

**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT MUSOMA**

**LABOUR REVISION NO. 16 OF 2023**

**REFERENCE NO. 20230824000522134**

**NORTH MARA GOLD MINE LIMITED ..... APPLICANT**

*VERSUS*

**JIDAYI DONALD ELIKIEZA ..... RESPONDENT**

**JUDGMENT**

*08<sup>th</sup> April & 28<sup>th</sup> May, 2024.*

**M. L. KOMBA, J.:**

The applicant herein is seeking for the following orders;

- 1. This honorable court be pleased to call for record and proceedings of the Commission for Mediation and Arbitration of Musoma (CMA) in Labour Dispute Number CMA/MAR/MUS/66/2022 and proceed to revise and set aside the CMA Award issued on 03/07/2023.*
- 2. Any other relief(s) this Honorable Court deems fit to grant.*

The application is preferred by way of chamber summons made under sections 91(1)(a) and (b), 91(2) (a, b, c) and S. 91(4) (a) (b), 94 (1) (b) (i), of the Employment and Labour Relations Cap 366, RE 2019, Rules

24(1), 24(2) (a) (b) (c ) (d) (e ) and (f), 24 (3) (a), (b), (c), and (d) and rule 28(1) (a), (b), (c), (d) and (e) of the Labour Court Rules of 2007 GN No. 106 of 2007 which has been supported by affidavit of Ivocatus Masanja.

When the matter was ready for hearing, the applicant had the legal service of Mr. Faustine Malongo and Mr. Castory Peja, while Mr. Ernest Mhagama represented the respondent, all are learned advocates.

Mr. Malongo was the one who started to address this court that respondent was charged for being dishonest to his employer contrary to the applicant's disciplinary code. The matter was taken to CMA where it was decided that applicant had no fair reason to terminate the respondent. That decision aggrieved the applicant hence the present revision with four issues as deponed at paragraph 20 of affidavit that;

- (i) Whether the applicant had fair reason to terminate the respondent's employment.*
- (ii) Whether it was proper for the arbitrator to award a compensation of Tsh. 36,345,119.16.*
- (iii) Whether it was legally proper for the arbitrator to award Tsh. 3,028,759.93 in lieu of notice of termination.*

*(iv) Whether it was legally proper for the arbitrator to award Tsh. 6,814,709.7 to respondent as severance pay.*

Arguing for the first one Mr. Malongo challenge the decision of arbitrator that applicant failed to prove the offence of dishonest or any other major breach of trust. He referred me at page 17 and 18 of the awards by the arbitrator when he was wondering why respondent throw the said piece of clothes. While explained what happened, counsel said the piece of clothes which was thrown had precious stones and the said stones were scattered the moment respondent throw the piece of clothes. It is from that scenario the applicant believes that respondent was not honest as there were no stones prior to the arrival of the vehicle (LV 140) which the respondent was a passenger. Further DW1 testified that the road had no stones before the respondent throw the said piece of clothes.

It was submission by Mr. Malongo that respondent did not cross examine DW1 and therefore arbitrator was supposed to draw adverse inference as was in **Hatari Masharubu @ Babu Ayubu vs Republic (Criminal Appeal No. 590 of 2017) [2021] TZCA 41 (26 February 2021)** and insisted the scenario creates doubts and to him, applicant managed to prove the offence against the respondent. He urges me to read **Nassoro**

**Yahya vs Toyota Tanzania Ltd**, Revision No. 192 of 2016 where it was decided that dishonest resulted to loss of trust by the employer to his employee. He prayed the first issue to be decided in favour of the applicant.

On the second issue Mr. Malongo complained of the compensation as the termination was fair. In alternative, he averred that respondent was not supposed to be awarded Tsh. 36.3 million as the base of the award was not legal, to him, arbitrator was supposed to calculate from basic salary and not gross salary. He cements his submission by decision in **Qatar Airways vs Mafuli Hamadi Mfinanga (Revision No. 200 of 2020) [2021] TZHCLD 230 (9 July 2021)** that all calculations have to be based on basic salary. He prayed the same to respondent herein.

In the 3<sup>rd</sup> issue Mr. Malongo disputed the Tsh. 3 million awarded to respondent being payment in lieu of notice as in law there is no provision requires such payment on unfair termination. He said, such payment is only applicable when the employer is forced to issue one month notice and employee will continue to work, if employer is forced to demand employee to quit immediately, as the case at hand, there is no circumstance the employer may issue one month notice and pray it be struck out. In

alternative, depending on the findings of this court, he prays it to be based on basic salary and not otherwise. In the last issue counsel had similar submission basing on section 42 (1) of Cap 366 he prayed it be calculated basing on basic salary.

Responding to the what has been adduced, Mr. Mhagama submitted that the termination was unfair and without valid reason as none of five witnesses of the applicant (DW1, DW2, DW3, DW4 and DW5) prove that it was respondent who put precious stone underneath the vehicle and they failed to explain when and how. He further submitted that the testimony of the DW2 was to the effect that the respondent gets out of the vehicle with nothing, empty handed and the vehicle was searched. According to witness the precious stones were found underneath of the vehicle and referred this court to testimony of DW4 and exhibit D6. He argued if the respondent dropped from the vehicle empty handed how did he put the stones under the vehicle.

Elaborating on the offence of dishonest, he said the offence has ingredients and among them is intention to deceit which was supposed to be proved by the appellant. He complained that appellant made a point that respondent wanted to steal precious stone but he failed to prove.

Relying on Exh D6 (CCTV footage) he said respondent was seen throwing a piece of clothes, not stones. How the piece of clothes come to his possession was answered by DW2 through his testimony to be part of the working tool. He insisted that Exh D6 is documentary evidence that show everything and that incase witnesses has any other testimony, that has to be regarded as afterthought as was in **Daniel Apael Urrio vs Exim T. Bank (Civil Appeal 185 of 2019) [2020] TZCA 163 (26 March 2020)**.

Mr. Mhagama further submitted that there was no chain of transaction that link the vehicle, LV 140 and the precious stone found underneath as there is nowhere stated that LV 140 visited the area where the stones are stored. To him, there is no fraud neither theft by the respondent that is why the termination was termed to be contrary to section 37(1) (2) of Cap 366 regardless of the procedures followed by the applicant.

Responding to payment issues, Mr. Mhagama bitterly submitted that unfair termination attracts huge compensation or severe penalty as it goes to the right to work as protected by the Constitution of the United Republic of Tanzania. He averred that the remedy for unfair termination is compensation of not less than 12 months as per section 40(1) (c) as

analysed in **Veneranda Maro & Another vs Arusha International Conference Center (Civil Appeal No. 322 of 2020) [2022] TZCA 37 (18 February 2022) at page 11**. He said Tsh. 36.3 million which is complained by the applicant is not huge as was supposed to be, due to the fact that, the termination was unfair. He said, the calculation was fair as it was based on salary slip. He distinguished the case of **Qatar Airways** (supra) as it is not binding and there is no legal justification of using basic salary.

About the payment of Tsh. 3 million which is one moth salary in lieu of notice as featured in the third issue it was his submission that as per section 44(1) (d) any person who terminate employment has to issue notice or give one month salary in lieu. To him, notice is terminal benefit as there was unfair termination. Counsel Mahagama had a short submission on the last issue that it was proper for the arbitrator to award severance pay as relationship between the employer and the employee must be terminated on fair compensation, he prayed the revision to be found of less merit and be dismissed with costs as it frivolous.

While rejoining, Mr. Malongo submitted that the scene was clear before arrival of the vehicle in which respondent was a passenger and the

standard of proof in labour cases was elaborated in the case of **Nassoro Yahya vs Toyota Tanzania Ltd** (supra) which Mr. Mhagama did not contest. He insisted that all testimony has to be considered as it is only DW4 who testify about Exh D6 and pray the application to be found meritorious or else the calculations have to base on basic salary.

After summarizing the noble submission by learned minds, I have now to determine the application as filed. Starting with the first issue on whether applicant had fair reason to terminate the respondent. I got time to read testimony of all witnesses, DW 1 testified that there was no stone prior to the arrival of the vehicle, and later on respondent took piece of clothes and spread stones. This action made the applicant to believe the respondent was not honest. DW2 testified that respondent and the driver get out from the vehicle with nothing. But the vehicle had a piece of clothes which it had stones with it. Counsel Mhagama submitted that none of the applicant's witness explained how the stones were under the vehicle, I too find there is no enough evidence to show how the stones get in the piece of clothes before they were thrown. Respondent's witnesses testified that respondent had nothing while in the vehicle and even by the time he gets out from the vehicle.

There is no doubt that there were precious stones under the vehicle but what was not explained is how and who put them. I know the standard of proof in cases of this nature is to the balance of probability as was said in case of **Nassoro Yahya vs Toyota Tanzania Ltd** (supra). However, applicant failed to balance the probabilities on how the stones rich the clothes as they were found under the vehicle. The case of **Nassoro Yahya vs Toyota Tanzania Ltd** (supra) as cited by Mr. Malongo and urge me to rely on finding the reason for termination is distinguishable on the fact that, in that case the applicant used his password to access account which later was proved there was insufficient money. Applicants PIN was used to access account and the PIN was kept by the applicant alone who did not deny to access the said account. In the case at hand, it was not proved who put the said precious stones **Gold Bearing Material-GBM** in the clothes underneath the vehicle while noting that the vehicle is not owned by the respondent and is used by different staff as testified by DW4. I find the applicant herein had no reason to terminate the applicant as provided under section 37 (1) and (2) of Cap 366 and therefore the termination was unfair just as awarded by arbitrator.

On the second issue which was amount of compensation, Mr. Malongo disputed the computation, to him the proper was calculation basing on basic salary. Counsel Mhagama just insisted the compensation should be punitive due to unfair termination and disagree on the calculation basing on basic salary as decided in **Qatar Airways vs Mafuli Hamadi Mfinanga** (supra) that it has no legal base.

The second issue should not detain me much, I had time to read the law regulating employment in our legal regime. Section 40(1) (c) provides as follows;

*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. [Emphasis supplied].***

The term remuneration has been defined under section 4 of the same Act to mean;

*"remuneration" means the total value of **all payments**, in money or in kind, made or owing to an employee arising from the employment of that employee; [Emphasis supplied].*

From the provision of law, calculation is supposed to be based from what was paid to employee on monthly base, that includes allowances as the word used is all payments in money or kind.

On the third issue which is one month salary payment in lieu of notice, Mr. Malongo said in the circumstance of the case there was no possibility of issuing notice to mean this case was not one to attract notice. I find to the contrary that employer was supposed to issue notice to respondent or else section 41 (1) (b) came into play as I hereby confirm the arbitrator finding on the need to pay one month salary in lieu of notice. Further to that, the law provides as follows concerning the base of calculation;

*(5) Instead of giving an employee notice of termination, an employer may pay the employee the **remuneration that the employee would have received** if the employee had worked during the notice period. [Emphasis supplied].*

From the provision of law, the amount to be used is one which employee was receiving at the end of each month basing on the definition of the word remuneration.

On the last issue, so far as the termination was not fair as applicant had no good reason to do so, respondent is entitled, under section 42(1) and (2) just as awarded by the arbitrator serve for the calculation. Let's see what the law provides;

*42.-(1) For the purposes of this section, "severance pay" means an amount at least **equal to 7 days' basic wage** for each completed year of continuous service with that employer up to a maximum of ten years. [Emphasis supplied].*

*(2) An employer shall pay severance pay on termination of employment if –*

*(a) the employee has completed 12 months continuous service with an employer; and*

*(b) subject to the provisions of subsection (3), the employer terminates the employment.*

The base of calculation in severance pay is basic wage. That mean, it should base on basic salary of the employee.


In the upshot, the application is dismissed serve for the calculation on severance pay as analysed. This being the labour matter, each party to bear his own costs.

**DATED** at **MUSOMA** this 28<sup>th</sup> of May 2024



  
**M. L. KOMBA**  
**Judge**

Ruling delivered in chamber in the presence of Mr. Iman Mfuru Advocate for the applicant and on the other hand Mr. Mfuru hold brief of counsel Ernest Mhagama for respondent.

  
**M. L. KOMBA**  
**Judge**  
**28 May, 2024**