**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION APPLICATION NO. 81 OF 2020**

*(Originating from Labour Dispute No. CMA/DSM/ILA/384/19/201)*

**BETWEEN**

**MERLION SHIPPING (T) PVT LTD.....APPLICANT**

**VERSUS**

**PHILLIP I. MAUGO.....RESPONDENT**

**JUDGMENT**

*Date of Last Order: 26/11/2021*

*Date of Judgment: 14/12/2021*

**I. Arufani, J.**

The applicant in the present application is pleasing the court to revise and set aside the award of the Commission for Mediation and Arbitration (hereinafter referred as the Commission) delivered in Labour Dispute No. CMA/DSM/ILA/R.384/19/201 dated 14th February, 2020. The application is supported by the affidavit sworn by Geofrey Joseph Lugomo, advocate for the applicant and opposed by the counter affidavit sworn by the respondent.

It is on record of the matter that the applicant had a shipping agency agreement with a company based in Hong Kong China namely Oriental Overseas Container Lines Limited (OOCLL). The

applicant employed the respondent to work in the said shipping agency as an Accountant/Executive from 5th March, 2018 in unspecified period of time contract. On December, 2018 the OOCLL issued 90 days' notice to the applicant to terminate their agency agreement. That means the agency agreement was supposed to come to an end on March, 2019. After the applicant's agency agreement with OOCLL come to an end the applicant terminated the respondent's employment.

The respondent was dissatisfied by termination of his employment and referred his complaint to the Commission claiming for various terminal benefits against the applicant basing on unfair termination of his employment. At the end of hearing of the respondent's complaint the Commission determine the complaint in favour of the respondent. The Commission awarded the respondent the sum of Tshs. 30,000,000/= being compensation of twenty four months' salaries plus one month salary in lieu of notice.

The applicant was dissatisfied by the award issued by the Commission and filed in this court the present application pleasing the court to revise and set aside the award issued by the

Commission. The grounds upon which the applicant invites the court to determine in this matter are as follows:-

a) *whether in the circumstances of this matter, it was justifiable for the Arbitrator to award twenty four (24) months' salaries compensation.*
b) *whether it was legally correct for the Arbitrator to issue an award without considering the evidence adduced by the applicant.*
c) *whether it was legally correct for an Arbitrator to interpret Rule 32 (5) of the Labour Institutions (Mediation and Arbitration Guidelines) Rule GN. No. 67 of 2007 and the case of* ***NMB V. Neema Akeyo****, Revision No. 35 of 2007, HC Labour Division at Arusha; as she has done in favour of the respondent and grant 24 months compensation to the respondent.*
d) *whether or not the respondent whose probation was not confirmed could be unfairly terminated.*

While the applicant was represented in the matter by advocates from Mzizima Law Associates Advocates, the respondent was represented by Mr. Baraka Murasira Maugo of Gabriel & Co. Advocates and Mr. Phillip Lincoln Irungu of B & E Ako Law. The court ordered the matter to be argued by way of written submission.

Submitting for the applicant, Advocate Franco Mahena from Mzizima Law Associates Advocates argued grounds (a) and (c) jointly and argued the rest of the grounds separately. He argued in relation to grounds (a) and (c) that, the award of 24 months salaries compensation to the respondent was unreasonable and unjustifiable. He acknowledged the position of the law provided under Section 40(1) (c) of CAP 366 RE 2019 which provides for compensation of twelve (12) months' salary to an employee who has been terminated from his employment unfairly.

He however argued that, the same does not mandate the court or arbitrator to award compensation of twelve months in all cases of unfair termination. He submitted that, it is upon discretion of the court or arbitrator to award lesser or more amount and stated that, the said discretion is required to be exercised judiciously. To support his argument, he referred the court to the cases of **Sodetra [SPRL] Ltd. V. Njellu Mezza and another,** Revision No. 207 of 2008, HCLD at DSM and **Yusufu Same & another V. Hadija Yusuph, Civil Appeal No. 1 of 2002**, CAT at DSM and **Sinde Kimera @ Sinde V. R**, Criminal Application No. 39 of 2020 HC at Musoma (All unreported).

He went on arguing that, in awarding compensation to unfairly terminated employee, the arbitrator or the court has to take into consideration the factors prescribed in Rule 32(5) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules GN. No. 67 of 2007 and in the case of **NMB v. Neema Akeyo** Revision No. 35 of 2007, HC at Arusha (unreported) where the factors to be considered before awarding compensation where enumerated. He submitted that in the present matter the arbitrator failed to interpret and apply the said factors. He argued that, although the Arbitrator stated at page 6 of the award that the reason for termination was fair, but he found the termination was unfair just because the reason was not communicated to the respondent.

He argued in relation to issue (b) that, the arbitrator failed to consider the evidence of the applicant adduced before the Commission by DW1. He argued DW1 testified that, after the OOCLL issued a 90 Days' notice of terminating the agency agreement with the applicant, it was communicated to all employees of the applicants including the respondent. After expiration of the notice period other employees who were recruited from the subsidiary companies of the applicant were returned to their positions in those companies as their

agencies were still in operation. He submitted that, if the arbitrator could have evaluated the evidence adduced before the Commission properly, he could have found the respondent was a probationer who cannot be unfairly terminated and he was not entitled to the huge compensation of twenty four (24) months remuneration.

As for the issue (d) it was submitted by the counsel for the applicant that, the respondent's employment was not confirmed hence he had no status of the applicant's employee and cited in his submission exhibit P1 which is the employment contract to support his argument. He argued further that, there is no automatic confirmation of employment, the same must be explicitly made by the employer. He submitted that, the respondent being a probationer is not covered and cannot seek protection and rights provided for under Sub part E of the Employment and Labour Relations Act, CAP 366 RE 2019. He bolstered his submission by referring the court to the case of **David Nzaligo v. National Microfinance Bank PLC**, Civil Appeal No. 61/2016. At the end he prayed the application be granted.

In response, advocate Philip Lincoln Irungu submitted for the respondent on grounds (a) and (c) that, the arbitrator rightly awarded the compensation to the respondent and he considered the

relevant factors as appearing at page 9 of the award. He stated that, the arbitrator found the respondent's termination was procedurally unfair as he was not served with a notice of termination of his employment and there was no consultation made. He submitted that, failure to adhere to the procedure for retrenchment made termination of the respondent's employment unfair and supported his argument with the case of **Tanzania Revenue Authority v. Andrew Mapunda** [2015] LCCD 1.

He stated further that, the arbitrator properly interpreted Rule 32 (5) (b) of the GN. No. 67 of 2007 and exercised her discretionary power judiciously as he considered all the circumstances of the case and he thus correctly awarded the respondent 24 months' salaries as compensation. Counsel for the respondent distinguished the case of **Yusuph Same & another** (supra) on the reason that the same is a criminal case and it was not held as submitted by the applicant.

As for the issue (b) Mr. Irungu averred that, all the facts stated by the applicant as regards to this ground were well considered by the arbitrator as can be reflected on the disputed award. He argued in relation to issue (d) that, the issue of the respondent to be probationer was neither raised nor discussed during trial before the

Commission. He submitted that, parties are bound by their pleadings and a party cannot be permitted to bring a new issue on a revision or appeal. He cited the cases of **Hotel Travertine Ltd. & 2 Others v. National Bank of Commerce Ltd.** [2006] TLR 133 and **James Funke Gwagilo v. The Attorney General** [2004] TLR 161 to support his submission.

The counsel for the respondent submitted that, the counsel for the applicant misleads the court as he stated the respondent admitted that he was not confirmed. He stated the testimony of the respondent at page 24 of the proceedings of the Commission shows he stated he was confirmed in his employment. He distinguished the case of **David Nzaligo** (supra) from the case at hand by stating that, in the said case the employee worked for less than six months while in the present case the applicant had worked for more than fifteen months.

The counsel for the respondent contended that, the law under Rule 10 (4) of GN. No. 42 of 2007 restricts probation period of an employee to be not more than one year. He argued that, under that circumstances the respondent cannot be considered as the probationary employee. He thus prayed for dismissal of the

application with the costs. In his rejoinder, the applicant's counsel reiterated his submission in chief. He added that, the issue of probation is not a new issue. He stated the same was discussed in cross examination that is why the respondent's counsel quoted the said questions and answers. He further contended that, the same was the applicant's great concern in his final submission. He reiterated the prayers he made in the submission in chief.

Having carefully considered the rival submission from both sides the court has found in order to be able to determine the issues proposed for determined in this application rightly, it is proper to start with the issue contained in ground (b) of the grounds for revision. Thereafter I will proceed with issue contained in ground (d) and thereafter I will finalize determination of the matter by dealing with grounds (a) and (c) which were argued jointly by the counsel for the parties.

The issue contained in ground (b) states that, the Arbitrator issued an award without considering the evidence adduced by the applicant. The court has carefully considered the arguments from both sides and after going through the record of the matter it has found that, it is not true that the Arbitrator issued the impugned

award without considering the evidence adduced by the applicant. The court has arrived to the above finding after seeing the evidence adduced before the Commission by the witness of the applicant who testified as DW1 was well considered from page 5 to 8 of the award issued by the Arbitrator.

The court has found the Arbitrator stated clearly at page 8 of the impugned award that, the evidence of DW1 who was the sole applicant's witness shows that, after the applicant received the 90 days' notice of terminating their agency agreement from OOCL, they didn't convene any meeting with the respondent to find if there was alternative way of serving his employment. The Arbitrator went on stating that, the evidence of DW1 shows that, the applicant did not discuss with the respondent to see whether they could have taken him to their other subsidiaries company where they returned other employees who were working with the respondent.

After considered the evidence of DW1 the Arbitrator found the applicant did not follow the procedures provided under the law in terminating employment of the respondent and concluded that, termination of employment of the respondent was unfair. In the premises the court has found that, as rightly argued by the counsel

for the respondent it is not correct to say the Arbitrator did not consider the evidence adduced by the applicant's witness as the award of the Commission shows the evidence of DW1 who was the sole applicants witness was thoroughly considered.

As for the issue contained in ground (d) it states that, as the respondent was not confirmed he could have not been unfairly terminated from his employment. The court has found that, as rightly argued by the counsel for the respondent the issue of the respondent to be probationer at the time of termination of his employment was not one of the issues raised and determined by the Commission. The court has found that, as stated in the cases of **Hotel Travertine Limited & Two Other** and **James Funkwe Gwagilo** (supra) the parties were required to bring to this court the matters which were raised and determine by the Commission and not matters which were not raised and determined by the Commission.

The court has found the issue of the respondent to be confirmed or not in his employment emerged when the respondent was being cross examined by the counsel for the applicant and it was not raised as one of the issues to be considered and determined by the Commission. Although it is true that the argument of the respondent

to be on probation was raised in the final submission of the applicant filed in the Commission but the commission was not bound to entertain the same as it was not by the parties as one of the issues to be determined by the Commission. Therefore, under normal circumstances and in the light of the position of the law stated in the above cited cases the court would have not been required to entertain the issue of the respondent to be probationer or not at the time of termination of his employment.

However, for the purpose of determine this matter justly the court has found the parties will not be prejudiced if the court will determine the said issue in the present application. The court has found that, the letter of employment of the respondent which was admitted in the matter before the Commission shows he was required to undergo six months probationary period. The said letter states categorically that, the respondent should have been confirmed in his employment in writing.

Nevertheless, the evidence available in the record do not show there was any writing adduced before the Commission to show the respondent was confirmed in his employment in writing as stated in the letter of his appointment until when his employment was

terminated on 11th May, 2019. That being the facts, the court has found the issue to determine here is whether the respondent would have been unfairly terminated from his employment as he had not been confirmed in his employment. The court has gone through the case of **David Nzaligo** (supra) cited by the counsel for the applicant to support his argument and find it is true that it was stated in the cited case that, expiration of period set for probation does not automatically lead to change of status from probationer to a confirmed employee.

It is stated further in the above case that, an employee who is still a probationer, he cannot seek for rights provided under Part III of the ELRA which one of them is a claim arising from unfair termination. The court is also in agreement with the position of the law stated in the above cited case and is also bound by that position of the law as that is the decision of the Court of Appeal.

However, the court has found that although there is no written evidence adduced in the matter to show the respondent was confirmed in his employment in writing as stipulated in the letter of his appointment but as rightly argued by the counsel for the respondent, the proceedings of the Commission show at its page 24

that, when the respondent was being cross examined by the counsel for the applicant, he stated that he was confirmed in his employment through the company email.

When he was asked if he had any evidence to show he was confirmed in his employment he said after the elapse of six months he wrote a letter to the applicant and they replied they had already confirmed him in his employment and said he had no access with the emails of the applicant. Since the respondent stated in his evidence he was confirmed in his employment after the elapse of six months through the email of the applicant and the applicant who had a duty under section 39 of the ELRA to prove the respondent was not confirmed in his employment did not adduce any evidence to establish the respondent was not confirmed in his employment it cannot be said the respondent had no right of claiming any right relating to unfair termination of his employment under Sub-Part E of Part III of the ELRA.

The above finding caused the court to come to the view that, the issue by the applicant that the respondent was not confirmed in his employment is an afterthought issue as it was not raised and proved before the Commission. Even if it can be said it was raised when the

respondent was being cross examined and it was raised in the final submission of the applicant filed before the Commission but he said he was confirmed in his employment through the emails of the respondent and that was not disputed by the applicant or disproved by the applicant. In the premises the court has found the position of the law stated in the case of **David Nzaligo** (supra) is distinguishable from the instant case, hence the respondent had a right to claim for unfair termination of his employment.

Coming to the issue contained in grounds (a) and (c) of the revision at had the court has found that, as stated at the outset of this judgment it is true that, the Arbitrator awarded the respondent compensation of twenty four months' salaries for unfair termination of his employment. The court has also found in awarding the said compensation the Arbitrator based on Rule 32 (5) of the GN. No. 67 of 2007 and the case of **NMB V. Neema Akeyo** (supra) to issue the said award. Rule 32 (5) of the GN No. 67 of 2007 upon which the Arbitrator based in issuing the impugned award states as follows:-

> *"Subject to sub-rule 2 an Arbitrator may make an award of appropriate compensation based on the circumstances of each case considering the following factors-*
>
> *(a) any prescribed minima or maxima compensation;*

*(b) The extent to which the termination was unfair;*

*(c) The consequences of the unfair termination for the parties, including the extent to which the employee was able to secure alternative work or employment;*

*(d) The amount of the employee's remuneration;*

*(e) The amount of compensation granted in previous similar cases;*

*(f) The conduct during the proceedings; and any other relevant factors."*

The wording of the above quoted provision of the law is very clear and do not need any strict interpretation. To the view of this court, it gives many factors which can lead an Arbitrator in determine what amount of compensation should be awarded to an employee who has unfairly been terminated from his employment. The Arbitrator is required to consider the amount of remuneration of the employee, the minimum and maximum amount of compensation prescribed by the law, the extent of unfairness of the termination, whether the employee can manage to secure an alternative work or employment, amount of previous compensation made in similar cases, conducts of the parties during the proceedings and other relevant factors.

The court has also found proper to have a look on the factors enumerated in the case of **NMB V. Neema Akeyo** (supra) used by the Arbitrator in awarding the amount awarded to the respondent. The court has found that when the court was looking into the factors required to be taken into consideration when determining the amount of financial compensation to be awarded to an employee who has unfairly been terminated form his employment it referred to paragraph 229, page 85 of the General Survey of the Committee of Experts on Application of Convention & Recommendation (CEACR) where it was stated that:-

> *"In the case of financial compensation, the amount has to be determined. Legislation often specifies the amount of compensation or the extent of damages to be awarded on the basis of one or several factors such as the nature of the employment length of service, age, acquired rights or the circumstances of the particular case namely the reason for termination of employment, the possibility of finding job, career prospects, or the personal circumstances of the employer such as the size or the nature of the undertaking."*

Those being the factors enumerated under Rule 32 (5) of the GN. No. 67 of 2007 and in the case of **NMB V. Neema Akeyo** (supra) the court has found the award of the Commission shows at

its page 10 that, the Arbitrator used the factor of the extent to which the termination was unfair to award the respondent payment of twenty four months' salaries as a compensation for unfair termination of his employment. The Arbitrator did not consider other factors like the age of the respondent, nature of the employment length of service, his professionalism, possibility of securing alternative employment, size and nature of the undertaking.

The court has found that, as argued by the counsel for the applicant the Arbitrator found the applicant had a fair and valid reason for terminating employment of the respondent. That finding was arrived by the Arbitrator after seeing the applicant's Agency Agreement with OOCLL which caused the respondent to be employed by the applicant had come to an end following the 90 days' notice issued to the applicant by the said OOCLL. The court has found as rightly argued by both sides the unfairness of termination of the respondent's employment was found on failure to follow the required legal procedure for terminating employment of the respondent. The court has found the Arbitrator found there was no consultation which was made by the applicant with the respondent as required by

section 38 of the ELRA read together with Rules 23 and 24 of the GN No. 42 of 2007.

That being the position of the matter the court has found as the Arbitrator found the applicant had a fair reason for terminating the employment of the respondent and unfairness of termination of his employment was based on failure to follow the procedure which was supposed to be followed in terminating employment of the respondent, it was not justifiable for the Arbitrator to award the respondent payment of 24 months' salaries as compensation for unfair termination of his employment.

The court has arrived to the above finding after seeing that, although it is true that section 40 (1) (c) of the ELRA provides for the minimum compensation to be paid to an employee who has been terminated from his employment unfairly and there is no maximum amount provided by the law and the arbitrator had discretion of awarding compensation of more than twelve months but as argued by the counsel for the applicant an Arbitrator is required to exercise its discretionary power judiciously in awarding an amount which is more than the minimum amount provided under the law. To the views of this court the Arbitrator was required to take into

consideration all the factors provided under Rule 32 (5) of the GN. No. 67 of 2007 and the factors stated in the case of **NMB V. Neema Akeyo** (supra) to see whether the evidence adduced in the case and the circumstances of a case justified grant of compensation of more than the minimum amount prescribed by the law.

The court has found that, as the Arbitrator was satisfied the applicant had a valid reason for terminating employment of the respondent but he only failed to follow the procedure for terminating his employment and after seeing the length of period the respondent had worked with the applicant which was one year and two months, the age of the respondent was 32 years and his profession is accountancy which it cannot be said he cannot secure an alternative employment the court has found it cannot be said it was justifiable to award him compensation of 24 months salaries which is two times the minimum amount provided under the law.

To the view of this court and as rightly argued by the counsel for the applicant the compensation of twenty four months' salaries awarded to the respondent by the Arbitrator was unjustifiable as it did not take into consideration all factors provided under section 32 (5) of the GN No. 67 of 2007 and factors stated in the case of **NMB**

**V. Neema Akeyo** (supra). To the view of this court the respondent was entitled to be awarded the minimum amount prescribed by the law which is twelve months' salaries and not twenty four months salaries.

The court has considered the argument by the counsel for the applicant that this is the fit case for the Arbitrator or the court to use the case of **Sodetra [SPRL]** cited in the case of **USAID Wajibika Project** (supra) to award the respondent compensation of less than twelve months if not less than six months but find the it was stated in the later case that, the position of the law stated in the earlier case was not made within the ambit of the law. Under that circumstances the court cannot use those cases to find the respondent was required to be awarded payment of compensation of less than twelve months provided under the law.

In the final result the court has found the revision of the applicant deserve to be partly allowed. Therefore, the award of the Commission is revised and altered to the extent stated hereinabove. The respondent will be paid compensation of twelve months' salaries which is Tshs. 14,000,000/=. He will also be paid one month salary in lieu of notice which is Tshs. 1,200,000/=. The total amount of

compensation to be paid to the respondent by the applicant is Tshs. 15,200,000/=. It is so ordered.

Dated at Dar es Salaam this 14th day of December, 2021.

I. Arufani

**JUDGE**

14/12/2021

**Court:** Judgment delivered today 14th day of December, 2021 in the presence of Mr. Geofrey Lugomo, Advocate for the applicant and in the presence of the respondent in person. Right of appeal to the Court of Appeal explained fully to the parties.


I. Arufani

**JUDGE**

14/12/2021