubwa cha asilimia ya ulemavu wake na daktari wa Insurance alimkabidhi fidia ndogo kulingana na kiwango kikubwa alichopata ulemavu kwa mujibu wa daktari wake."

This means that, the Applicant was paid other entitlements from WCF and the Insurer. I therefore agree with Mr. Nyerembe that, the duty to provide medical costs after termination lies on Director General of WCF and

not employer. It is stated so because medical services after termination is not a claim related to unfair termination. In essence, the same is outside the scope of the contract of employment which, in clause 6 reads that:

6.Medical benefits.

***For the duration of your employment with the company you** will be entitled to medical cover for yourself, one spouse and four registered dependants. The company will select the most appropriate medical scheme which could change from time to time (emphasis mine).*

On the third issue of whether the CMA had no jurisdiction to entertain a case on tort for work injury sustained at workplace, section 14 (1) of the Labour Institutions Act,2004 provides that:

'The functions of the Commission shall be to-

(a) mediate any dispute referred to it in terms of any labour law;

(b) determine any dispute referred to it by arbitration if-

(i) a labour law requires the dispute to be determined by arbitration;

(ii) the parties to the dispute agree to it being determined by arbitration;

(iii) the Labour Court refers the dispute to the Commission to be determined by arbitration in terms of section 94(3)(a)(ii) of the Employment and Labour Relations Act.

According to the provisions as cited above, CMA has no jurisdiction to adjudicate on compensation under the Workers Compensation Act ,Cap.263 and the Insurance Act, No.10 of 2009. it is a trite law that, compensation assessment is regulated by the Workers Compensation Fund (WCF) in terms of the Workers Compensations Act, Cap.263.On the other hand, insurance compensation is regulated by Tanzania Insurance Regulatory Authority (TIRA) in terms of the Insurance Act No.10 of 2009. Having all this in mind, at page 28 of the CMA award, it is recorded that:

*"Kwa jinsi hiyo kwa kuwa pande zote zimeshafikia hadi kusaini fomu za Insurance na WCF, basi pande zote zinaunga mkono, kama hakuna pande mlalamikaji angekuwa hajasaini ningeweza kufanya tofauti.**Na kwa kitendo cha mlalamikaji kusaini basi TUME inamshauri mlalamikaji kama kuna suala la mlalamikaji kulipwa na WFC basi mlalamikaji***

anashauriwa na TUME kwenda WCF *kufuata utaratibu huo kwakua TUME haihusiki na mambo ya WFC. (emphasis mine)*

This also features in evidence that TIRA and WCF are responsible with the claims of the Applicant. DW1 when examined made the following version:

S: Mlimshirikisha daktari katika malipo yake?Mlipigiaje hesabu malipo?

J: Ndiyo. Ndiye aliyetoa recommendations. WCF na insurance wanayo formula.

DW2 his was that:

S: Ripoti ya daktari huyo aliyeitoa alimuangalia ipo wapi?

J:Haipo. Hiyo ni kazi ya WCF ndiyo huangalia hayo.

As to DW3, the following has been reported:

S: Nani alisimamia malipo ya fidia?

J: Tanzania Regulatory Insurance Authority.

As to the quotation cited above, it is clearly demonstrated that, certain procedures got deployed regarding payment of compensation to the

Applicant to WCF and TIRA. As said, the two are governed by laws mandating courts' jurisdiction and not the CMA to deal with such claims. I therefore concur with Mr. Joseph Nyerembe that, the Arbitrator was right to refuse to determine the said claims.

Having said so, in the totality, this application is hereby dismissed. Each party to bear own costs.

It is so ordered.

Gerson J. Mdemu
JUDGE
13/08/2021

DATED at **SHINYANGA** this 13th day of August, 2021.

Gerson J. Mdemu
JUDGE
13/08/2021