THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

LABOUR REVISION NO. 09 OF 2022

(Originating from Labour Dispute CMA/MOR/441/2019, CMA Morogoro)

ADSON BISEKO CHIMASA ..... 1ST APPLICANT

JESWALD FRANCIS MAWANJA..... 2ND APPLICANT

JOSEPH HADSON MOLOLO..... 3RD APPLICANT

ZUHURA JUMA MFIKILWA .....4TH APPLICANT

VERSUS

YAPI MERKEZI INSAAT VE

SANAYI ANONYM SIRKET ..... RESPONDENT

JUDGEMENT

Last court order on: 25/08/2022
Judgment date on: 24/10/2022

NGWEMBE, J.

The applicants, Adson Biseko Chimasa and three other colleagues, being aggrieved with the award of the Commission for Mediation and Arbitration at Morogoro (CMA) on unfair termination, preferred this application for revision before this court. They have moved this court to call upon and revise the CMA award dated 25th February, 2022.

The applicants moved this court under sections 91 and 94 of **the Employment and Labour Relations Act, Cap 366 RE 2019** and rule 24 read together with rule 28 (1) and rule 55 of the **Labour Court Rules G.N 106 of 2007** together with a joint affidavit supporting the application.

Extracting from the affidavit and other pleadings, it is evident that the applicants were employed under a specific task contract from 01/02/2018 in the Standard Gauge Railway Project (SGR), undertaken by the respondent. They held the respective posts of Reserve Bus Drivers and Roller Operator up to 01/08/2019, when they were terminated from employment due to disciplinary offences. Perceived that termination as unfair, they filed a dispute before the CMA praying for one month salary in lieu of notice; 60 months' salary compensation for the remaining period of contract; annual leave; severance pay; repatriation costs; subsistence allowance and 36 months' salary compensation for unlawful termination.

In determining their application, CMA ruled that the respondent had no valid reason for terminating the appellants, but the procedure for termination were properly followed. At the end dismissed some reliefs sought and awarded the following to each; payment of annual leave; one month salary in lieu of notice; repatriation costs and twelve months' salary compensation for unfair termination, forming an aggregate of Tshs. 43,880,000/= The applicants were dissatisfied with that award, hence came up with grounds that: -

1) The arbitrator erred to rule that the termination was procedurally fair.

2) The arbitrator awarded only 12 months' salary compensation instead of 36 months for breach of contract and Tsh. 2,500,000 for repatriation costs instead of Tshs. 5,000,000 prayed while declining to grant some reliefs.

The applicants were represented by Mr. Michael Mgombozi, from Tanzania Union of Private Security Employees (TUPSE) and Mr. Daniel Kalasha, Principal Officer of the respondent company appeared for the respondent. Following completion of pleadings, this court granted parties to address the court by way of written submissions. With appreciation, both complied with industrious input in this matter.

The applicants' written submission was centred on the complaints that the arbitrator failed to evaluate the evidences adduced by the applicants, thus failed to grant all reliefs sought. Added that the employer terminated the applicants' employment due to their resisting to illegal change of their contract contrary to section 37 (1)(2) of **the Employment and Labour Relations Act, Cap 366 RE 2019** and rules 11 (4) & (6) and 12 (2) of **the Employment and Labour Relations (Code of Good Practice) Rules of 2007 GN. No. 42 of 2007.** Rule 12 (2) of **GN. No. 42 of 2007** provides that: -

> *"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."*

The applicants' representative referred this court to a number of authorities to be referred when necessary. Insisted, the applicants did not commit any offence, the employer had no reason to terminate them.

To him, the arbitrator misguided himself by failure to consider that there was neither investigation nor offence was established and proved. Referred this court to the case of **BIDCO Oil and Soap Ltd Vs. Robert Matonya and 2 others, Revision No. 70 of 2009, HCT Labour Division,** underscored the prominence of substantive and procedural fairness in employment termination proceedings.

Arguing in respect to awarding the entitlements, challenged the arbitrator that did not follow the mandatory requirement of section 40 of **Cap 366.** Reiterated the prayers before the CMA and other new prayers. Went on arguing that they were entitled to subsistence allowance under section 43 (1)(c) of **the Employment and Labour Relations Act,** severance pay, certificate of service and repatriation costs (fare and transportation costs). Justified his arguments by citing the case of **Juma Akida Seuchanga Vs. SBC Tanzania Ltd, Civil Appeal No. 7 of 2019.**

New complaints were on arrest and being kept under custody for days by the police officers upon accusation of theft, that the arbitrator erred in not compensating them for that. Sought support from **North Mara Gold Mine Vs. Khalid Abdallah Salum, Labour Revision No. 25 of 2009** where 48 months' salary was awarded. To him, the CMA was required to award compensation of more than 12 months' salary as prayed.

In turn, Mr. Kalasha prefaced his submission by a background. Then discredited the applicants' averments that they were previously employed by Mota Engel Engineering Construction Ltd, on the place of recruitment being Dar es Salaam and Tanga respectively, and about the

terms and conditions maintained when transferred to the respondent company. Referring to exhibit DD1 maintained that place of recruitment was Ngerengere, herein Morogoro. Above that, no witness testified on it. On the applicants' reliefs, he submitted that, they were not proved.

In respect of repatriation and subsistence costs, argued that as the applicants were recruited from Ngerengere within Morogoro Municipality and never tendered any evidence to the contrary, the tribunal did not have to award them repatriation costs under section 43 (1) of **the Employment and Labour Relations Act.**

Mr. Kalasha argued further that, no changes of the contract were made as no proof was established. He distinguished and disapplied the case of **James Leonidas Ngoge Vs. Dawasco, Revision No. 382 of 2013 Hashimu Mbughi Vs. TANESCO, Revision No. 16 of 2014,** also rule 11 (4) and (6) of **GN 42 of 2007** referred by the applicants, that they only apply to probationary employees.

Countered the argument on the issue of theft, but not much relevant in this matter. Facing the contention of arrest, detention, and unfair labour practice, the respondent's representative, discredited as new facts which were never pleaded in the CMAF1 nor determined by the CMA. The court is barred from determining new facts at Revision stage. Supported his argument by referring to the case of **Kisanga Tumainiel Vs. Frank Pieper and Travel Lodge Ltd, Civil Appeal case No. 139 of 2008.**

Mr. Kalasha referred to the preliminary objections raised at the CMA and argued by raising some new grounds, same will not be

considered as there is no cross revision. Rested by a prayer that the application be dismissed. In rejoinder, the applicants filed 12 pages rejoinder but comprising repetition and irrelevant arguments to the subject matter.

Having recapped the rival arguments and points of contention between the disputants, obvious this court is tasked to determine whether the application is meritorious by considering two important issues, of whether the CMA was correct to rule that termination procedure was fair under the circumstance of the dispute; and whether the awarded entitlements were proper.

In answering those questions, I will be guided by basic principles relevant to labour disputes. The first principle is that an employer cannot terminate the employees but on substantive reasons and procedural fairness. Relevant to the foregoing, is the employer's duty to prove on the balance of probability, that termination was on fair ground and that the procedures were followed. If the employer fails to prove that the employment was terminated in accordance with a fair procedure, the termination is unfair. This is provided for under section 37 and 39 of the **Employment and Labour Relations Act** together with rule 9 (3) and (5) of **the Code of Good Practice**. Also, I will refer to the cases of **Asanterabi Mkonyi Vs. TANESCO, Civil Appeal No. 53 of 2019; Paschal Bandiho Vs. Arusha Urban Water Supply & Sewerage Authority (AUWSA), Civil Appeal No. 4 of 2020;** and **Fredy Ngodoki Vs. Swissport Tanzania Plc, Civil Appeal No. 232 of 2019.**

In considering the holding in the case of **Asanterabi Mkonyi,** (Supra) it was held: -

> *"The above provision creates the concept of unfair termination of employment by defining "unfair termination of employment" as a termination where the employer fails to prove that the termination was for a valid and fair reason and that fair procedure was followed"*

From the proceedings before the CMA I have found that, there was ample evidence that a disciplinary offence of theft and breach of trust - stealing of water cartons was committed from where the applicants were. None of the applicants was proved to have committed such a disciplinary offence. What seems to have caught the applicants in the web is circumstantial evidence showing that the person who committed the offence was amongst them and that the applicants made a cover up.

Other factors which seem to have stained the applicants' trust in the eyes of the employer is their refusal to produce their work IDs when a security officer demanded them. But on this, I will agree with the CMA that since there was no proof of who committed the stealing, the employer had no justifiable reason to terminate the applicants.

Regarding the procedure, I visited the CMA proceedings. The disciplinary hearing proceeding and checklist were tendered before the CMA as DD5 and DD9 respectively. Also notice to show cause/charge as DD4 and the letter which exhibited the termination after time to appeal expired as DD6 and DD7. Having made a thorough review of the CMA

record, testimonies and documentary exhibits, it is clear to this court that disciplinary committee of the respondent complied with the provisions of Section 35 (1) (2) of ELRA and Rule 13 (5) of GN.42 of 2007 which forms the basis for fair disciplinary hearing. The charge was plainly clear against the applicants and were availed right to defend before the committee, which at last made recommendation to the management. Thus, constituting fair hearing.

Despite the rule, this court has in several occasions ruled that, where the employer had no fair reason for termination, fairness of the procedures may not validate termination. The whole purpose of the legislature was, among others, to require employers to terminate employees only basing on valid reasons and not on their whims. Where there is unlawful or unfair termination, compensation and other statutory entitlements must follow. (See sections 37 to 42 of **the Employment and Labour Relations Act).**

However, employees should never exaggerate the provisions above or take labour disputes for enrichment. All the time, courts have awarded compensations by considering circumstances of each case. This is because at all the time, courts and tribunals should preserve the spirit of section 3 of **The Employment and Labour Relations Act,** which I quote *extenso:* -

> **Section 3**. *The principal objects of this Act shall be -*
> *(a) to promote economic development through economic efficiency, productivity and social justice;*

(b) to provide the legal framework for effective and fair employment relations and minimum standards regarding conditions of work;

(c) to provide a framework for voluntary collective bargaining;

(d) to regulate the resort to industrial action as a means to resolve disputes;

(e) to provide a framework for the resolution of disputes by mediation, arbitration and adjudication;

(f) to give effect to the provisions of the Constitution of the United Republic of Tanzania, 1977, in so far as they apply to employment and labour relations and conditions of work; and

(g) generally, to give effect to the core Conventions of the International Labour Organisation as well as other ratified conventions."

In awarding compensation, the court therefore will have the above in mind, also all the procedural laws and rules in labour matters. In the matter at hand, the arbitrator having awarded the compensations and entitlements as per page 19, observed the following: -

"Uamuzi huu umezingatia sababu zifuatazo uasili wa mgogoro, uasili wa mwajiri na manufaa ya kazi inayofanyika kwa jamii na kazi ya mradi, kwa pamoja misingi ya ujumla ya haki jamii (social justice) kwa wanaotekeleza mradi huo"

The above means that the award took into consideration the nature of the dispute, nature of the employer, benefits of the project to the community and social justice. Having considered the award closely, I am confident to commend that, the arbitrator followed the spirit of

section 3 above. Variations therein were normal and did not go the root of substantive justice.

Further, relevant to this revision is rule 32 (5) (a) – (f) of the **Mediation and Arbitration Guidelines Rules, GN 67 of 2007,** which gives a number of factors for courts to consider in exercising their discretionary powers under section 40 of **the Employment and Labour Relations Act**. It reads: -

> **Rules 32 (5)** *"Subject to sub–rule (2), an arbitrator may make an award of appropriate compensation based on the circumstances of each case considering the following factors: -*
>
> (a) *Any prescribed minima or maxima compensation.*
> (b) *The extent to which termination was unfair.*
> (c) *The consequences of 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 the previous similar cases.*
> (f) *The parties conduct during proceedings and other relevant factors."*

Among other factors, in this matter, item (f) was relevant and would affect the amount of compensation. The circumstance suggested that the applicants knew or had a reason to know who actually committed stealing of water cartons, but concealed their knowledge. Even when the security officer faced them and needed to see their IDs

they adamantly refused. Concealing information on crime and or failure to report a crime is in itself an offence. Even if there may be no direct implicating evidences against one specific person, yet it was an unacceptable conduct in the whole business of the employer. Such behaviour would render employment relationship intolerable.

In this matter I am satisfied that, even if the employer did not conduct serious investigation, yet there was ample evidence that an offence was committed by the employees, only that those who witnessed the perpetration did not devote cooperation to the employer. Thus, may amount into conspiracy.

The applicants' conduct before and during disciplinary hearing was not good for continued labour relations as provided for under section 3 of the Act quoted above. In the circumstances, the respondent had a probable cause to take action against the employees, save that it did not attain the standard of fair reason for termination because of deficient investigation.

Applying all the factors properly, it would be proper to conclude that, by conduct the employees contributed to the employer's motion of terminating them. Termination under the circumstance, would not attract much compensation. I am of the strong view that even the 12 months' salary compensation was too much to the applicants, they deserved less.

On the issue of repatriation, the CMA was expected to base its verdict on the evidence available before it. Section 43 of the

Employment and Labour Relations Act provides rights for repatriation as quoted hereunder: -

> **Section 43 (1)** *"Where an employee's contract of employment is terminated at a place other than where the employee was recruited, the employer shall either*
>
> *(a) transport the employee and his personal effects to the place of recruitment;*
>
> *(b) pay for the transportation of the employee to the place of recruitment; or*
>
> *(c) pay the employee an allowance for transportation to the place of recruitment in accordance with subsection (2) and daily subsistence expenses during the period, if any, between the date of termination of the contract and the date of transporting the employee and his family to the place of recruitment.*
>
> *(2) An allowance prescribed under subsection (1)(c) shall be equal to at least a bus fare to the bus station nearest to the place of recruitment.*
>
> *(3) For the purposes of this section, "recruit" means the solicitation of any employee for employment by the employer or the employer's agent."*

This court has observed that the contention between the parties was on the question of which one was a place of recruitment to the applicants. While applicants holding fast to the averment that their places of recruitment were Dar es Salaam and Tanga respectively, the respondent maintained that, place of recruitment for all of them was none other than Ngerengere, herein Morogoro. Visiting Exhibit DD1

(employment contracts) this court found that, place of recruitment in the contract was Ngerengere to all applicants, though their place of domicile were Dar es Salaam. This court gave an interpretation of the provision above in the case of **Tanzania Revenue Authority Vs. Schubert Bebwa, Revision No. 283 OF 2020,** held: -

> *"On the basis of the above position of the law, it is very clear that determinant factor on payment of transport allowance or repatriation allowance and subsistence allowance for any employee including public servant is a place of recruitment and not place of domicile"*

Therefore, in absence of any other relevant fact to the contrary, the arbitrator did not have any ground to award Tshs. 2,500,000/= as repatriation costs, since correctly as the respondent submitted, there was no evidence suggesting place of recruitment to be any other than Ngerengere, herein Morogoro region.

Consideration is made also to the reality, with the changing trend of labour market, people may move from their areas of domicile to the cities seeking employment. Under the current situation, it is important for arbitrators or courts to interpret properly the concept "place of recruitment". It automatically follows that the complaints concerning subsistence allowance would in no way stand. I concur with the arbitrator but for a different reason as shown herein.

Other reliefs sought by the applicants that were not granted are: - damages for unfair termination, subsistence allowance, 60 months' salary compensation for the remaining period of contract. Seriously I

reviewed the applicants' testimonies before the CMA. Unfortunate there was no evidence established proving right to damages, subsistence allowance and damages for the said period of 5 years (60 months' salary).

In any event, this court has a duty among others, to revisit and realign the award as per the applicable laws, based in the circumstances lead into termination. As such the award of repatriation costs as earlier alluded was unfounded same is set aside. Likewise, the award of Tshs. 2,500,000/- to each of the applicants, making an aggregate of Tshs. 10,000,000/= is set aside under section 91 of **the Employment and Labour Relations Act.** On the same vein, compensation of 12 months' salary was of high side, but I need not to disturb it simply because the employer was satisfied for not preferring cross revision. I was determined to reduce the compensation to a reasonable amount based on the circumstances discussed above. However, reluctantly, the compensation of 12 months salaries is retained as per the CMA award. Save for the varied reasoning and slight variations, the application is dismissed.

I accordingly order.

Dated at Morogoro in chambers this 24th day of October, 2022.

THE HIGH COURT OF TANZANIA

P. J. NGWEMBE

JUDGE

24/10/2022

Court: Judgment delivered at Morogoro in Chambers on this 24th day of October, 2022, **Before Hon. J.B. Manyama, AG/DR** in the presence of Ms. Esther Shoo, Advocate for the Applicants and in the presence of Christin Maduhu for the Respondent.

Right to appeal to the Court of Appeal explained.

SGD. HON. J.B. MANYAMA

AG/DEPUTY REGISTRAR

24/10/2022

I Certify that this is a true and correct copy of the original

Deputy Registrar

Date 24/10/2022 at Morogoro