**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(MWANZA SUB-REGISTRY)**

**AT MWANZA**

**LABOUR REVISION NO. 25 OF 2021**

*(Arising from CMA/MZ/MAG 348/2019A/2016, Labour Revision No. 86 of 2018 and Labour Revision No. 56 of 2002)*

**BOC TANZANIA LTD.....APPLICANT**

**VERSUS**

**THOMAS NAMFUA.....RESPONDENT**

**JUDGMENT**

**12th May,2022 & 23rd Feb. 2023**

**DYANSOBERA, J.:**

In this Labour Revision, the respondent Thomas Namfua was employed by the applicant, the BOC Tz Limited on 2nd May, 2016 as a driver and was stationed at Nyakato in Mwanza Region. On 27th July, 2019 he was retrenched. Dissatisfied, the applicant referred the matter to the Commission for Mediation and Arbitration claiming payment of one month's salary in lieu of notice, leave allowance, severance allowance, twelve months' compensation for unfair termination and transport allowance. He was claiming a grand total of Tshs. 31, 310, 854, 000/=. His reasons for making reference to the CMA were that he was not

informed about termination and there was no meeting convened for agreement.

Before the CMA, the applicant's preliminary objection that the labour dispute was time barred was sustained and the application was struck out on 21.10.2019. However, the respondent successfully applied for condonation. The application was granted and the delay condoned on 2.3.2020.

According to the respondent, on 10.6.2019 the applicant through teleconference, informed the employees, the respondent inclusive, that on 31.7.2019 the applicant's company would close its business. The employees, upon receiving that information, raised no objection but subject to the law being complied with. On the following day the respondent received some documents from the applicant being minutes of the meeting held on 10.6.2019 but the respondent refused to sign on account that the minutes had issues that were not canvassed during the teleconference meeting. Later, that is on 27.7.2019 the respondent received a letter of termination by way of redundancy.

The respondent complained that the applicant did not follow the procedure and there was no valid reason stated.

On her part, the applicant contended that the respondent was employed in 2016. He was retrenched due to poor business performance. It was argued on part of the applicant that all legal procedures were followed.

Responding to the issues, that is whether the employer/applicant had fair reason to terminate the respondent and whether the employer followed fair procedures, the applicant submitted that Section 38 (1) (a) and (d) of the Employment and Laboure Relations Act, demands, *inter alia*, that in any termination based on operational requirement, an employer is duty bound to give notice of intention to retrench as soon as it is contemplated. The applicant argued that all the laid down procedures were followed. Clarifying on how she managed to follow the procedure, the applicant stated that she notified their employees immediately after they noted that their business was not performing well, alerted the employees about the possibility of retrenchment, informed them again on 9.6.2019 and on 10.6.2019 held a meeting by the employee by a teleconference. He affirmed that the respondent participated fully. She stressed that efforts to rescue the business became impossible and after

complying with the law, the respondent was finally issued with a notice and a letter of termination.

The applicant further argued that the respondent admitted to have been informed about poor business performance and participated in the meeting though he refused to sign the minutes of the meeting. As to the respondent's claim that the procedures were not followed, it was submitted on part of the applicant that the respondent failed to specify and explain which procedures were not followed. The applicant questioned the credibility of the respondent in that he was not credible and was inconsistent on the holding of the meeting on retrenchment, was unclear about his salary and was uncertain whether he was retrenched or unfairly terminated.

Citing the case of **Hemed Saidi v. Mohamed Mbilu** [1984] TLR 113, the applicant submitted that according to law, both parties can't lie but the person whose evidence is heavier than that of the other is the one who must win and that in measuring the weight of evidence, it is not the number of witnesses that count but the quality of the evidence.

The applicant concluded his submission by stressing that the evidence provided by the applicant is heavier and weighty compared to the evidence given by the complainant/respondent.

Having considered the application and the submissions in support and in opposition, I am alive to the established principle in labour law that for termination of employment to be considered fair it should be based on valid reason and fair procedure. This is the import of Section 37 (2) of the Employment and Labour Relations Act No. 6 of 2004. This legal position was confirmed by this court in case of **Tanzania Railways Limited v. Mwinjuma Said Semkiwa**, Lab. Div. DSM, Rev. No. 239 of 2014. In the application under consideration, I am satisfied as was the Hon. Arbitrator that the respondent's termination was substantively fair. The reason is not far to find. It is in evidence that the closure of the applicant's business was due to *ugumu was biashara/hali mbaya ya uchumi*. In his evidence, Pius Wambura who testified as DW 1 and who tendered in the CMA a financial report and a report of fiscal year, he said at p. 10 of the Award that:

> *"Kampuni ilishindwa kujiendesha na hivyo Makao Makuu waliamua ifungwe na hivyo wafanyakazi kupunguzwa"*

This evidence was not controverted. Indeed, it was amply proved that the respondent was paid and did receive some payments after the applicant's business closed down. According to the Arbitrator, the termination was, however, procedurally unfair.

It is provided under Section 37 (2) (c) of the Employment and Labour Relations Act that termination of employment by an employer is unfair if the employer fails to prove that the employment was terminated in accordance with a fair procedure. Rule 13 of the Employment and Labour Relations (Code of Good Practice), GN No. 42 of 2007 provides a clear and detailed procedure for termination of employment.

Since it has not been seriously disputed that the respondent's termination was not in accordance with a fair procedure, the finding by the Hon. Arbitrator that:-

> *"Katika Ushahidi uliotolewa pande zote mbili utaratibu haukufuatwa na ndiyo hata sababu muhtasari wa kikao haukusaniwa na baadhi ya wafanyazi akiwemo mlalamikaji kwa sababu mwajiri alikiuka utaratibu halali wa kupunguza kazi kwa mujibu wa sheria".*

was justified and cannot, therefore, be doubted.

The question calling for determination is whether the Arbitrator was right to order payment of Tshs. 17, 147,340 being twelve months' salary

as compensation for unfair termination. While the applicant argues that the award was improperly given, the respondent maintains that the Hon. Arbitrator was justified in awarding that relief.

Section 44 (1) of the Employment and Labour Relations Act, No. 6 of 2004 provides that:

*"On termination of employment, an employer shall pay an employee the following entitlements, that is:-*

*(a)Any remuneration for work done before the termination.*

*(b) Any annual leave pay due to an employee under section 31 for leave that the employee has not taken;*

*(c) Any annual leave pay accrued during any incomplete leave cycle determined in accordance with section 31 (1);*

*(d) Any notice pay due under section 41 (5); and*

*(e) Any severance pay due under section 42;*

*(f) Any transport allowance that may be due under section 43*

*(g) On termination, the employer shall issue to an employee a prescribed certificate of service."*

There is enough evidence to prove that the respondent was paid and received the mandatory statutory terminal benefits but which he later claimed before the CMA. The relevant provision on the matter is Section 40 of the Act which provides that:-

*40.-(1) Where an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer –*

*(a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or*

*(b) to re-engage the employee on any terms that the arbitrator or Court may decide; or (c) to pay compensation to the employee of not less than twelve months remuneration.*

*(2) An order for compensation made under this section shall be in addition to, and not a substitute for, any other amount to which the employee may be entitled in terms of any law or agreement.*

*(3) Where an order of reinstatement or reengagement is made by an arbitrator or Court and the employer decides not to reinstate or re-engage the employee, the employer shall pay compensation of twelve months wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment.*

According to the law as indicated above, payment of 12 months' salary in addition to any salary due and other remuneration is awardable in the circumstances explained under Section 40 (3) (c)above. In the instant case, there is no evidence that the CMA ordered re-instatement or re-engagement of the respondent in employment and the applicant did not reinstate or re-engage him.

Indeed, rule 32 (1) of the Labour Institutions (Mediation and Arbitration), Rules, GN No. 67 of 2007 clarifies on the aspect. It states:-

*(1) Where an arbitrator finds a termination to be unfair, the Arbitrator may order an employer to reinstate or re-engage the employee, or to pay compensation to the employee.*

*(2) The Arbitrator shall not order reinstatement or re-engagement where-*

*(a).....(not relevant)*

*(b) .....(not relevant)*

*(c) .....(not relevant)*

*(b) .....(not relevant)*

*(c) .....(not relevant)*

*(d) the termination was unfair because the employer did not follow a fair practice.*

In the instant case, apart from the fact that there was no order of reinstatement or re-engagement, there was substantively fair termination but that the applicant did not follow a fair procedure. Clearly, the course taken by the CMA of awarding the respondent 12 months' compensation was in violation of the law, rule 32 (1) (c) of the Labour Institutions (Mediation and Arbitration), Rules.

this court. The cases cited by the appellant in support of his grounds of appeal are inapplicable to the facts of this case and, therefore, distinguishable.

Since this first ground of appeal alone is sufficient to dispose the whole appeal, I find no need to delve into the rest grounds of appeal as that would amount to an academic exercise, the course into which I cannot venture.

In the final analysis, the appeal fails and is struck out for being incompetent. No order as to costs is made as the respondent made no appearance during the hearing of this appeal and at the delivery of this judgment.

The Right of Appeal Explained.

**W.P. Dyansobera**
**Judge**
**22.2.2023**

This Judgment is delivered at Mwanza under my hand and the Seal of this court on this 22nd day of February, 2023 in the presence of the absence of all parties.

THE HIGH COURT OF TANZANIA
MWANZA

**W.P. Dyansobera**
**Judge**