

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**LABOUR REVISION NO. 32 OF 2021**

*(C/F CMA/ARS/ARB/26/2020)*

**JACKOB GIBONS NYONYOMA.....APPLICANT**

**VERSUS**

**MOBISOL UK.LTD.....RESPONDENT**

**JUDGMENT**

**06/12/2021 & 28/03/2022**

**GWAE, J**

Seemingly, the applicant, Jakob Gibons Nyonyoma is dissatisfied with the award of the Commission for Mediation and Arbitration for Arusha at Arusha ("Commission") procured on the 30<sup>th</sup> day of March 2021. He has now brought this application under the provisions of Section 91(1) (a) and 91 (2) (a) (b) (c) and Section 94 (1), (b), (i) of the Employment and Labour Relations Act No. 6 of 2004 (Act), Rules 24(1), (2) (a) (b) (c) (d) (e) (f), (3) (a) (b) (c) (d), 11 and 28 (1) (c) (d) and (e) of the Labour Court Rules, GN No. 106 of 2007, praying for the following Orders:

1. That, the Court be pleased to call for and examine the records of the Commission for Mediation and Arbitration of Arusha at Arusha vide *CMA/ARS/ARB/26/2020*) for the purpose of *satisfying itself as to the correctness. Legality or propriety of the proceedings* and order made therein and revise the award and set aside the same
2. That, the court be pleased to determine the matter it considers appropriate
3. Any other reliefs that this Court may deem fit and just to grant.

Brief facts giving rise to the present labour dispute are as follows; the applicant and respondent were an employee and an employer respectively, that the parties' relationship commenced since 1<sup>st</sup> October 2018 and the same was to come to an end on the 30<sup>th</sup> day of September 2020 however their relationship was unilateral terminated on the 12<sup>th</sup> December 2019 2020 by the respondent on the ground of misconducts, namely; negligence and major breach of trust. It was alleged that the applicant paid one Emmanuel Mongela Tshs.1,000,000/= without following proper procedures. Following such accusation, the disciplinary hearing was conducted against him and he was found guilty. He was terminated and unsuccessfully appealed to the appellate Disciplinary Body. Aggrieved by the termination, he referred his

dispute to the Commission where he was finally awarded Tshs. 5,400,000/= being three months' remuneration.

Still feeling aggrieved by the arbitral award, the applicant filed this application supported by his sworn affidavit stating that there was no proof that he made such payment to the said Mongela taking into account that the record of the Disciplinary Hearing does not illustrate who exactly made the alleged payment. He was therefore not responsible for the alleged loss. According to him, the Commission was wrong in awarding three months' compensation whilst the minimum statutory compensation is twelve months' salary and by its failure to take cognizance that his contract of employment with the respondent was to expire on the 30<sup>th</sup> September 2020

On the other hand, the respondent filed notice of opposition by filing a counter affidavit sworn by his advocate one Mnyiwala Mapembe in which he stated that, the Commission properly evaluated the evidence before it and that the applicant was fairly terminated as he actually committed the disciplinary offences to wit, major breach of trust.

On the 6<sup>th</sup> December 2021 when this application was called on for hearing, Mr. Allen Godian and Mr. Mnyiwala Mapembe, both the learned

advocates practicing as Hakika Law Partners and D'souza and Co. Advocates, appeared representing the applicant and respondent respectively. The application was orally disposed of.

Arguing in support of the application, Mr. Allen stated that, the award of the Commission was improperly procured on the reason that, the applicant was to be awarded payment of compensation for the remaining period of his contract since the termination was found unfair in terms of procedural aspect. He added that the alleged payment of one million to the said Mongela was unproven taking into account that the one who made payment was not applicant but one Tumsifu Kirundwa, senior accountant to the applicant. He then made a reference to the case of **Joakim Mwinukwa v. Golden Tulip**, Revision No. 268 of 2013 (unreported) where the decision of the Court of Appeal of Tanzania in Tanzania **Saruji vs. Mago Co. Ltd** (2004) TLR 155 where it was held that the remedy available for unfair termination in the specific terms of contract of employment is payment of compensation for the remaining period.

Mr. Mapembe vigorously resisted by arguing that, the impugned award was properly founded since there was a valid reason for termination except that there was non-adherence to termination procedure on the part

of the respondent since the applicant admitted to have sent Tshs. 4,000,000/= to one David and Tshs.1,000,000/= to Mongela on the assertion that the Mpesa limited amount was Tshs.4,000,000/=. He then argued this court to make reference to the decision of the Court of Appeal of Tanzania in **Pangea Minerals Ltd vs. Gwandu**, Civil Appeal No. 504 of 2020 (unreported) and **Felician Rutwaza vs. World Vision Tanzania**, Civil Appeal NO. 213 OF 2019 AND Rule 32 (5) (b) of GN. 67 OF 2007.

Mr. Allen reiterated that the applicant was unfairly terminated since he was not involved in the alleged transaction taking into account that the David Mwita claimed Tshs. 5,000,000/=but no proof of payment of Tshs 1, 000, 000/= by the applicant. According to him (PE1). He alternatively added that the procedural error observed by the Commission was so fatal taking into consideration the basis of disciplinary offence that is investigation making the whole exercise of disciplinary hearing a nullity.

Having briefly given what transpired before the Commission and before this court on revision stage, the following are two issues for determination;

1. Whether the applicant's termination was fair

2. Whether the arbitrator was, in the circumstances of the case, justified to award less than the remaining period

**In the 1<sup>st</sup> issue,** it is always the duty of the Commission or of the court to ascertain if termination of employment by an employer was for a valid reason (s) and if fair procedure was followed before termination. The Commission in this case held that the applicant was guilty of breach of major trust since he failed to abide to the accounting principles. The Commission found that there was violation of procedure, the applicant was thus unfairly terminated on the procedural aspect especially investigation report was lacking as opposed to substantive unfairness.

I have carefully looked at the record of the Commission particularly the testimonies of respondent's witnesses (RW1, RW2 and RW3) and oral submission of the parties as well as the documents tendered and received during arbitration and observed that, the evidence of the respondent is not very clear if the applicant was the one who effected the said payment that is Tshs.1,000,000/= nor is it clear if the applicant signed PE1. For clarity I reproduce the evidence adduced by the respondent's witnesses particularly when cross examined;

PW1 (RW1), Evaline

Qn: According to exhibit P1 who are (sic) effected payment

Ans: Tumsifu Kirundo-senior account

Qn: Therefore, Jacob -the applicant did not affect the payment

Ans: Yes

Qn: Did the applicant sign any form

Ans: No

PW1 (RW2) Felix Haule

Qn: Who authorized the imprest

Ans: Someone Kilindwa

It is my considered view that, a valid reason for termination of an employment must be clear. In our case, the evidence of the respondent is very contradictory in different aspects for example;

- (i) If truly, there were rules of effecting payments yet such rules or policies must be known by an employee.
- (ii) If the alleged initiation of payment was done by the applicant, whether such initiation of payment by the applicant pertained with fraud
- (iii) It is not clear whether payment was ~~made~~ made by the applicant.

I have also considered the alleged payment of Tshs.1,000,000/=. Even by examining the evidence before the Disciplinary Hearing, the same is not capable of enabling the court or Commission to come into conclusion that there was clear and valid reason for termination. In **Miller vs. Monister of Pensions** (1937) ALL ER 372 at page 374 where it was stated;

“If evidence evenly balanced, that the tribunal is unable to come to a determination, conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the case against him reaches decree of cogency as is required to discharge the burden in a civil case”.

In my considered view, the respondent did not discharge his burden of proving that, there was a valid reason for the termination of the applicant’s employment. A valid reason has to be proven in the required standard (See decision of this court in **Patricia M. Rwagatare Vs. Dorcas Albert Minja** Lab. Div., DSM, Revision No. 272 of 2009, 06/06/2011). Due to unclear reason for the termination, the applicant is given the benefit of the doubt. It follows therefore, the award of the Commission in this aspect is hereby quashed and set aside.



Since the termination in question is found to have been unfair in terms of reason and since the learned arbitrator's decision on procedure is clear that the investigation was conducted on the 25<sup>th</sup> November 2019 while the charge sheet leveled against the applicant was drawn on the 20<sup>th</sup> November 2019 and since it is as it was rightly observed that, the applicant was not interrogated during the purported investigation, it follows therefore, the decision of the Commission in respect of fair procedure cannot be faulted.

**As to the 2<sup>nd</sup> issue**, whether the arbitrator was, in the circumstances of the case, justified to award less than the remaining period. It is general principle that whenever termination of employment founded in unspecified term contract is found unfair in terms of both substantive and procedural requirement, the Commission or Labour Court may order reinstatement or payment of compensation of not less than 12 months' salary compensation (See section 40 (1) of the Act). However, in case where the parties' contract of employment was for specific term, the remedy available if the termination is found to be unfair is no other than payment of compensation for the remaining period as rightly argued by the applicant's advocate, I thus find myself bound by the decisions in **Joakim Mwinukwa v. Golden Tulip**, Revision No. 268 of 2013 (unreported-CAT), **Saruji vs. Mago Co. Ltd**

(2004) TLR 155 and **Good Samaritan vs. Joseph Robert Savari Muntha**, Lab. Division 165/2011 (2013) LCCD 1 which held that probable and foreseeable consequence for the employee's action is loss of salary for the remaining period of their employment.

In our case, the Commission awarded only three months whereas the applicant's contract of employment with the respondent was the specific one and remaining period was thus nine months (9) and 18 days' compensation. Nevertheless, the Commission was, in my considered view, quite aware of the proper award in favour of the applicant if the termination was unfair substantively and procedurally. More so, according to the nature of the the impugned award, I think the arbitrator gave reasons of his departure from the general rule stressed in the cases cited above. However, the award by Hon. Arbitrator must be faulted as I have found that, the termination was substantively and procedurally unfair herein above and since labour laws abhor substantive unfairness more than procedural unfairness as was rightly emphasized in **Sodeta (SPRL) Ltd vs. Mezza and another**, Labour Revision No.207 of 2008 it was held

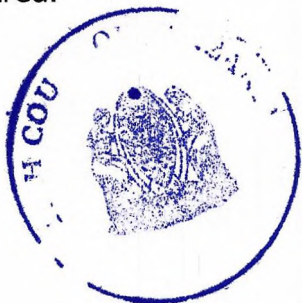
"A reading of other sections of the Act gives a distinct impression that the law abhors substantive unfairness more

than procedural unfairness, the remedy for the former attracts a heavier penalty than the latter

In our instant application for revision, it is clear from the award and the learned arbitrator's good reason as far as the award of three months' salary compensation in favour of the applicant and the finding of this court in respect of the first issue above, the award of three months' salary compensation cannot be left to stand. The applicant is now entitled to nine months' and 18 days' salary compensation  $(9 \times 1,800,000) + (1,800,000 / \times 18/30) = \mathbf{17,280,000/ =}$ .

Consequently, the applicant's application is granted, the CMA is revised and quashed aside to the extent that, the applicant's termination of his employment is found to be substantively and procedural unfair. The finding by the Commission that, the termination was unfair in terms of procedure is hereby confirmed. The applicant is therefore entitled to the payment of his salaries for the remaining term of the contract that is nine months and 18 days' salary  $(9 \times 1,800,000) + (1,800,000 / \times 18/30) = \mathbf{17,280,000/ =}$ . No order as to costs of this application is made.

It is so ordered.



  
**M. R. GWAE**  
**JUDGE**  
**28/03/2022**