

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA**

LABOUR REVISION NO. 36 OF 2023

(Arising from Labour Dispute No. CMA/MZ/NYAM/105/2022/35/2022)

KALWANDE CHURCH SERVICE & TRAINING CENTRE APPLICANT

VERSUS

BERNADETHA AMAN RESPONDENT

JUDGMENT

18/4/2024 & 31/5/2024

ROBERT, J:-

The applicant, Kalwande Church Service and Training Center, filed this application challenging, by way of revision, the award of the Commission for Mediation and Arbitration (CMA) for Mwanza in Labour Dispute No. CMA/MZ/NYAM/105/2022/35/2022 which found the termination of the respondent's employment to be both substantively and procedurally unfair, and awarded compensation equivalent to 36 months' salaries at the rate of TZS 220,000/= per month. The applicant moves the court to set aside the award and grant appropriate reliefs under the circumstances. The application is supported by an affidavit sworn by Akriatus Thobias Kumbago, Principal

Officer of the Applicant. The respondent opposes the application, having filed a counter-affidavit to that effect.

Briefly, the respondent, Bernadetha Aman, was employed by the Applicant as a personal secretary under an indefinite contract starting from February, 2013. Her employment was terminated on 18th March, 2022 on grounds of absenteeism. The applicant contended that the respondent had been absent from work without prior notice for more than five days between 3rd March, 2022 and 18th March, 2022. Dissatisfied, the respondent challenged her termination at the CMA arguing that it was substantively and procedurally unfair.

At the CMA, the applicant asserted that the respondent's absenteeism constituted serious misconduct justifying termination. Conversely, the respondent argued that her absences were due to illness, supported by a sick sheet (exhibit P4) from Nyamagana Hospital. The CMA found that the applicant failed to substantiate the claim of absenteeism adequately and the termination procedures were not properly followed. Consequently, the CMA ruled that the Respondent's termination was substantively and procedurally unfair. Aggrieved, the applicant preferred this application challenging the CMA award.

The applicant raised three primary legal issues challenging the CMA's decision: Whether the arbitrator failed to evaluate and analyze the evidence correctly, leading to unjust decisions; Whether the arbitrator failed to apply the law correctly; and Whether the award dated 27th September 2022 was illegally and improperly procured.

Submitting in support of the application, Mr. Innocent Bernard, counsel for the applicant argued that the applicant challenges the CMA particularly in respect of the evaluation and analysis of evidence presented. He maintained that the respondent's absenteeism without notification constituted valid grounds for termination and argued that the CMA erred in its analysis and application of the law.

He highlighted that although arbitrator indicated that he did not see the alleged absenteeism, the extract of attendance register book (exhibit D1) indicates that the Respondent was absent at her work place for more than five days within the period from 3/3/2022 and 18/3/2022. Further to that, at page 32 to 33 of the CMA proceedings, the Respondent admitted that she was not at work on the said dates while being cross – examined. She also failed to indicate in her response letter to the applicant (exhibit P5) any medical reasons as a factor for her absence during the alleged period. He

argued that the sick sheet tendered by the respondent was an afterthought because it came to the knowledge of the employer after termination was done.

He made reference to Section 37(2)(b)(i) of the Employment and Labour Relations Act, which defines absence from work without permission for more than five working days as serious misconduct justifying termination. He also cited the case of **Bulyanhulu Gold Mine Limited vs George Allen Gwabo**, Labour Revision No. 48 of 2015, which affirmed that non-consecutive absences can still constitute gross misconduct.

Further to that, he challenged the arbitrator's determination of the salary at TZS 220,000, asserting that no evidence supported this figure and further that there was no issue raised in respect of the employee's salary. He argued that according to exhibit P1 (Respondent's letter of appointment), the Respondent's salary was TZS 150,000/=. However, the Arbitrator at page 14 of the Award, calculated the Respondent's compensation on the basis of the salary of TZS 220,000/= without any supporting evidence.

On the amount of compensation awarded, he referred the Court to the case of **Edward Valentine vs Foundation for African Medicine**, Labour

Revision No. 46 of 2021 at page 26 to support his argument that substantive unfairness attracts heavier penalty than procedural unfairness. Hence, he argued that since there were valid reasons for termination in the present case, the Court in awarding compensation needs to consider procedural unfairness only, which attracts a lighter penalty, because there were valid reasons for termination of the Respondent.

In response, Counsel for the respondent, Mr. Inhard Mushongi, argued that the respondent's absenteeism was justified due to her illness. He emphasized that on 3rd March 2022, the respondent fell sick while at work and requested permission to go to the hospital, as evidenced by the sick sheet (exhibit P4) from Nyamagana Hospital. This sick sheet, which covered the period from 3rd March 2022 to 22nd March 2022, was presented to the employer promptly through the Academic Master.

He referred to Section 37(2)(b)(i) of the Employment and Labour Relations Act, and argued that where the reason for termination is alleged to be misconduct, as it is in this case, the employer needs to prove that the reason for termination is valid and fair, and noted that the CMA found the employer to have failed to meet this burden. He argued that, the case of **Bulyanhulu Gold Mine Limited vs George Allen Gwabo (supra)** is

distinguishable from the present case, as it involved consecutive absenteeism without any justification, unlike the present case where illness was substantiated.

Mr. Mushongi pointed out that during the cross-examination at the CMA, the applicant did not effectively challenge the respondent's testimony regarding her illness and permission to seek medical treatment. He highlighted that Rule 12(1)(a) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 G.N. No. 42/2007 requires that any misconduct justifying termination must be proven with clear and unambiguous evidence. The respondent's evidence of illness and the lack of effective cross-examination by the applicant rendered the absenteeism claim unsubstantiated.

Regarding the determination of the monthly salary, Mr. Mushongi argued that the respondent's claim of a salary increment to TZS 220,000/= was supported by her testimony, indicating that her salary had been increased progressively since her initial appointment. He cited Rule 32(5) of the Labour Institution Mediation and Arbitration Guidelines, GN 67/2007, which provides factors for determining compensation, and noted that the

respondent's salary increment was not contested by the applicant during the proceedings.

Addressing the compensation award, Mr. Mushongi argued that Section 40(1)(c) of the Employment and Labour Relations Act mandates that compensation for unfair termination should not be less than 12 months' remuneration. He referenced the case of **Bati Service Company Limited vs Shargia Feizi**, Civil Appeal No. 38 of 2021, which discusses the factors influencing the extent of compensation beyond the statutory minimum, and asserted that the CMA had appropriately exercised its discretion in awarding 36 months' salary, considering the circumstances of the unfair termination.

He further emphasized that the respondent's long service, the psychological impact of the unfair termination, and the employer's procedural lapses justified the higher compensation. He implored the Court to uphold the CMA's award, arguing that the compensation was fair and reasonable under the circumstances.

From the submissions of parties and evidence on record, this Court must now determine if the arbitrator's findings on the validity of the termination and the awarded compensation were justifiable.

On validity of reasons for termination, this Court concurs with the CMA's finding that the applicant did not substantiate the claim of absenteeism. The law necessitates clear proof of unnotified absence for more than five days to justify termination. The evidence presented, including the attendance register (exhibit D1) and the sick sheet (exhibit P4), supports the respondent's absence at work and claim of illness. The applicant failed to provide sufficient evidence to contradict the respondent's documented illness. Hence, this Court finds and holds that the arbitrator did not fail to evaluate and analyze the evidence correctly as there were no valid grounds for termination.

On excessiveness of compensation, the Court finds that the award of 36 months' salary is excessive. Section 40(1)(c) of the Employment and Labour Relations Act specifies that compensation for unfair termination should not be less than 12 months' salary. The arbitrator did not provide compelling justification for awarding 36 months' salary, and the Court refers to case law, including **Edward Valentine vs Foundation for African Medicine**, Labour Revision No. 46 of 2021, which emphasizes that compensation should be proportionate to the unfairness of the termination.

The Court finds no basis for awarding more than the statutory minimum without a detailed rationale.

With regards to the determination of the respondent's monthly salary, this Court finds that, the determination of the respondent's monthly salary at TZS 220,000/= by the CMA lacked substantial evidence. The employment letter (exhibit P1) indicated a salary of TZS 150,000/=. The burden of proof rested with the respondent to substantiate any claims of salary increments, which was not done adequately. The CMA's reliance on an unsubstantiated salary figure was erroneous.

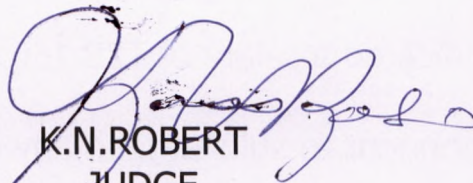
As a consequence, the Court finds merit in the applicant's application regarding the excessiveness of the compensation and the lack of substantial evidence for determining the respondent's salary. Therefore, the award of compensation is reduced to 12 months' salary based on the respondent's verified monthly salary of TZS 150,000/=.

That said, The CMA's finding on the unfair termination of the respondent is upheld. The applicant's application is partially allowed only to the extent of revising the compensation awarded to twelve months' salary

at the monthly salary of TZS 150,000/=. Each party shall bear its own costs of this application.

It is so ordered.




K.N.ROBERT
JUDGE
31/5/2024