IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION N0. 520 OF 2019

BETWEEN

GERVAS JEREMIAH..... APPLICANT

AND

SBC TANZANIA LIMITED ..... RESPONDENT

JUDGMENT

Date of Last Order: 16/04/2021

Date of Judgment: 07/05/2021

A. E. MWIPOPO. J

This is revision application against the award of the Commission for Mediation and Arbitration (CMA) which was delivered on 10th May, 2019 by Hon. Massawe Y., Arbitrator. **GERVAS JEREMIAH**, the Applicant herein, filed Revision applications before this court against the decision of the CMA in labour dispute no. CMA/ILA/BLU/420/02.

The applicant herein, is praying for the orders of the Court in the following terms; -

i. That this Honourable Court be pleased to call for the records and revise the arbitral award of the Commission for Mediation and Arbitration (CMA) of Dar es salaam Zone in Labour Dispute No. CMA/ILA/BLU/420/02 delivered by arbitrator called Massawe Y., dated on 10th May, 2019.

ii. That this honorable Court be pleased to determine the dispute in the manner it considers appropriate.

iii. That this honorable Court be pleased to give any other order it deem fit and just to grant.

The application emanates from the following background; the Applicant who was employed by the Respondent namely SBC Tanzania Ltd as a Full Clerk was aggrieved by the decision of his employer to terminate his employment on 3rd December, 2002 for misconduct. The Applicant referred the matter to the CMA which decided the matter in his favor. The Applicant was not satisfied with the remedies awarded by the Commission and he filed the present application for revision.

At the hearing of the application, the Applicant appeared in person while Respondent was represented by Mr. Patrick David, learned Counsel. Hearing of the application proceeded by way of written submission following the Court order.

The Applicant submitted that being dissatisfied by the Commission Award he decided to apply for the Revision of the said award that the compensation was supposed to be Sixteen Years and five Months times Monthly Salary of 150,000/= and not salary of shillings 92,095/= which was awarded by the commission. The Commission did not considered the evidence of both parties regarding the Applicant's salary as a result the arbitrator erred in awarding half payment of his compensation instead of

full payment basing on monthly salary which was Tshs 150,000/=. It is a settled principle of law that once an employee was unfairly terminated from his employment, then he or she must be paid his salary from the date of termination to the date when CMA found that termination was unfair. To support his submission the Applicant cited the case of **Peter Msungu & 13 Others vs. The DED Sengerema, Revision No. 47 of 2013, High Court Labour Division, at Dar Es Salaam, (Unreported).** The Applicant is of the view that the application has merits and he prayed for this application for revision to be allowed.

Replying to the applicant submission, the Respondent's Counsel submitted that the Respondent herein proved before the Commission during the hearing that the Applicant monthly salary was shillings 92,805/= per month according to his letter of appointment dated 2nd May, 2001. This fact which was neither rebutted nor disputed or proven otherwise by the applicant herein. The Applicant has never supplied any single evidence to support his allegation that his salary was TZS 150,000/= per month. The alleged Applicant's salary was not an issue during arbitration hearing. The Respondent herein did not challenge the Commission award despite the fact that it was not in his favor. The Arbitrator acted arbitrarily against the Respondent by awarding payment of 98 months salaries equivalent to eight (8) years salaries to the Applicant while he served as an employee to the Respondent for only one

(1) year and eight months. The arbitrator acted extraneously, unfairly and she did not exercise her discretionary judiciously considering the length of service of the Applicant.

He further submitted that, under section 40(1) (a), (b), (c) and (2) of the Employment and Labour Relations, Act No. 6 of 2004, the law provides for remedies for unfair termination which includes reinstatement or re engagement or payment of compensation. At page 14, paragraph 1 of the arbitration award the arbitrator ordered both compensation and re-engagement at once contrary to the provisions of section 40(1) of the Act. This is a double jeopardy which renders all orders issued by the arbitrator to be unjustifiable. Thus, the arbitrator erred in law by ordering both payment of compensation of 98 months for unfair termination in addition to re-engagement.

The Counsel submitted further that section 70 of the Interpretation of Laws Act, CAP 1, R.E. 2019, prohibit double punishment to the person on the same offence which was already punished. He of the view that the arbitrator overlooked the provision by ordering two remedies against the respondent herein contrary to the requirements of the law. This made the entire award to be defective. The Counsel prayed for the application to be dismissed for want of merits.

In rejoinder the applicant retaliated his submission in chief.

From the parties' submissions it is obvious that the Applicant challenged the arbitral award which find that his termination was unfair and he was awarded 8 years' salary compensation for unfair termination. The Applicant's prayer is to be awarded with 16 years' salary compensation and calculation to be based on shillings 150,000/= as his monthly salary. The Respondent did not file any revision against the Commission award hence he is not in position to challenge the decision of the Commission on the fairness of the termination. The Respondent is of the view that the Commission award was according to the evidence available in record. Thus, the only issues for determination which is in dispute between the parties herein is whether the remedies awarded by the Commission to the Applicant was fair.

Before addressing the issue in disputed, this Court finds it is relevant to direct itself to Section 13(1) of the Employment and Labour Relations Act, Cap. 366, R.E. 2019, as amended by the Written Laws (Miscellaneous Amendments) Act, Act No.2 of 2010. The section provides for determination of disputes originating from repealed laws. The section reads as follows, I quote:-

> *"13. - (1) All disputes originating from the repealed laws shall be determined by the substantive laws applicable immediately before the commencement of this Act."*

From the above legal position, the dispute which originates when the repealed laws was in force shall be determined by the substantive

law applicable before commencement of the Employment and Labour Relations Act. The evidence available in record shows that the Applicant was terminated from employment for misconduct on 13th December, 2002. At that time the law applicable in disputes about termination of employment was the Security of Employment Act which was repealed and replaced by the Employment and Labour Relations Act in 2004. This means that the matter at hand has to be determined by the substantive laws applicable immediately before the enactment of new law which is the Security of Employment Act. The parties' submissions on the remedies for unfair termination has based on the application of Section 40(1) of the Employment and Labour Relation Act. These submission on applicability of section 40 (1) of the Employment and Labour Relations Act to the present matter lacks legal stance.

In addressing the issue as to whether the remedies awarded by the Commission to the Applicant was fair, the Applicant submitted that the remedies awarded by the Commission was not fair since he was compensated for the 8 years' salary while he was out of work for 16 years before the Commission award. He also submitted that his salary before termination was shillings 150,000/= but the Commission calculated his payment on monthly salary of 92,805/=. In opposition, the Respondent submitted that the evidence available in record shows that Applicant salary was 92,805/= and that he is double jeopardize since the

Commission awarded two remedies of compensation and re-engagement to the Applicant at the same time instead of one remedy only.

As I have already stated earlier here in, section 40(1) of the Employment and Labour Relations Act is not applicable in the present matter. The applicable law is the Security of Employment Act especially section 24(1) (b). The section reads as follows hereunder:-

"24(1) Subject to the provision of this part, where reference is made to a board under head (b), the Board –

(a) .....;

(b) May, in the case of employee who has been dismissed or suspended pending the decision of the Board, order his, re-engagement or reinstatement, as the case may be, or direct that the dismissal or proposed dismissal, shall take effects (unless the employer re engages or reinstate the employee) as a termination of employment otherwise than by dismissal, and may, authorize the imposition of a lesser disciplinary penalty;"

From above provision, substantively the Arbitrator has power to order re-engagement of the employee after it was found that the termination was not fair. The law provides further in section 33 that Board may order the employer to pay the employee additional payment in certain circumstances.

The Arbitrator awarded the Applicant to be compensated for 8 years salaries. The reason for awarding the respective compensation is that the dispute was pending before several machinery vested with

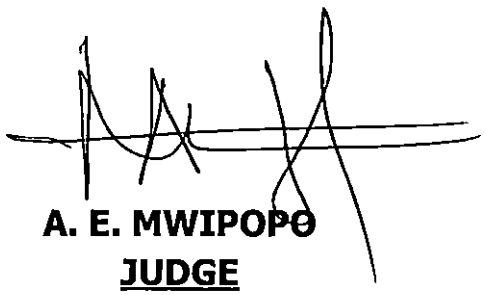
solving labour disputes including the Commission for 16 years and five months. Also, since there will be changes in the technology during the time the Applicant was out of the employment, Respondent have to re - engage the Applicant in any position that he will fit.

I have read the CMA typed proceedings and it shows that both parties were to be blamed for the delay in disposing of the matter timely. For that reason, I'm of the opinion that the decision to award the Applicant with the payment of the half of the time he was before the Commission pursuing his rights is justified. Also, the reason for the order for re- engagement which was ordered by the Commission is justified on the basis of the changes which took place during the time the Applicant was out of work. This is not double jeopardy since the Arbitrator considered the time which the dispute did take before the award was delivered.

Now turning to the issue of what was the Applicant's salary, this was not among the issue in dispute before the Commission. As a result the parties did not adduce evidence on the issue. The only available evidence in Court record which shows the Applicant's salary is the letter of appointment of the Applicant (employment letter) dated 2nd May, 2001 with Ref. No. SBC/ZEK/05/01 which is in the list of document to be relied by the Respondent. But the letter was not tendered as exhibit. The letter shows that the Applicant salary is shillings 92,805/=. For the purpose of

calculation of the Applicant's compensation this is the only evidence showing the Applicant's salary. For that reason, I'm of the same position as the Arbitrator that the Applicant's monthly salary was shillings 92,805/=.

Therefore, I find the application is devoid of merits and I hereby dismiss it. The commission award is upheld. Each party to bear its own cost of the suit.



A. E. MWIPOPO
JUDGE
07/05/2021