

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT MUSOMA

LABOUR REVISION NO 22 OF 2021

*(Arising from the award of the CMA at Musoma in CMA/MUS/331/2019 issued on
25/08/2021)*

NORTH MARA GOLD MINE LIMITED APPLICANT

VERSUS

MWITA WAISE SAMSON RESPONDENT

JUDGMENT

19th September & 31st October 2022

F. H. Mahimbali, J.

The respondent Mwita Waise Samson was employed by the applicant company to carry on some duties at the company. It appears he was working in Engineering Department (fitter and tuner duties). That in the performance of his duties, he was also authorised in driving some Vehicles (such as LV 123).

In the performance of his duties, he came to face disciplinary charges of theft and dishonesty offences with his employer. The respondent was thus terminated for misconduct of theft of Gold Bearing

Material, on allegation that on the material date he was caught at Gokona double gate driving LC123 where upon search, the said LV was found with 4 bags of Gold bearing material (AB15). That the respondent was charged with four disciplinary offences (Exhibit AB4) and upon hearing he was found guilty thus terminated from his employment. Not dissatisfied with the said verdict of the disciplinary committee, the respondent verdict appealed to the General Manager (AB 8) where he was partly successful as his punishment was reduced to Final written Warning (Exhibit AB9). The respondent then resumed to work while serving his sentence of final written warning. That in the course of serving his sentence while also going on with the work, from nowhere and without any clear justification, the applicant summoned the respondent to what can be so called appeal to the same General Manager and re-opened hearing. This subsequent appeal hearing, then led to the confirmation of the previous findings of the disciplinary hearing committee and thus dismissed the respondent from his employment.

The respondent successfully challenged his termination from work before CMA following the findings of the subsequent appeal by the applicant and was thus ordered to be paid a 48 months' salary as

compensation for the unlawful termination on both substantive and procedural basis.

This award of the CMA has aggrieved the applicant thus the basis of this current revision.

According to the applicant, the CMA's award is contested on the following grounds:

- 1. The arbitrator erred in not signing after the testimony of DW4.*
- 2. The Arbitrator erred in ruling that the applicant had no fair reasons for terminating the respondent's employment or that the arbitrator erred in not holding that the respondent committed the disciplinary offences levelled against the respondent.*
- 3. The Arbitrator erred in ruling that the applicant did not follow fair procedures in termination the respondent's employment.*
- 4. The Arbitrator erred in awarding the respondent 48 months salaries which is exorbitant without justification.*

The hearing of this revision proceeding was conducted by way of written submission. Whereas for applicant was Castory Peja and for the respondent was Mr. Mhagama, both learned advocates.

In arguing the first ground of revision, Mr. Castory Peja was of the view that as the testimony of DW4 was not signed by the Arbitrator, this

vitiating the CMA's proceedings relying on the decision by the Court of Appeal in the case of **Iringa International School Vs. Elizabeth Post**, Civil Appeal No. 155 of 2019 as it invoked the provision of order XVIII, rule 5 of the CPC for the proceedings before CMA for the same to be authentic.

This submission has been rebutted by the respondent's counsel arguing that as it is the only testimony of DW4 which has skipped the mind of Arbitrator. So long as the testimonies of other witnesses (DW1, DW2, DW3 and DE4 are intact), the expunge of DW4's testimony does not affect the respondent's case as to the remaining witnesses, their evidence is intact and still maintains the finding of the CMA, that the respondent was unlawfully.

On the ground of termination, it has been argued that there were valid reasons for the respondent's termination as per applicant's submission but opposed by the respondent's submission. As the respondent was in charge of that vehicle LV 123 he was driving and that the same were established to have GBM (Gold Bearing Materials), the taking of them and heading out from the gate door, the offence charged with (theft and dishonesty charges) were fully established. Therefore, he was rightly convicted and punished. Since the respondent failed to

challenge the material witnesses on material incriminating evidence, then they are now precluded from arguing it at appeal as he failed to cross examine them at trial.

On the other hand, the respondent differed with this submission, arguing that there was no any proof of the said offences charged. All that was said, was a mere suspicion, arguing that the applicant's witnesses failed to establish that, the said LV23 was only being driven by the respondent.

On the fourth ground of appeal, it was submitted for the applicant the finding by CMA that there was no fair procedure leading to the termination of the respondent was a misplaced finding. He relied this finding as per rule 12 of GN 42 of 2007. As there were two conflicting decisions of the employer, the remedy was for the applicant to re-open appeal proceedings and issue proper punishment as per law.

On this, the respondent's counsel countered, arguing that since the applicant had already conducted disciplinary meeting and varied it in appeal process, there cannot be second appeal process after the former appeal had dealt with the matter conclusively. There was no room for the other parallel appeal process by the same unless it was correction of

a clerical or typographical error. The current error, he submitted as affecting the central issue of the dispute the applicant had no legal justification of issuing the second punishment.

Lastly, the applicant challenges the award of 48 months' compensation by the Arbitrator. He submitted that, though the law has not set the maximum award of compensation but minimum, he argued that the trial arbitrator ought to have judiciously awarded the 12 months' salary compensation. Rebutting this argument, Mr. Mhagama while relying on the wisdom of the Court of Appeal in the case of **Veneranda Maro and Winfrida Ngasoma vs Arusha International Conference Centre**, Civil Appeal No 322 of 202, CAT at Arusha, submitted that so long as the law has set the minimum award of 12 months' salary for unlawful termination the payment of 48 months for a person unlawfully terminated can at least accord justice against the whims of trouble employers.

I have carefully examined the evidence in record, proceedings and the rival submissions in respect of this revision application, I am of the considered view the determination of this revision is centred on whether the respondent's termination was lawful or not.

The law is, for the termination of employment to be considered fair, it should be based on valid reason and fair procedure. In other words, there must be substantive fairness and procedural fairness of termination of employment (**Section 37 (2) (a), (b), (i) (c) of the ELRA**). That a termination of an employment by an employer is unfair if the employer fails to prove: **i). That the reasons for termination is valid, ii. That the reason is fair and valid.**

I have no doubt that the intention of the legislature in enacting the Labour Laws was to require employers to terminate employees only basing on valid reasons and not their will or whims. This is also the position of the **International Labour Organization Convention (ILO) 158 of 1982, Article 4.**

A similar line of thought was well articulated by the Labour Court in **Tanzania Revenue Authority v Andrew Mapunda**, Revision No. 104 of 2014 Labour Division at DSM.

In the current case, both substantive and procedural justice were not well complied with in reaching the justice of the case. The charges preferred against the respondent at the disciplinary committee were not well established. As the charges involved theft offences, it was expected

that there ought to be proof beyond reasonable doubt as this is the legal standard in criminal cases. This being the national and international standard recognised by the national laws as well international standards, could not be lowered by the applicant. That the respondent was just driving the said vehicle while still within his employer's premises, the alleged theft was not complete. Otherwise, there ought to have been clear evidence on that.

Regarding there being two appeal proceedings by the same employer, that is unknown legal practice. So long as the applicant finally gave his verdict altering the disciplinary committee's punishment, that was final and conclusive. He became functus officio to re-open the appeal proceedings and enhance the sentence by strange proceedings. The latter proceedings prejudiced the respondent. Thus, the respondent was legally justified to challenge it before the CMA as rightly done.

Moreover, it is uncontested that the testimony of DW4 was not duly signed by the Arbitrator after recording the same. The legal consequence of non-signing after the said testimony is to render that particular evidence unauthentic as per law. Although the laws governing proceedings before the CMA happen to be silent on the requirement of the evidence being signed, it is still a considered view of this Court as

rightly directed by the Court of Appeal in the case of **North Mara Gold Mine Ltd Vs. Isaac Sultan**, Civil Appeal No. 458 of 2020 (all unreported), the Court of Appeal has insisted that a signature must be appended at the end of the testimony of every witness and that an omission to do so is fatal to the proceedings. Thus, for purposes of vouching the authenticity, correctness and providing safe guards of the proceedings, the evidence of each witness needs to be signed by the Arbitrator. On this, inspiration is drawn from the Civil Procedure Code [Cap 33 R.E. 2019] (the CPC) and the Criminal Procedure Act [Cap 20 R.E. 2019] (the CPA) wherein it is mandatorily provided that the evidence of each witness must be signed. **Order XVIII rule 5** of the CPC provides as follows:

"The evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence and under the personal direction and superintendence of the judge or magistrate, not ordinarily in the form of question and answer, but in that of a narrative and the judge or magistrate shall sign the same."[Emphasis supplied]

Further, the Court of Appeal in **Iringa International School Vs. Elizabeth Post** (supra) made reference under section 210(1) of the CPA which provides that:

"S.210 (1) In trials other than trials under section 213, by or before a Magistrate, the evidence of the witnesses shall be recorded in the following manner-(a) the evidence of each witness shall be taken down in writing in the language of the court by the magistrate or in his presence and hearing and under his personal direction and superintendence and shall be signed by him and shall form part of the record' [Emphasis supplied].

In a countless number of cases including **Yohana Mussa Makubi and Another vs Republic**, Criminal Appeal No. 556 of 2015, Sabasaba Enos @ Joseph vs Republic, Criminal Appeal No. 411 of 2017, **Chachas/o Ghati @ Magige vs Republic**, Criminal Appeal No. 406 of 2017 and **Mhajiri Uladi & Another vs Republic**, Criminal Appeal No. 234 of 2020, **North Mara Gold Mine Ltd Vs. Isaac Sultan**, Civil Appeal No. 458 of 2020 (all unreported), the Court of Appeal has insisted that a signature must be appended at the end of the testimony of every witness and that an omission to do so is fatal to the proceedings. In **Yohana Makubi and Another** (supra) the Court held, among other things, that:

"In the absence of the signature of the trial [Judge] at the end of the testimony of every witness; firstly, it is impossible to authenticate who took down such evidence, secondly, if the maker is unknown then, the authenticity of such evidence is put to questions as raised by the appellants' counsel, thirdly, if the authenticity is

questionable, the genuineness of such proceedings is not established and thus; fourthly, such evidence does not constitute part of the record of trial and the record before us"

That said, the evidence of DW4 which is not dully signed is the one to be discarded from the CMA's record. It cannot affect the whole proceedings as argued by Mr. Paul Kipeja, learned advocate for the applicant. However, in examining the CMA's record with the testimony of DW4 (Pages 40-45) is partly signed by the arbitrator on the examination in chief, but not signed on cross-examination and re-examination. Nevertheless, the law says, signing at the end of the testimony of every witness. Upon expunge of the testimony, as DW4 was just an arresting officer, there was other evidence in record (DW1, DW2, DW4, DW5) which yet was used to make a finding by the CMA that the appellant was not lawfully terminated.

On the quantum of compensation, awarded 48 months' salary, I am guided and inspired by the position of the Court of Appeal in the case of **Veneranda Maro and Winfrida Ngasoma vs Arusha International Conference Centre**, Civil Appeal No 322 of 202, CAT at Arusha which quoted the South African leaf that in labour disputes, compensation for procedural unfairness also includes punitive element

(See **Viljoen Vs. Nketoana Local Municipality** [2003] 24 ILJ 437).

With me, under rule 32(1) of the Mediation and Arbitration Rules, I am satisfied that the award by the CMA for compensation equivalent to 48 months salary is justified as per circumstances of this case.

That said and considered, the revision application is hereby dismissed. This being a labour matter, parties shall bear their own costs.

It is so ordered.

DATED at MUSOMA this 31st day of October, 2022.




F.H. Mahimbali

Judge

Court: Judgment delivered this 31st day of October, 2022 in the presence of the Castory Peja, advocate for the applicant, Mr. Mhagama, advocate for the respondent and Mr. Gidion Mugo, RMA.


F. H. Mahimbali

Judge