

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT ARUSHA

LABOUR REVISION NO. 56 OF 2019

(Arising from CMA, Application No. CMA/ARS/ARB/11/2017)

ARON NAKEMBETWA JUMBE..... APPLICANT

VERSUS

K.K SECURITY (T) LIMITED RESPONDENT

JUDGMENT

1/9/2021 & 27/10/2021

ROBERT, J:-

The Applicant, Aron Nakembetwa, moved this Court to revise and set aside the award of the Commission for Mediation and Arbitration (CMA) in Employment Dispute No. CMA/ARS/ARB/11/2017. The application is made under the provisions of the Labour Court Rules, G.N. No. 106/2007 and the Employment and Labour Relations Act, No. 6 of 2004 and supported by an affidavit sworn by the Applicant.

The Applicant lodged Employment Dispute No. CMA/ARS/ARB/11/2017 at the CMA against his the Respondent claiming compensation for unfair termination, one month notice, severance pay, unpaid salaries and medical expenses. After the hearing, the CMA decided that the Applicant should be reinstated and be paid six months' salaries as compensation for unfair termination.

At the hearing of this revision, the Applicant appeared in person without representation while the Respondent was under the services of **Mr. Fidel Peter**, learned counsel. The hearing was conducted by written submissions and both parties complied with the court schedule.

Submitting in support of the application the Applicant submitted that, the CMA having decided in favour of the Applicant refused to ~~award compensation for unfair termination~~ as required under section 40(1) of the Employment and Labour Relations Act, Cap. 366 R.E. 2019.

He argued that, the Hon. Arbitrator had no option other than giving an order of reinstatement, re-engagement or compensation of not less than twelve months' remuneration. However, an option of re-engagement or reinstatement couldn't work out at this moment as the relationship between the parties was already broken down irreparably.

He prayed to be awarded compensation for not less than 12 months' remuneration.

Further to that, he argued that the CMA did not award him other benefits including hospital bills, severance pay, salary arrears, annual leave and notice.

Opposing this application, Mr. Fidel Peter submitted that application of section 40(1) of the Employment and Labour Relations Act, 2004 is not mandatory since the Arbitrator has discretion to apply any of three options available depending on the circumstances of the case. He argued that, the Hon. Arbitrator awarded compensation of six months remuneration on the basis of section 3 (a) of the Employment and Labour Relations Act, 2004 which provides that principal object of ~~the law is to promote economic development through economic~~ efficiency, productivity and social justice. Thus, he maintained that, the notion that the Arbitrator did not give the remedies for unfair termination is baseless and unfounded.

Submitting on the Arbitrator's failure to award other benefits claimed by the Applicant, he contended that, the Applicant failed to prove allegations of salary arrears while notice and severance pay could not be paid because as the Applicant was re-engaged. He maintained

further that, the Arbitrator did not award leave as required by the law and according to the CMA F1 annual leave was not one of the remedies claimed.

In a brief rejoinder, the Applicant reiterated the arguments made in his submissions in chief and insisted that he is entitled to payment of a lawful compensation for unfair termination as well as payment for annual leave, severance, overtime and other remedies for unfair termination.

Having considered submissions from both parties and records of this matter, the question for determination is whether in the facts of this case the CMA award was properly procured.

Section 40 (1) of **the Employment and Labour Relations Act** provides clearly the remedy once termination of employment is found to be unfair. It provides that:

"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."

Apart from the listed remedies, the law also provides for payment of other entitlements on termination of employment under section 44 of the Act including, remuneration for work done before termination, annual leave pay due or accrued during any incomplete leave, notice, severance and transport allowance. However, it is in the discretion of the CMA or the Court to give an award that is considered just and fair depending on the circumstances of the case but with restrictions to reliefs claimed in the CMA Form No. 1 (See **Power Roads (T) vs Haji Omary Ngomero, Revision No. 36 of 2007**).

In the present case the Applicant in his CMA Form No.1 prayed for the following remedies, notice, severance pay, salary arrears, medical bills and compensation for unfair termination. In his award, the Arbitrator ordered reinstatement of the Applicant under section 40(1)(a) of the Act and payment of six months remuneration. Explaining why he exercised his discretionary powers to give the said award, the Arbitrator stated that he gave consideration to section 3 (a) of the Employment and Labour Relations Act which aims to promote economic development through economic efficiency, productivity and social justice.

While I do not fault the Arbitrator in exercising his discretionary powers to give the impugned award, it is clear that when ordering reinstatement of the Applicant, the Arbitrator did not consider remedies sought by the Applicant in the CMA F.1 or assign any reasons on why he didn't award reliefs sought. The Applicant is of the view that in the circumstances of this case, reinstatement of the Applicant is not a viable option because the Applicant has been out of work for a long period and the relationship between parties has already broken down irreparably.

This Court is in agreement with the Applicant that, in the circumstances of this case, it might not be suitable for both the Applicant and Respondent working together since their relationship has already gone sour. In the circumstances, the Court considers the remedy for compensation sought in the Applicant's CMA F.1 suitable

In determining how to consider reasonable compensation, the law has set the minimum standard of compensation for an employee who is unfairly terminated. Section 40 (1) (c) of **the Employment and Labour Relations (Code of Good Practice) Rules** GN. 42 of 2007 provides for 12 months compensation and section 32 (5) of **the Employment and Labour Relations (Code of Good Practice) Rules** GN. 42 of 2007 provides for the factors to be considered by the

court in awarding an appropriate compensation, the section reads as follows: -

"32 (5) Subject to sub-rule (2) an Arbitrator may make an award of appropriate compensation based on the circumstance of each case considering the following factors-

- (a) any prescribed minimum or maximum 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 on employment;*
- (d) the amount of the employees' remuneration,*
- (e) the amount of compensation granted in person's similar cases,*
- (f) the parties conduct during the proceedings; and any other relevant factors."*

Similarly, in the case of **Sodetra (SPRL) Ltd v Njelu Mezza and**

another Labour Revision No. 207 of 2008, it was observed that: -

" ...order of compensation is discretionary yet the Act does not specify grounds when despite a finding of unfair termination compensation need not be ordered. Second, when the above provision is read together with Rule 32 (5) of the Guidelines on remedies for unfair termination, where some of the factors to be considered by the arbitrator in determining the amount of


compensation are itemized; it appears that the arbitrator has discretion in determining the amount of compensation in such cases..."

Guided by the principles above, having made a finding that the award of reinstatement of the Applicant is not appropriate in the circumstances of this case, I proceed to determine that, the compensation of six months' remuneration awarded by the CMA lower taking into account the minimum amount of compensation provided for under section 40(1)(c) of the Act and the fact that the Applicant's termination was both procedurally and substantively unfair.

On the foregoing, this court finds and holds that the Applicant is entitled to compensation of 12 months' remuneration and in terms of ~~section 44 of the Act No. 6 of 2004~~ order the Respondent to pay the Applicant his terminal dues, if not paid. Consequently, the CMA award is set aside and substituted accordingly.

It is so ordered.




K.N. ROBERT
JUDGE
27/10/2021