IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION

AT MWANZA

LABOUR REVISION No. 03 OF 2021

(Arising from the decision of the Commission for Mediation and Arbitration at Mwanza, Hon. Salehe, B, Arbitrator dated 13/09/2019 in Dispute No. CMA/ SHY/65/2018)

BETWEEN

GEITA GOLD MINING LIMITED..... APPLICANT

VERSUS

BENJAMIN PETER LUKINDO..... RESPONDENT

JUDGMENT

28th August, 2021 & 30th September, 2021

TIGANGA, J

This judgment is in respect of an application for revision namely Labour Revision No.03 of 2021 filed by the applicant through a notice of application and chamber summons which were supported by an affidavit sworn by Mr. Gregory Lugaila, he introduced himself as the legal Counsel for the applicant who had the conduct of the matter at the CMA, thus conversant with the facts of the case.

The application was preferred under section 91(1)(a) 91(2)(b) and 94(1)(b)(i) of the Employment and Labour Relations Act, [Cap 366 R.E 2019] and Rule 24(1),(2),(a),(b),(c),(d),(e),(f); 24(3),(a),(b),(c),(d) & Rule 28 (1) (c), (d) and (e) of the Labour Court Rules, 2007 GN. No. 106 of 2007 and any other enabling provisions of the law.

The applicant herein calls upon this court to grant the following orders;

1. This honourable court be pleased to call for and revise the proceedings and the award of Hon. Salehe, B dated 22/12/2020 in Land Dispute No. CMA/GTA/85/2018.
2. This honourable court be pleased to set aside the award of the Hon. Arbitrator, Salehe, B dated 22/12/2020 in Land Dispute No. CMA/GTA/85/2018.
3. Any other relief and/or further orders the Court may deem just to grant.
4. Costs of this application be provided for,

Briefly, the background of this dispute as reflected in the record and affidavit sworn in support of the application is that the respondent was

with effect from 03rd April 2007 employed by the applicant and was working in engineering and reliability department as a fuel truck driver with the duty of distributing fuel to all mobile or non mobile GGM equipments in the field.

In November 2017 the respondent was suspected to have been involved in fuel theft. Following those allegations, he was suspended from duty. The suspension was followed by investigation, which was carried out by Nestory Ishigita of the Security Department of the applicant. The investigation report revealed that, the respondent was at fault and occasioned a loss of Tsh. 2,557,800/=.

That resulted into the arraignment before the Disciplinary Hearing Committee where he stood charged with four offences under the Disciplinary Policy and Procedure of the applicant. He was consequently found guilty of two offences, and the committee recommended a comprehensive warning as a punishment after being convinced by the mitigating factors presented by the respondent.

The recommended punishment aggrieved the applicant who appealed against the findings of the Committee to the appellate body, which body

substituted the findings of comprehensive warning to the termination of the respondent, with effect from 10th August 2018. It also directed the respondent to be paid his terminal dues.

That decision aggrieved the respondent, who filed Labour Dispute No. CMA/GTA/85/2018 which was decided in the favour of the respondent on the ground that there was no valid reasons for termination. That award by the CMA aggrieved the applicant who filed this application on the ground that; **first**, the Arbitrator failed to evaluate evidence adduced by the applicant therefore reached at a wrong conclusion and **second,** that the award is unlawful, illogical, and or irrational. From these grounds, applicant proposed the following legal issues that;

(a) Whether the award is unlawful, illogical and or irrational.

(b) Whether the respondent was terminated from employment substantively unfairly

(c) To what reliefs are the parties entitled to.

In the end the court was asked to set aside the award of the CMA, at Geita in Labour Dispute No. CMA/GTA/85/2018 by Hon. Salehe, B, the Arbitrator dated 22/12/2020, in favour of the applicant and give any other relief as it may deems just to grant.

The application was opposed by the respondent by filing the Notice of opposition filed by the respondent, who was represented by Mr. Yisambi Siwale, learned Advocate. In the notice of opposition, which according to its contents stands as the counter affidavit, the respondent in essence conceded to have been employed by the applicant on the permanent terms up to when he was terminated. He insisted that the termination was unfair as it based on un proved allegations of diesel stealing while there was no such evidence, as the said Nestory Ishigita who apart from being the only complainant he was also the only witness who testified in the case and the only investigator, therefore the complaint itself was improper, personal and biased.

Alternatively, the respondent proposed one issue that, whether CMA Award in Labour Dispute No. CMA/GTA/85/2018 was improper for failure to evaluate evidence.

Further to that he submitted that the award was not in ratio to what the respondent claimed in CMA Form No. 1 the unfair Labour Practice of the applicant as well as the financial stability.

With leave of the court and consent of the parties, the application was argued by written submissions. Parties filed their respective

submissions on time as scheduled. In the submission in chief filed by the counsel for the applicant, the court was reminded of the fact that, termination of employment can be faulted on two grounds; one, substantive ground that whether there was a fair and valid reason for termination, two, on procedural ground which is whether the termination followed fair procedure.

The counsel also reminded the court that from page 18 to paragraph 5 of page 19 it was made clear that the procedure was followed, therefore the base was on the substantive part that, there was no fair reasons for termination of employment of the respondent, in that the applicant did not prove the involvement of the respondent in a loss or theft of fuel in collusion with others as it was awarded at page 16 from sixth paragraph to page 18.

He submitted further that, the arbitrator's finding is premised on the wrong assumption and are contrary to law, as had she considered the applicants closing submissions before the CMA particularly from paragraph 4.0 to paragraph 4.1.13 which he also prays to adopt as part of his submissions, she wouldn't have arrived to a wrong conclusion, that there

was no valid and fair reasons for termination of the respondent employment contract.

Further to that, the counsel referred this court to the evidence of DW2, Nestory Ishigita and the investigation report that is exhibit D5 in which it was found that, the refueling alleged to be made to GS41, on 06/12/2017 was not made to that machine as alleged, but to a different location at Nyankanga pit which is located about three kilometers away from where GS41 was located. According to him, the discovery was made using C-Track and LAS computerized system. C-Track is a devise used to record motor vehicles movement within the mine and LAS system records fuel dispensing records on different machine.

The counsel submitted that, basing on the exhibit D5 and D6 collectively, the findings of the Disciplinary Committee at page 44 of the list of documents which was upheld by the MD in appeal which was adopted by the submission, there was enough evidence on the balance of probabilities that there was a criminal syndicate involving the respondent, LAS technicians, contractor and outsider in relation to fuel theft. He submitted insistently that the repeated act of the respondent on that date of not obtaining signatures to acknowledge refueling of the machine,

cannot be used as a defence but can be inferred as a clear pattern of an evil intention to steal, he said the investigation concentrated on GS41 due to its unusual consumption of fuel. He said further that signing for the acknowledgement of refueling is a process which can reasonably be inferred and expected to be followed and the employee was aware of it in terms of Rule 17(1)(b) of the Code of Good Practice G.N 42 of 2007.

In his view, the evidence by DW2 is that before the committee there was ample evidence that, the respondent acted contrary to code 12.3.5 and 12.4.4 of exhibit D4, that is the Code of Disciplinary Policy and Procedure, that the respondent while on duty acted in a manner which amounted to dishonesty and had breached the trust by unauthorized removing property of the employer amounting to theft contrary to the Code, which is a criminal syndicate involving the respondent, LAS technicians, contractor and outsider in relation to fuel theft.

He said the evidence of the respondent before the CMA was an after thought, as he did not appeal against the conviction entered against him by the Disciplinary Committee he was satisfied by the guilty he was found with and the resultant sentence of comprehensive warning recommended against him. Therefore the respondent's testimony which the arbitrator

relied upon is inconsistent with the facts on the disciplinary hearing, therefore the arbitrator instead of relying on the testimony was supposed to impeach it under section 164(1)(c) of Evidence Act [Cap 6 R.E 2002].

He submitted that the testimony by DW2 is the true account of what transpired on the fateful day, date of 06/12/2017. There is no evidence to the contrary that entitled the Arbitrator to discredit the same on the ground that they were mere assumptions. That the documents and the computer printout relied upon are authentic, as per certificate of authenticity and they were admitted after admitting after meeting the requirement of section 18 of the Electronic Transaction Act, No. 13 of 2015.

He submitted that the findings of the CMA that the applicant did not call important witness is unfounded because the Employment and Labour Relations Act, [Cap 366 R.E 2019] read together with section 143 of the Evidence Act, [Cap 6 R.E 2019] which provide no particular number of witnesses shall in any case be required for the proof of any fact, but of importance is the value of the evidence of that particular person.

He also informed the court that the respondent had a legal duty to prove what he was alleging in terms of section 115 of the Evidence Act,

(supra), short of that, the employer in the disciplinary hearing under rule 9(3) of the Code of Good Practice is entitled to make adverse inferences against the employee.

He cited the provision of Rule 12(3)(a) of the Code of Good Practice (supra) that gross dishonesty may justify termination. He cited the case of **Vedastus S. Ntulanyenka & 6 others vs Mohamed Trans Ltd,** Revision No. 04 of 2014 High Court of Tanzania Labour Division, Shinyanga (unreported) where it was held *inter alia* that, acts of employee of disobeying a lawful order or instruction of the employer constitutes gross insubordination and may portray the act of dishonesty. Defining the term dishonesty, he cited **Blacks Law Dictionary 6th Edition, 1990**, he said an act of deceit by an employee which causes employer to suffer some loss caused by false, deceiving act by an employee.

He submitted that the act of the respondent of participating in theft of the property of the employer did not only breach the disciplinary Code of the employer but amount to breach of trust which apart from causing loss is enough to dismiss the employee. To cement on that stand, he cited the case of **Metcash Training Ltd t/a Metro Cash and Carry vs Fobb & Another**, (1998) 19 IL J (LC) in which it was held that;

"Trust is a core of employment relationship, dishonest, conduct is a breach of that trust, accordingly, dismissal is the appropriate sanction".

He further relied onto the authority in the case of **Lulu A. Wamunza vs National Bank of Commerce,** Labour Revision No. 458 of 2017 HC, Lab, Division, at Dar es Salaam in which the case of **National Microfinance Bank PLC, vs Andrew Aloyce,** Revision 01/2013 HC Labour Division, Musoma, Sub Registry (unreported) in which the honesty of the employee in the banking industry was insisted. He asked this court to equally apply the principle in the mining industry as such and that the dismissal of the respondent was an appropriate sanction.

In the reply submission filed by Mr. Yisambi Siwale, learned counsel for the respondent, he started by asking the Court to dismiss the application as the applicant failed to discharge the burden of proof before the CMA, which failure resulted into the findings that termination was both substantively and procedurally unfair. He asked the court to look at the evidence of DW1 and DW2, and find that, the applicant had no valid reasons for termination of the respondent, as well as he failed to follow fair procedure contrary to Rule 37 and 32 of the Employment and Labour

Relations Act, (supra) GN. 06 of 2004 (sic) and Rule 12 of GN No. 42 of 2007 for terminating the respondent.

He submitted further that, the applicant failed to call crucial witness for proof of excessive use of fuel in the machine that could have amounted to theft especially on the part of the fuel operator. This argument was based on the evidence that DW2 found the excessive use of fuel in the machine as reflected at page 22 of the proceedings before the CMA as stated that *"nilikuta mashine ina matumizi makubwa kuliko kiwango cha kawaida kilicho wekwa niligundua hasara ya zaid ya lita 1000"*

According to him, there was supposed to be a witness who would prove that, the excessive use of fuel by the machine was caused by theft, not by any other factors including mechanical problem. He submitted that the charges facing the respondent was theft, which was inferred from the excessive use of fuel in the machine known as GS41, however there was no any other evidence of diesel theft reported by the security department or else. He said the complainant, DW2 was biased, as he did not involve other departments such as security, cctv camera, mechanics, technician or machine operator which were better positioned to prove the allegations,

but none of these came out to prove that, the fact which makes the applicant to have failed to prove the case at the required standard.

The counsel cited the case of **Tanzania Meat Company Ltd vs Mohamed Ghost and Others,** Labour Revision No. 01 of 2013, Hon. Rweyemamu, J, to support his stand that it is important to have an independent witness.

He said in this case, there was no any independent witness to support the evidence of DW2, who was the investigator, the complainant and the witness, something which was contrary to the principle in the case of **North Mara Gold Mine Ltd, vs James Emmanuel Maha,** Labour Rev. No. 19 of 2020 HC-Musoma (unreported), **Serengeti Breweries Limited vs Alberto Nyoka and Others,** Labour, Rev No. 07 of 2019 HC-Moshi, **Tanzania Meat Company Ltd vs Mohamed Ghost and Others,** Labour Revision No. 01 of 2013, and **JHPIEGO vs Lydia Tirweshobwa**, Labour, Rev. No. 545 of 2019, HC Labour, Div, Dsm.

The other argument advanced by the counsel for the respondent was that the applicant lodged his claim out of time and the same was not accompanied with the reasons for such delay. He said that, the Disciplinary Policy and Procedure as amended in March 2018, as per Code 7.1.3

requires the complaint to be lodged within two days after receiving the information but the complainant received the information on 06/12/2017 but the complaint was lodged on 30/01/2018 which was almost 28 days later without justifiable reasons. Further to that, he raised a complaint that even the investigation was conducted beyond the time limit of 14 days from 30/01/2018 after the suspension of the employee and was completed on 03/03/2018 contrary to code 7.4.2 of the Disciplinary Policy and Procedure as amended in March 2018.

In support of the contention he cited the decision in the case of **Tanzania Revenue Authority vs Elias Joseph Huruma,** Revision No. 572 of 2016, HC Land Division Page 20 Hon. Mashaka J, (as she then was) emphasized on the reasonable time within which the employer can take conduct of investigation. He submitted that, in this case the investigation was conducted beyond the required time that is 14 days and there was no leave to conduct investigation out of time.

He in the end asked the court to find that the CMA was justified when it held that the termination was illegal as the applicant did not comply with section 37 of Employment and Labour Relations Act (supra).

In rejoinder, the counsel for the applicant submitted that DW2 gave evidence that the respondent used LAS tag 176 which evidence was not controverted, and so to the system based facts that the alleged refueling of the GS41 on 06/12/2017 was not done, because the fueling was done at different location from where GS41 is located he said that evidence was discredited by the arbitrator on mere assumption. He submitted further that, the assumption that the offence of theft can only be detected by apprehension on the spot while stealing is wrong, that is why there are system based audit tools which are helpful to detect theft as evidenced by exhibit D5 the investigation report. He said that DW2 was the only competent witness being assisted by the tools of work. As he is a person employed and trusted for a task therefore is a reliable witness.

Discrediting the authority cited by the counsel for the respondent, he submitted that, the cited authority was distinguishable as none dealt with the fuel theft based on detection made through electronic or computerized system.

Further discrediting the reply submission, he said the respondent has been evasive in his reply submission, he did not address the legal and evidential issues involved and he deliberately tried to misdirect the court on

the facts in issue and the points of law raised. He submitted that the finding that the procedure was followed was not challenged; as there is no cross application for revision, by the respondent therefore it can not be heard now that the same was faulted.

Further to that, the counsel for the applicant submitted that, the Disciplinary Committee found the respondent guilty of the two offences, he did not appeal against them all, neither did he appeal against the punishment he was given. This makes the complaint of the respondent against the findings of the Disciplinary Committee unfounded and an afterthought, he in the end asked the prayer in the chamber summons to be allowed as prayed.

Now having summarized at length the contents of the documents filed in support and opposition of this application, I find that, from the proceedings there is no dispute that the respondent was accused of four counts before the Disciplinary Hearing, **One,** dishonesty, forgery, fraud or any other breach of trust, in the first count. **Two,** theft or unauthorized possession of the company property or any other property to other employees, customer, client or member of the public, in the second count, **three,** attempted theft, or removal of the property of the company in the

third count and **four,** collusion in assisting others to unlawfully obtain the companies property, in the fourth count.

He was found guilty of two counts by the disciplinary hearing, and punished to be given comprehensive warning. That punishment aggrieved the complainant who decided to appeal to the MD. In his decision the MD overturned the decision of the Disciplinary hearing and substituted the sentence proposed and passed by the Disciplinary hearing with termination of the respondent.

It is that findings of the MD which prompted the respondent to refer the matter to the CMA where the CMA held *inter alia* although the procedure for terminating the respondent were followed, the reasons for his termination were not valid, as the employer failed to prove that the termination of the respondent based on valid reasons.

Following that findings, the respondent was condemned to pay the compensation of 24 months salaries in terms of section 40(1)(c) of the Employment and Labour Relations Act [Cap 366 R.E 2019]. That award based on the argument that as the respondent had a permanent contract of employment, which when computed from the monthly salary he was being paid, that is Tshs. 1,136,051.40/= becomes a total of Tshs. 27,265,

233. 6/= together with a notice in terms of section 41 of the same law, making a total of Tshs. 28,401,285/=

As earlier on pointed out by the counsel for the applicant, the respondent did not appeal against the conviction entered against him by the Disciplinary hearing, and the sentence proposed by the same organ against him. That by implication means that, he was satisfied by the decision by the disciplinary hearing. Therefore he cannot be heard challenging the same before the High Court.

Further to that, after the MD, had changed the punishment and terminating the respondent, it was when the applicant decided to refer the complaint to the CMA, where the CMA held that the procedure for terminating the respondent was followed, but the applicant failed to prove the valid and fair reasons for termination. Following that verdict the respondent did not file cross application for revision to challenge the findings that the procedure for terminating the respondent was fair. As correctly submitted by the counsel for the applicant, the respondent cannot be heard challenging the decision which he did not file an application to challenge. Now having resolved that predicament, I now go to the merit of the application at hand.

In the application, the applicant raised two main grounds of revision, **first**, that the Arbitrator failed to evaluate evidence adduced by the applicant therefore reached at a wrong conclusion and **second,** that the award is unlawful, illogical, and or irrational, wherefrom, he proposed three legal issues as follows:

i) Whether the award is unlawful, illogical and or irrational.

ii) Whether the respondent was terminated from employment substantively unfairly

iii) To what reliefs are the parties entitled to.

Looking at the argument by parties, it can be easily ascertained that, the dispute at hand is built on the issue as to whether the respondent was substantively fairly terminated or not?

I will start with the legal issue number (ii) which is whether the respondent was terminated from employment substantively unfairly?

As earlier on pointed out, the respondent was terminated on the ground that he participated together with other employee in a criminal syndicate to steal or cause 1000 liters of fuel to be stolen.

There is no dispute from the evidence of DW1 the Human Resource Officer that although the respondent was accused to have participated in a

criminal syndicate which is a purely criminal matter, but the same had never been reported to police or any other investigative institution for investigation and charging the respondent in criminal case.

DW1 also said what was reported to the HR department was not theft but fuel loss. It is also not disputed that, the Disciplinary Committee though found the respondent guilty, but did not terminate him, the termination was done by the employer MD on appeal by DW2. Now the pertinent issue is whether there were any justifiable reasons for the MD to vary the punishment recommended by the Disciplinary Hearing Committee?

Although so many issues have been raised in the arguments by the counsel for the parties, from the foregoing discussion, the main issue in dispute is whether there were valid reasons for termination of the respondent by the employer.

In law, the matter pertaining to termination of employment is regulated by section 37 of the Employment and Labour Relations Act (supra). For easy reference the same is hereby reproduced hereunder.

> *"(1) It shall be unlawful for an employer to terminate the employment of an employee unfairly.*
>
> *(2) A termination of employment by an employer is unfair if the employer fails to prove-*

(a) that the reason for the termination is valid;

(b) that the reason is a fair reason if it-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer, and

(c) that the employment was terminated in accordance with a fair procedure.

(3) N/A

(4) In deciding whether a termination by an employer is fair, an employer, arbitrator or Labour Court shall take into account any ***Code of Good Practice published under section 99.***

(5) N/A"[emphasis supplied]

The code of good practice referred to in subsection 4 of section 37 is the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007 and the relevant provision which was also relied upon by the arbitrator is Rule 12.-(1) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007 which provides that;

12(1)"Any employer, arbitrator or judge who is required to decide as to whether termination for misconduct is unfair shall consider-

(a) whether or not the employee contravened a rule or standard regulating conduct relating to employment;

(b) if the rule or standard was contravened, whether or not

(i) it is reasonable;

(ii) it is clear and unambiguous;

(iii) the employee was aware of it, or could reasonably be expected to have been aware of it;

(iv) it has been consistently applied by the employer; and

(v) termination is an appropriate sanction for contravening it.

(2) First offence of an employee shall not justify termination unless it is proved that ***the misconduct is so serious that it makes a continued employment relationship intolerable****.*

(3) The acts which may justify termination are;

(a) gross dishonesty;

(b) willful damage to property;

(c) willful endangering the safety of others;

(d) gross negligence;

(e) assault on a co-employee, supplier, customer or a member of the family of, and any person associated with, the employer; and

(4) In determining whether or not termination is the appropriate sanction, the employer should consider:-

(a) the seriousness of the misconduct in the light of the nature of the job and the circumstances in which it occurred, *health and safety, and the likelihood of repetition; or*

(b) ***the circumstances of the employee such as the employee's employment record, length of service, previous disciplinary record and personal circumstances****.*

(5) The employer shall apply the sanction of termination consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who commit same misconduct." [Emphasis supplied]

From these provisions, it is glaringly clear that, section 37 of the Employment and Labour Relations Act, (supra), must be read together with Rule 12 of the Code of Good Practice, made under section 99 of the Employment and Labour Relations Act. Reading these two laws together, the following are the clear directives to be complied with before an action of terminating the employee is done by the employer and upheld by Arbitrator or the Court that;

(i) The first offence/misconduct of an employee shall not justify termination,

(ii) The termination may only base on the first offence/misconduct if it is proved that the misconduct is so serious that it makes a continued employment relationship intolerable.

(iii) If that offence/misconduct relates to damage to the property of employer then it must be established that the act was done willfully.

(iv) Taking into account the nature of the job and the circumstances in which it occurred that misconduct is so serious to endanger health and safety, and there is a likelihood of repetition;

(v) Looking at the circumstances of the employee such as the employee's employment record, length of service, previous disciplinary record and personal circumstances the misconducts merits termination.

In this case, the record shows that the misconduct committed by the respondent was the first, this is because there was no previous proved disciplinary record presented. Further to that, the evidence of DW1 was to the effect that, as the HR department there was no any reported

misconduct against the respondent. Absence of any disciplinary record against the respondent entitles him the benefit of being referred to as the first offender.

That being the first misconduct, then it cannot justify the termination of employment of the respondent unless there is evidence led to prove that the same was very serious so as to make a continued employment relationship between the employer and employee intolerable. In this case there was no evidence led to prove that the alleged misconduct was very serious and that it made a continued employment relationship between the applicant and respondent intolerable.

Further to that, from the nature of the case, the evidence which was relied on to find the respondent guilty was more circumstantial than direct, as no witness saw the respondent stealing, but the findings based on the system, and even the matter which was reported to the HR department was fuel loss as opposed to theft. That being the evidence, there could be no ground upon which the employer could have concluded that the employment relationship between the two was intolerable. That burden was on the shoulder of the employer but unfortunately the same was not discharged.

Further to that, taking into account the nature of the job and the circumstances in which the misconduct occurred, there is no evidence proving that the said misconduct was so serious to endanger health and safety of others and there is a likelihood of repetition. It has also been proved that, the respondent had worked consistently for 11 years for the applicant, and without any record of previous disciplinary charges proved. That, by all necessary implications proves that, the record of the employee was good and he has worked for the applicant for so long. Last on this issue is that, there was no evidence led to prove that in the circumstances termination was the only appropriate sanction.

That said, I find by all chances that, the disciplinary hearing in its findings regarding the punishment against the respondent relied and was actually guided by the provision of section 37 read together with rule 12.-(1) – (5) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007, therefore the MD on appeal was supposed to give concrete reasons to vary the same and terminate the respondent.

Basing on that reasoning, I find the CMA to have been justified in its findings that the termination of the respondent did not base on valid

reasons. Therefore the second issue is resolved in affirmative that, the respondent was terminated from employment substantively unfairly.

Next is issue Number one (i) which is famed on the following terms "whether the award is unlawful, illogical and or irrational". Under this issue this court is called upon to examine the lawfulness, or legality, logical and rationality of the award subject of these revision proceedings. The key word in this issue is "award", now what is an award in Labour Dispute? According to https://www.sdrdlawnotes. Com. 2017/01/ first indexed by Google in February 2016.

> *"An award is an interim or a final determination of any industrial dispute or of any question relating thereto by any Labour Court,....and it includes an arbitration award made under the law. It resembles the judgment of a court.."*

It means an award includes the decision of the CMA and the reasons thereto as well as the benefits awarded by the CMA in that decision. Having resolved the part of the award which deals with the decision and the reasons thereto next is the issue of what are the entitlements of respondent?

As shown hereinabove, the CMA in its award ordered a compensation of 24 months salaries in terms of section 40(1)(c) of the Employment and

Labour Relations Act [Cap 366 R.E 2019]. The quantum based on the facts that the respondent had permanent contract of employment, which when computed from the monthly salary he was being paid, that is, Tshs. 1,136,051.40/= becomes a total of Tshs. 27,265, 233. 6/= together with a notice in terms of section 41 of the same law, making a total of Tshs. 28,401,285/=

The issue is whether the order was legal, rational and logical? section 40(1)(c) upon which this order was purportedly made provides as follows:

> *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 remuneration.*

As it can be seen from the provision above, the same sets the minimum amount which can be awarded which is twelve months salaries. This can be gathered from the use of words "not less than twelve months remuneration." The law has not set the maximum amount to be awarded as compensation, however, the wording of the word "May" in subsection 1, suggest that, the Court or CMA has discretion to set the maximum amount depending on the circumstances of each case. Moreover, whenever the

Court or CMA chose to award more than the minimum, it must give reasons for such increase. The only maximum limit is that the compensation must be just and fair, depending the circumstances of each case. This issue was subject of the discussion and decision in the case of **North Mara Gold Mine Ltd, vs Khalid Abdallah Salum,** Labour Revision No. 25 of 2019, HC- Musoma, Kisanya, J. In which my brother Kisanya, J, relied on the decision of **Sodetra SPRL Ltd vs Njellu Meza and Another**, Revision No. 207 of 2008, HC-Laour Division DSM, **Multi Choice Tanzania Ltd vs Felix Nyari,** Revision No 09 of 2018, HC-LD, Mbeya, **Tanzania International Containers Terminal Service (TICTS) vs Fulgence Steven Kalikumtima & 7 others**, Revision No. 471 of 2016 HC Labour Division Dar es salaam.

Some of the issues to consider are whether the termination was faulted on substantive or procedural bases, it has been a canon that where it is on substantive bases, then the amount may be justifiably increased, but where it is on the procedural ground, the practice is that, it is not increased.

The case at hand is a bit peculiar, although the same is on substantive ground, but the substance is that there is no reasons for

termination though the reasons for finding the respondent guilty and the punishment of comprehensive warning were not challenged by the respondent. That fact insinuates that, the respondent was satisfied by the decision passed by the disciplinary committee. That being the case, then the compensation cannot be raised to justify the award of 24 months, thus the respondent, in the circumstances of the case at hand deserves a minimum compensation of 12 months. Which is the Tshs. 1,136,051.40/= times 12 which becomes a total of Tshs. 13,632, 616. 8/= plus the one month salary in lieu of notice making a total of Tshs. 14,764,668.2.

In fine, the Award in respect of the compensation is revised to the extent explained herein above; therefore the parties are entitled to get what I have explained above.

It is accordingly ordered.

DATED at **MWANZA** this 30th day of September, 2021

J. C. Tiganga

Judge

30/09/2021

Judgment delivered in open chambers in the presence of Mr.Lugaila learned counsel for the applicant and Mr. Siwale for the applicant, on line vides audio teleconference.

J. C. TIGANGA

JUDGE

30/09/2021