

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LABOUR DIVISION

AT ARUSHA

LABOUR REVISION No. 07 OF 2021

*(Originated from labour dispute No. CMA/ARS/ARB/17/2019) decisions and award of
Hon. Lomayani, dated 13th January 2021)*

BETWEEN

SANYA BUREAU DE CHANGE LTD APPLICANT

AND

RUTH MWAKASEGE.....RESPONDENT

JUDGMENT

30th June & 09th August 2022.

TIGANGA, J.

In this application, the applicant hereby having been aggrieved by an award of the Commission for Mediation and Arbitration hereinafter the CMA, in Labour Dispute No. CMA/ARS/ARB/17/2019, moved this court under section 91(1), 91(1)(a), 91(2)(c) and 94(1)(b)(i) of the Employment and Labour Relations Act, 2004 (Act No.6 of 2004), Rules 24(1), (2)(a), (b), (c), (d), (e), (f) and (3)(a), (b), (c) and (d), Rules 28(1), 28(1), (c), (d) and (e) of the Labour Court Rules G/N No.106/2007).

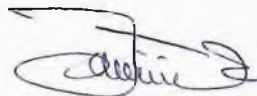
He applied through the chamber summons in which she presented the following prayers:

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- i. That, this honourable Court be pleased to revise and set aside the whole award of the Commission for Mediation and Arbitration at Arusha (Hon. Lomayani – Arbitrator) in Employment and Labour Case No. CMA/ARS/ARB/17/2019.
- ii. That, the Honourable Court be pleased to grant costs of this application.
- iii. Any other orders as this Honourable Court will deem just and equitable to grant.

The chamber summons was supported by an affidavit of Bashir Ibrahim Mallya, learned counsel for the applicant. The basis of the applicant's prayers is upon the following grounds adduced via the affidavit filed in support of the application.

- i. That, the Honourable Arbitrator erred in law and facts by holding that the respondent was unfairly terminated while he was fairly terminated due to misconduct.
- ii. That, the Honourable Arbitrator erred in law and in fact by holding that the termination was unfair basing on the fact that the applicant did not give the respondent the chance to be heard and defend herself.

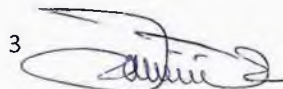


- iii. The compensation of 24 months an amount which is excessive and unreasonable.

The historical background of this matter is that, the respondent lodged a complaint before the CMA for compensation following the allegation that she was unfairly terminated by the applicant. The CMA delivered its award after full hearing of the parties in which it held that, the respondent was unfairly terminated. Therefore, she be paid a total sum of Tsh. 17,000,000/=.

Following dissatisfaction with an award and the orders emanated therefrom, the applicant filed this revision before this Court on the grounds already listed herein above.

With leave of the court, the application was argued by the parties by way of written submissions. The learned Counsel for the applicant submitted that, the respondent absconded from job following the loss of the applicant's money. She even reported her fellow workers to the Police and caused maltreatments upon them. He further submitted that, the termination was fair because the respondent was given chance to defend herself against the allegations she was facing. He further stated that, the employment relationship between the applicant and the respondent was intolerable because of the serious misconduct on part of the respondent.


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It was his further submission that, concerning the allegation that the respondent was not given right to be heard, the records of the CMA show that the respondent used the name of Sarah instead of Ruth, she was notified of the disciplinary hearing which was to take place on the 12th November 2018 the accusation being the loss of money that occurred.

He further stated that, further steps were taken including sending the notice of the meeting to the respondent via the ward leader who delivered to her a notice of the meeting. According to him, that was proved by exhibit D1. However, despite the fact that, the respondent was served and there is a proof to that effect, the respondent did not enter appearance at that meeting while she was informed.

With regard to 24 months' compensations which the respondent has been awarded by the CMA, he submitted that, the same is too excessive. Further to that, the respondent in his Complaint form 1 did not specifically plead the said compensations should cover the period of how many months. He further submitted that, in law, parties are bound by their own pleadings. Therefore, as long as she did not specify as it has already been said, it was not proper for her to enjoy such excessive compensations.

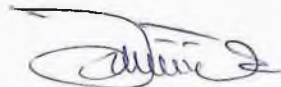
In reply submissions made by the respondent through her counsel, it was submitted that, the alleged misconduct was unproven, since it was

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reported before the investigatory machinery and the charge was filed before the District Court of Arumeru charging her with an offence of stealing by a servant contrary to section 258(1) and 271 of the Penal Code [Cap. 16 R.E 2019]. That the respondent fraudulently and without any claim of right stole cash money amounting to Tanzanian shillings ten million the property of Sanya Bureau de Change Ltd, which came to her possession by virtue of her employment. In that case, the respondent was found not guilty and acquitted as indicated at page 10 of the Court's judgment.

It was further submitted that the pendency of a criminal case in which the employee stands charged bars the employer from taking other disciplinary action before the court in which the employee stands charged had determined the matter, since in this case, the respondent was terminated before the trial was concluded it was the counsels view that, the hearing and the termination was unprocedural.

The Counsel further submitted that, the right to be heard on the part of the respondent was infringed because there is no evidence proving that she was served with the notice to attend the disciplinary meeting. It cannot fairly be said that, she was afforded an opportunity of being heard. There was no even an affidavit of the process server to prove the same.



He concluded the reply by submitting that, the 12 months' compensation under the law is indeed the bare minimum set by the law, it is the discretion of the Arbitrator to award more. In his view, the Arbitrator could even award the respondent above 24 months' compensation as the circumstance of the particular case allows, indeed the Arbitrator gave reasons for awarding such 24 months' compensation.

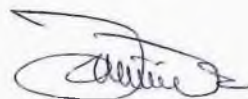
In rejoinder submissions, the Counsel for the applicant submitted that, the employee if unreasonably refuses to attend the hearing of the disciplinary committee, an employer may proceed with the hearing in the absence of the employee. He further submitted that, the respondent was given right to be heard but he misused that right. The respondent prayed for the 12 months' compensation but the CMA awarded her a 24 months' compensation.

Having passed through both parties' submissions, the issue for determination before this Court is whether there was fair termination of the employee's employment contract.

It is my considered view that, the rules of procedures in all kinds of proceedings have been established with a purpose of making sure that, justice is not only done, but it is manifestly seen to have been done. It is on records that, the termination letter which has been tendered before

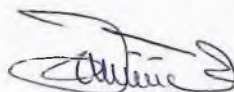
the CMA as exhibit P1 shows that, the basis of their decision relied on three misconducts which the respondent was charged with before the disciplinary committee. The *first* is theft, the *second* is gross dishonesty, the *third* is wilful endangering the life of others. It goes without saying that, according to the findings of the disciplinary committee the offence of theft and endangering other people's life are the ones which led to the alleged gross dishonesty.

The last offence of endangering other peoples' life as alleged before the disciplinary committee was done in the course of respondent's assistance to the lawful investigating machinery through its Police officers, in which the respondent mentioned other employees when she was interrogated. In my view, this act was a lawful procedure in investigation which cannot be perceived as the mistreatment of other employees caused by the respondent. It should rather be taken as a patriotic act of assisting the Government law enforcement machinery to succeed in their lawful businesses. I hold so because section 7 of the Criminal Procedure Act Cap. 20 R.E 2022 requires every person (responsible citizen) to report any act which is by its nature a crime committed in his presence, and assist the law enforcement Agencies in the investigation.

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That said, the offence of endangering other people's life against the respondent is basically unfounded, since it is a criminal offence which was to be reported to Police and get investigated. If the same was not done, that would have amounted to the respondent's violation of criminal procedures. It is my take that, since it is a criminal offence which was reported to the appropriate authority, the investigation was to be done by the investigative Agencies and the guilty or innocence was supposed to be proved in court. Having said that, I therefore find the applicant to have misconstrued act and charged the applicant without base.

With regards to an offence of theft, since the matter was reported, investigated by the investigative Agencies, filed, heard before the court which found the respondent not guilty and acquitted her, a decision which was not appealed against, there was no base for the disciplinary committee to charge him for the same misconduct. Further to that, it was also unprocedural under section 37 of the Employment and Labour Relations Act, [Cap 366 R.E 2019] for the applicant to conduct disciplinary hearing while the same matter was proceeding in court. For purposes of clarity I find it important to quote in for easy reference, **section 37(5) of the Employment and Labour Relations Act, [Cap 366 R.E 2019]** provides that;

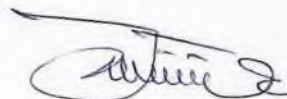
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"S.37(5) No disciplinary action in form of penalty, termination or dismissal shall lie upon an employee who has been charged with a criminal offence which is substantially the same until final determination by the Court and any appeal thereto."

I find it prudent to rest my pen upon deliberation of the first ground for revision raised by the Applicant that, since the applicant conducted a disciplinary hearing while the matter was also proceeding in court, that alone vitiates the whole proceeding of the disciplinary hearing. That said, it will be meaningless to proceed deliberating on other grounds.

Therefore, I find the respondent to have been unfairly terminated and I hereby uphold an award of the Commission for Mediation and Arbitration and all orders emanating from its decision.

Now regarding the award of 24 months' compensation, I entirely agree with the counsel for the respondent that the award of 12 months as prescribed under section 40(1)(c) is the minimum, and that the Arbitrator may award more. However, once the Arbitrator wants to award more, then he must be guided by the rules of reasoning. I have passed through the award, I find no reasons concrete enough, which were adduced by the Arbitrator to justify the award of 24 months' compensation.

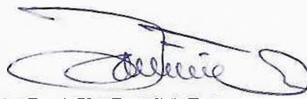
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That said, I thus find that, although the respondent was entitled to compensation, but there is no justification whether legal or factual to award her 24 months. For that reasons, I therefore alter the award, and reduce the compensation from 24 months to 12 months' compensation which is the minimum threshold.

It is so ordered.

DATED at **ARUSHA** on 28th day of July 2022.




J.C. TIGANGA
JUDGE.