

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

**REVISION NO. 148 OF 2020**

**BETWEEN**

**KENYA KAZI SECURITY..... APPLICANT**

**VERSUS**

**FATUMA MTUNYUNGU..... RESPONDENT**

**JUDGMENT**

Date of Last Order: 28/06/2021

Date of Judgement: 02/07/2021

**T.N MWENEGOHA, J.**

This Application emanates from the Commission of Mediation and Arbitration (CMA) Award issued against complaint No.CMA/DSM/ILA/193/19/210 by Hon. Wilbard on 13/03/2020.

The Applicant is applying for revision after being aggrieved by the said Award advancing the following grounds:

- i. Whether the Hon. Arbitrator was correct in holding that termination was procedurally unfair.
- ii. Whether the compensation of 12 months' salary was appropriate to the circumstances of the case

The Application was supported by the affidavit of Daniel Mwakajila and opposed by counter affidavit of Fatuma Kasimu Mtunyungu which all are adopted herein.

In advancing their case, the Counsel for applicant, advocate Shepo Magirari John submitted that the genesis of the Application is that the respondent, who was employed by applicant as a security guard had to be terminated due to medical condition. That the root of the ailment emanated from work place related accident, where on 3<sup>rd</sup> May 2017 the respondent was hit by a folk lift machine when she was on duty at the applicant's client. It is submission of the applicant that following that she was admitted to hospital and after clinical evaluation the doctor recommended that she be excluded from duty. This led to granting respondent 146 days sick leave as her condition was not improving.

The applicant further submitted that as a result a discussion between applicant and respondent on the way forward was necessary and after going through the respondent's doctor recommendations and in consideration to the nature of applicant's business, the applicant, on 18/2/2019 decide to terminate the respondent on a ground of incapacity. It is also submitted by the applicant that upon hearing, CMA found the termination was fair with valid reasons but procedurally unfair. The applicant being aggrieved with CMA Award, challenges that it was wrong for Arbitrator to hold that the termination was procedurally unfair, because they adhered to all procedures by consulting the respondent and her doctor to see whether there was an alternative which will suit her. He also noted the fact that the applicant did not rush to terminate the respondent and that he gave her two sick leaves (146 days) as per S.32 of the

Employment and Labour Relations Act, 366 R.E 2019 with full wages in all leaves. Therefore, it is his view that the applicant adhered to all procedures before terminating the respondent.

In submitting on the second ground, the counsel for applicant was of the view that the applicant had valid reasons for terminating the respondent and hence she ought not be given compensation of 12 months because the law which gives remedies, S.40 (1) (c) of the Employment and Labour Relations Act, 366 R.E 2019 provides for compensation of 12 months' salary for substantive unfair termination only. When termination, is procedurally unfair the court may award lesser compensation and this is due to the fact that in labour law the substantive unfairness attracts heavier penalty than procedural issues.

The applicant pleaded that the Award should be 3 months compensation and not 12 months as per his view. He further noted that the Commission should have considered payment of full wages the respondent was given during sick leave as well as all medical expenses which were covered by the applicant and WCF; and that the respondent was paid all her terminal benefits. Therefore, procedural aspect should be considered and lesser compensation should be given.

He cemented this argument with a Court of Appeal decision in **Felician Rutwaza vs World Vision Tanzania, Civil Appeal No. 213 of 2019**, where Court of Appeal at page 15 approved a case of **Sodetra Ltd vs Mezza & Another** where the Court interpreted S.40(1) (c) of Cap 366 RE 2019 and were of the opinion that the remedy for substantive unfairness attracts heavier penalty than the remedy for procedural unfairness.

The applicant therefore argued that it is not necessary to order compensation not less than 12 months. Hence he prayed for a lesser a compensation than what was granted at CMA.

In replying to the applicant's submission, the counsel for respondent, advocate Frank Chacha was of the view that the Honorable Arbitrator awarded the respondent a compensation of 12 months rightly so due to the applicant's failure to comply with S.37 of Employment and Labour Relations Act, Cap 366 which requires the applicant to follow all procedures as indicated in Rule (19) (1) of Code of Good Conducts GN.No.42 of 2007.

The counsel further submitted that 12 months compensation ordered by CMA was correct as it was issued under a provision which requires minimum compensation to be 12 months. Hence the CMA's order was correct according to Employment and Labour Relations Act and its regulations thereto.

The Counsel further submitted that the applicant wrongly acted to terminate the respondent after sustaining an injury while performing employer's duty which led to serious sickness; causing her to suffer from post-traumatic epilepsy resulting to permanent incapacity. Therefore, it is the respondent's view that the compensation should be more than the 12 months as per Rule 19 (1) (a) & (e) of GN. No.42 of 2007 and Rule 21 (1)-(8) of the Code of Good Practice GN.42 of 2007 which gives an opportunity to add or to order otherwise on the Award of CMA.

The counsel for respondent was also of the view that the applicant should have looked for a light job for the respondent instead of terminating her.

In his rejoinder, counsel for applicant argued that the respondent was consulted prior termination and that it is of their view that the applicant adhered to the procedure before termination.

The counsel further submitted that there were no alternative job as some of the jobs such as those of cleanliness were outsourced to other companies and other positions either needed qualifications or were occupied.

In replying to additional compensation, it was the argument of the counsel for applicant that repatriation costs were paid for and was not an issue.

The applicants reiterated their prayers, asking the court to be guided by the submitted authority to award lesser compensation than that of Arbitrator.

The court took into consideration submission from both parties and also received the relevant laws and regulations governing the matter. It is noted from above submission that there is no dispute on the respondent's illness and her capacity to continue working for the applicant at her employed position. It is also a settled matter that compensation is needed due to disposal of such work relations. Therefore, what is contested is the amount of compensation.

Therefore issues at hand are whether there was a fair procedure in the course of termination and whether the compensation is appropriate. The issue of fair procedure is straight forward as it only require evidence of the needed procedure. The applicant has not produced evidence as to how they have followed this procedure other than informing the court that they have spoken with the respondent's doctor. This submission reflects lack of



proper procedure for termination as provided under Rule 21 of Code of Good Practice GN.42 of 2007. Therefore, this court is upholding the decision of the arbitrator that the proper procedure should have been followed. I further wish to emphasize on this with a Labour Revision case of **Otter Mining Limited vs Majengo Athumani Mohamed**, Revision No. 7 of 2020 which quoted in approval a case of **Issas Maulid Mangara & Salehe Kitapwa Vs. Tanzania Railways Ltd [2015] LCCD 57** where the court observed that:

"...procedural justice and substantive justice are two inseparable wings which fly together into which the absence of the other makes the other meaningless. Procedural justice acts as a complement to substantive justice; it gives life to substantive justice hence procedural justice cannot be overlapped under the umbrella of substantive justice."

Moreover, in the case of **Tanzania Railway Limited vs. Mwajuma Said Semkiwa, Labour Revision No. 239 of 2014**, at Dar es salaam, it was held that:-

'It is established principle that for the termination of employment to be considered fair it should be based on valid reason and fair procedure. In other words there must be substantive fairness and procedural fairness of termination of employment'.

Thus, it is the established principle that procedure of termination of employment must also be fair.

Having determined the issue of fair procedure, I now proceed to examine whether the compensation accorded by the Commission is appropriate. I am bound to refer to a court decision of **Felician Rutwaza vs World Vision Tanzania, Civil Appeal No. 213 of 2019**, referred by the applicant, where Court of Appeal interpreted **Sodetra (SPRL) Ltd vs. Njelu Mezza and Another, Labour Revision No. 207 of 2008**, where the court held that the law does not make it mandatory for an order for payment of 12 month salary for whoever is terminated on unfair procedure. Quoting the decision at p. 10 it was stated that:

*"...reading of other sections of the Act gives a distinct impression that the law abhors substantive unfairness more than procedural unfairness, the remedy for the former attracts heavier penalty than the latter".*

As the issue of termination being unfair procedurally is already determined and the position of compensation of such termination a settled principle by Court of Appeal, I am hereby of the view that the respondent is entitled to compensation of less amount compared to the substantive termination.

I order the employer to compensate the respondent for payment of six months' salary. As the respondent was receiving a salary of Tshs. 150,000/- per month, the applicant has to pay her 150,000/- x 6 totaling to Tsh 900,000/-.

Consequently, I hereby vary the Commission Award as far as amount of compensation is concerned.

Each party to take care of its own cost of the suit.

It is ordered.



  
**T.N Mwenegoha**

**JUDGE**

**02/7/2021**

Labour Court TZ.