

**IN THE HIGH COURT OF TANZANIA  
LABOUR DIVISION  
AT DAR ES SALAAM**

**REVISION NO. 679 OF 2019**

**BETWEEN  
BROOKSIDE DIARY TANZANIA LIMITED..... APPLICANT**

**VERSUS**

**CRISPINA JOSEPH MMASI ..... RESPONDENT**

**JUDGMENT**

*Date of Last Order: 17/05/2021*

*Date of Judgment:03/06/2021*

**Z.G.Muruke, J.**

Brookside Diary TZ Ltd applicant, employed the respondent as a Merchandiser officer on 13<sup>th</sup> October,2014, they maintained their employment relationship until 11<sup>th</sup> July,2017, when respondent was retrenched on ground of operational requirement. The respondent was dissatisfied with the termination, she thus referred the dispute to the Commission of Mediation and Arbitration (CMA) where decision was partly on her favour, where she was awarded 12 months' salary to the tune of 4,620,000/= as compensation for being unfairly terminated on procedurally aspect. The applicant felt resentful with the award hence filed the present application on ground stated under paragraph 20(a-e) of the affidavit of Patrick Wambua in support of the application. The same was challenged by the counter affidavit sworn by the respondent her self. The matter was disposed by way of written submissions. Both



parties were represented, Advocate Zuriél Kirunde Kazungu was for the applicant and Stanley Nyamle represented respondent.

Submitting for the applicant Mr. Kazungu prayed to adopt the affidavit in support of the application to form part of their submission. As regard to the ground that the arbitrator erred in law and fact into holding that, the respondent was unfairly terminated after finding there was fair reason for termination, Learned Counsel submitted that:- the arbitrator after evaluation of the evidence found that the applicant had valid reason for termination. However, ended up concluding that the termination was unfair and awarded the respondent 12 months' salary as compensation. Further, it was submitted that, justice demands punishment for non-compliance of procedure, should not be equal to the one given when there was both substantive and procedural unfairness, cited the cases of **G4S Security Services (T) Ltd v. Peter Mwakipesile** Rev. 109/2011 and **Secretary General ELCT North Western Diocese v. Edward Magurubi** (2013) LCCD 149.

Mr. Kazungu further submitted that the circumstances which led to termination, are special qualifying to be an exception to the requirement of compliance to Section 38 of Employment and Labour Relation Act, Cap 366 RE 2019(Cap 366 RE 2019). The respondent's post was automatically rendered redundant as its existence depended on importation of milk and subsequent closure of the entire business by TRA. Therefore, termination was both substantively and procedurally fair.



As regard to the ground for failure by arbitrator to properly asses the evidence on record, henceforth reached on a wrong final decision, it was submitted that arbitrator failed to properly analyse the evidence tendered by the applicant the respondent's retrenchment was special to be considered as an exception to the compliance of Section 38 of Cap 366 RE 2019. As a result, proceeded to hold that the retrenchment procedures were not adhered. Applicant's counsel thus prayed for CMA's award be quashed and set aside.

In response, the respondent's counsel contended that the arbitrator's decision was very clear that termination was substantively fair and procedurally unfair. Therefore, the arbitrator's award was within his discretion and was in accordance with Section 40(1) of Cap 366 RE 2019. In his submission the applicant's counsel referred the case which held that the arbitrator has discretion to grant 12 months' salary as per Section 40(1) (c) of Cap 366 RE 2019, that being the standard relief for unfair termination. Further as regard to paragraph 2.8 and 2.9 of the applicant's submission, Mr. Stanley Nyamle submitted that all the procedures for retrenchment employment as provided for under the law were not adhered accordingly as found by the arbitrator. He thus prayed for dismissal of the application for lack of merit.

Having gone through the rival submission, and the records, the issue for determination is **whether the award of twelve months' salary as compensation was proper?** It is position of the law, when termination is substantively fair and procedurally unfair, the remedy cannot be similar to the one provided under Section 40 (1) (c) of CAP

*Stee*

366 RE 2019 (supra). In the Consolidated Revision No. 370 and 430 of 2013 between **Saganga Mussa Vs. Institute of Social Work**, High Court of Tanzania, Labour Division, at Dar es salaam(unreported) as cited in the case of **Puma Energy Tanzania Ltd v. Azayobob Lusingu & 2 others**, Rev. No. 697 OF 2019 the Court held that; -

*'Where there is a valid reason for termination but the procedures have not been complied with, then the remedy cannot be similar as in cases where both the termination was unfairly done substantively and procedurally.'*

Likely, in the case of **Felician Rutwaza v. World Vision Tanzania**, Civil Appeal No. 213 of 2019, CAT at Bukoba (unreported). it was held that; -

*'.....Under the circumstances, since the learned Judge found the reasons for the appellant's termination were valid and fair, she was right in exercising her discretion ordering lesser compensation than that awarded by the CMA.....'*

Basing on the above position and on the circumstances of this matter, where the respondent's business collapsed over a sudden, it was not easy for the applicant to comply with the procedure for retrenchment. As correctly submitted by applicant counsel. The circumstances which led to termination, are special qualifying to be an exception to the requirement of compliance to Section 38 of Employment and Labour Relation Act, Cap 366 RE 2019(Cap 366 RE 2019). The respondent's post was automatically rendered redundant as its existence depended on importation of milk and subsequent closure of the entire business by Tanzania Revenue Authority (TRA). Thus, termination was both substantively and procedurally fair.



According to the records respondent is entitled to the retrenchment package as computed by the applicant on Exhibit D5 a total sum of 644,676/=. However, according to the salary slip respondent was paid a total sum of 443,976/= I have gone through CMA proceedings DW2 in his testimony stated that a total sum of 200,000/= was deducted as payment of excess leave taken by the applicant. Surprisingly the applicant has not tendered any proof as regard to the same. Therefore, I hereby quash the CMA's order of 12 months' salary as compensation. I hereby order the applicant to pay the respondent the deducted sum of 200, 000/=. Tshs, same to be paid within 21 days from today.

I thus find Revision application with merit accordingly granted. CMA award is revised to that extent. It is so ordered.

  
Z.G.Muruke

**JUDGE**

03/06/2021

Judgment delivered in the presence of Zuri'el Kazungu, Advocate for applicant and respondent in person. Copy of the Judgment, Decree and Proceedings are ready for collection.

  
Z.G.Muruke

**JUDGE**

03/06/2021