

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT TANGA

REVISION NO. 5 OF 2021

(Arising from the Labour Dispute No. CMA/TANGA/123/2020/05)

MWANAASHA MWACHA APPLICANT

-VERSUS-

ELOHIM EDUCATION CENTRE LIMITED..... RESPONDENT

R U L I N G

Date of last order: 12/11/2021

Date of ruling: 23/02/2022

AGATHO, J.:

The Applicant filed this application by way of chamber summons supported by her affidavit. In the application the Applicant prays for:

1. That the Honourable Court may be pleased to call for and examine the records of proceedings and thereafter revise the Award of the Commission for Mediation and Arbitration (CMA) decision dated 9th April 2021 before arbitrator Hon. Mwalongo A., in Labour Dispute No. CMA/TAN/123/2020/05 against the applicant on the grounds inter alia set forth in the annexed statement of legal issues.

2. That consequently after revision the Honourable Court be pleased to issue an order setting aside and quashing the said Award.
3. Any other reliefs that this Honourable Court shall deem fit and just to grant in the circumstances of this application.

The application was brought under section 91(1)(a) and 91(2)(b) of the Employment and Labour Relations Act [Cap 366 R.E. 2019] and Rule 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d), Rule 28(1)(a)(c) and (e) of Labour Rules G.N. No 106 of 2007 by way of chamber summons supported by the affidavit of the Applicant. The Court ordered the hearing of application for revision be conducted by way of written submissions. The schedule was accordingly set, and the parties comply with it.

The Applicant claims that there was unfair termination, she was did not hold a meeting with the employer as promised in the letter dated 27/11/2020. Moreover, she alleged that since the CMA Arbitrator noted that there were irregularities in the termination procedures, the employer was at fault for breaching the law. He ought to have held that the termination was unfair. The Applicant is of the view that she is entitled to be paid the salary as per the contract of employment.

To begin with the issue as to whether the termination of the Applicant employment was unfair. Unfair termination may be a result of substantive or procedural flaws. With substantive unfair termination we look at the reasons for termination of employment. And as for procedural unfair termination we consider how the termination process was carried out. These two instances of unfair termination have been elaborated in the case of **Veneranda Maro and Another v Arusha International Conference Centre** (supra). Thus, regarding the procedural unfair termination we ask whether there is evidence showing that the meeting between the Applicant and the Respondent to discuss changes of the employment contract due to decrease in students' enrolment was conducted. The Respondent employer on 27/11/2020 in the meeting with employees promised to meet each employee for discussion on the contract changes. Could the letter dated 27/11/2020 be regarded as notice of termination? The employee was served with termination letter dated 02/12/2020 which was set to take effect from 31/12/2020. This raises three questions: One, what were the reasons for termination of employment? That is substantive unfairness. Two, if the reasons for termination of employment contract were justifiable and fair, were the procedures fair? That is procedural unfairness. And three, if the procedures were breached what are remedies available to the Applicant?

From the record of proceedings, and the award granted by the CMA they show that the Respondent employer realized that it was in financial crisis because the number of students enrolment kept decreasing. And since the Respondent relies entirely on tuition fees from students to pay the employees' salaries and tax to Tanzania Revenues Authority (TRA), it was concerned that it can no longer manage to pay salaries to its employees without cutting them down. This required some negotiations with the employees. The Respondent therefore called for the meeting with the employees on 27/11/2020 to inform them about decrease in students' enrolment and possible changes that will be implemented. The Respondent also promised to hold a meeting with every employee. Unfortunately, there is no evidence that the Respondent met the Applicant to discuss her employment contract. That is seen on page 7 of the CMA Award. The testimony of DW2 (Paulo Askwari Haali, the headteacher) on page 5 of the CMA Award also shows that the meeting of the Respondent and the Applicant might have not taken place.

There is not dispute that economic crisis or business hardships are fair and justifiable ground for termination of employment. Thus, there was no substantive unfairness. I concur with CMA Arbitrator that the Applicant was informed and actually was aware of the economic crisis facing the Respondent. This is apparent on pages 6 -7 of the CMA

Award. The Applicant attended the staff meeting on 07/11/2020 where one of the agenda items was discussion trends on students' enrolment. The Respondent employer also served the Applicant with a letter dated 27/11/2020 informing about decrease in students' enrolment. Therefore, the Applicant cannot claim that she was unaware of financial crisis the Respondent was facing. There was not substantive unfairness in the termination of the employment contract.

Despite the reasons for termination being fair, the law requires under section 38(1)(a)(b)(c)(i)(ii)(iii)(iv)(v) of the Employment and Labour Relations Act [Cap 366 R.E. 2019] that the procedures for termination to be fair too. While the employer claimed to follow the procedures stated in the above provisions of the Employment and Labour Relations Act [Cap 366 R.E. 2019] including conducting meetings with the employees and discussing with every employee individually, there is no evidence to support a claim (see CMA award on pages 4-5) that the Respondent employer met the Applicant and discussed about her employment contract as promised in the Respondent's letter dated 27/11/2020 to the Applicant. This was contravention of the law, Section 37(1)(c) of the Employment and Labour Relations Act [Cap 366 R.E. 2019].

I should also add in my perusal of the records of the proceedings at CMA, and even the CMA Award I have not seen the issue of notice of termination being clearly examined. The latter dated 27/11/2020 was inviting the employee to a meeting with the employer to discuss the issue of contract of employment in relation to decrease in students' enrolment. As per the evidence on record that meeting was not conducted. Instead, the Applicant was served with the termination letter dated 02/12/2020. Therefore, one month's notice of termination as required by clause 6 of the ELOHIM Education Centre Limited employment contract between the Applicant and the Respondent was not breached because the aforesaid letter of termination stated that the termination of employment to take effect from 31/12/2020. That was a sufficient notice of termination. The letter dated 2/12/2020 was the notice of termination.

Although I agree with the CMA arbitrator that the reasons for termination (that of decrease in students' enrolment and tax liability towards TRA) are just, fair, and reasonable reasons for termination of employment contract, the procedures of termination were unfair. According to section 37(1)(c) of the Employment and Labour Relations Act [Cap 366 R.E. 2019], the termination of employment whose reasons were fair may become unfair if the procedures were unfair. Along that

the CMA arbitrator concluded on page 7 of the CMA Award that the Respondent contravened the procedures as I have shown herein above.

Before delving into what went wrong with the CMA Arbitrator's decision, it is worthwhile to note that the Hon. Arbitrator rejected the Applicant's claim for students' performance allowance (*posho ya kufaulisha wanafunzi*) for lacking evidence to support the same. I agree with the Arbitrator's finding on this. Besides the contract of employment did not indicate that the Applicant will be paid such allowance. It is the law as per section 110 of the Evidence Act [Cap 6 R.E. 2019] that he who alleges must prove.

As will be shown herein below the Arbitrator erred not holding that the termination was unfair. After having held that the procedure for termination was unfair, he ought to have proceeded to hold that the termination was unfair as per Section 37(1)(c) of Employment and Labour Relations Act [Cap 366 R.E. 2019]. The error observed calls for this Courts intervention. It was held in **Veneranda Maro & Another v Arusha International Conference Centre, Civil Appeal No. 322 of 2020 Court Appeal Tanzania** (decision delivered on 18th February 2022) that:

"...there are circumstances upon which the Appellate Court can interfere with the exercise of discretion of an inferior Court or tribunal such as if the inferior Court or tribunal misdirected itself; or where it has failed to take into consideration matters which it should have taken into consideration, and in so doing, arrived at a wrong conclusion."

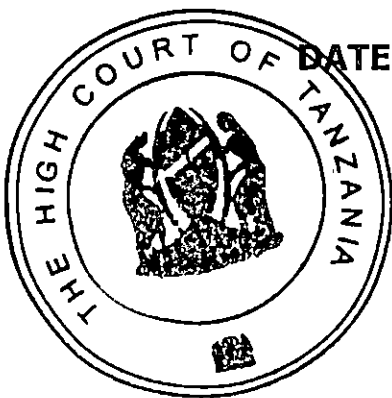
Since there was no meeting or discussion conducted between the Respondent and the Applicant, and because the employer (Respondent) failed to honour the promise of holding the meeting with the Applicant to discuss the employment contract that constituted unfairness of procedures. I find that the CMA Arbitrator failed to take into consideration the aforesaid issue, and hence he arrived at a wrong conclusion. Thus, the Respondent's failure to hold discussion meeting with the Applicant constitute procedural unfairness which makes the termination unfair. Hence there ought to be compensation. Overall, while the grounds for termination of employment were fair, there were unfair procedures of termination worth compensation to the Applicant as per Section 40(1)(c) of the Employment and Labour Relations Act [Cap 366 R.E. 2019]. For the foregoing reasons the CMA Arbitrator's award is varied as follows:

The two months' salary granted by CMA arbitrator is elevated to twelve (12) months' salary being compensation for unfair termination caused by unfair procedures of termination as per section 37(1)(c) of the Employment and Labour Relations Act [Cap 366 R.E. 2019] and section 40(1)(c) of the Employment and Labour Relations Act [Cap 366 R.E. 2019]. The employee cannot be granted two years' salary because had it not been for unfairness of procedures of termination, the Respondent employer was justifiable in terminating the employee due to financial crisis as per section 38 of the Employment and Labour Relations Act [Cap 366 R.E. 2019]. But since the termination procedures were unfair and denied the Applicant an opportunity to discuss with the Respondent employer on the changes to the contract of employment, the termination was unfair and triggered the application of Section 37(1)(c) of the Employment and Labour Relations Act [Cap 366 R.E. 2019] which deals with unfair termination resulting from unfairness of termination procedures. As to what remedies the Applicant is to be granted, the law is clear that there should be compensation. Thus, by virtue of Section 40(1)(c) of Employment and Labour Relations Act [Cap 366 R.E. 2019] twelve (12) months' salary is awarded because of unfair procedures of termination. The twelve months salary is the minimum period prescribed by the law as per **Veneranda Maro and Another** (supra), and Section


40(1)(c) of Employment and Labour Relations Act [Cap 366 R.E. 2019].
In the present case, the Applicant's salary per month was TSH. 500,000/= that amount is multiplies by 12 months. That is TSH. 6,000,000/=. In addition to that, the Applicant shall be paid TSH. 80,000/= that the Respondent owed to her in the previous salaries. That shall as well be paid as rightly held by the CMA Arbitrator.

Therefore, a total amount payable by the Respondent to the Applicant is TSH. 6,080,000/=.

It is so ordered.



DATED at TANGA this 23rd Day of February 2022.


U. J. AGATHO
JUDGE
23/02/2022

Date: 23/02/2022

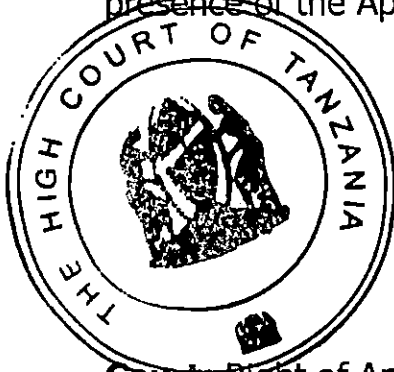
Coram: Hon. Agatho, J


Appellant: Present

Respondent: Absent

B/C: Zayumba


Court: Ruling delivered on this 23th day of February, 2022 in the presence of the Appellant, and in the absence of the Respondent.




U. J. AGATHO
JUDGE
23/02/2022

Court: Right of Appeal fully explained.




U. J. AGATHO
JUDGE
23/02/2022