IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MOROGORO

REVISION NO. 02 OF 2021

KILOMBERO SUGAR CO. LTD.....APPLICANT

AND

HAMIS KITOLE HAMISI & ANOTHER.....RESPONDENTS

JUDGMENT

31th August & 7th September 2021

Rwizile J.

The applicant herein namely **KILOMBERO SUGAR CO. LTD** has filed this application against the decision of the Commission for Mediation and Arbitration (CMA) praying for the orders;

1. That the Honourable Court be pleased to revise the proceedings and decision of the Commission for Mediation and Arbitration at Morogoro in Labour Dispute No. RF/CMA/MORO/270/2015 delivered by Hon. Magreth, K. Arbitrator, on 8th February, 2019.
2. That, this Honourable Court may be pleased to make any other order or orders as it may deem just and equitable to grant.

The application is supported by the affidavit of Mwanaidi Kiya Principal Officer. The grounds for determination include;

i. That the arbitrator erred in law and in facts by holding that the applicant has failed to prove the respondents were terminated from employment without justifiable grounds as well as valid reason while there is proof that the respondents committed misconduct

ii. That the arbitrator erred in law and in fact by awarding 24 months compensation each without exceptional circumstances and reason.

The background of the dispute in brief is that; the respondents were employed by the applicant as a Boiler Operators in 2014. Their employment, however was terminated on 27th July 2015.

The reasons for termination were alleged as cheating and dishonesty. Dissatisfied with the applicant's decision, they successfully referred their dispute to CMA. Having found that their termination was not fair, the Commission awarded terminal benefits. The applicant was not happy with the decision, hence the present application. Before this court, the applicant was represented by Mr. Kaijage, learned advocate, whereas the respondent was represented by Mr. Kitua Kinja learned advocate

For the applicant, it was argued that the award has irregularities. He stated that, three witnesses testified before the Commission. He argued further that although Dw3 gave evidence but the same was not considered in the award as at page 7, and so held the view that the award was not fair. It was submitted that at page 13-14 of the award, the arbitrator found termination was of valid reasons but held the view that termination was not a proper sanction. The misconduct committed by the respondents, it was decided, deserved a warning and not termination. He stated that, since there was a valid reason for termination, the arbitrator was not fair in awarding 24 months compensation. To support his submission, he cited the case of **Felician Rutwaza vs World Vision Tanzania,** Civil Appeal No. 213 of 2019, Court of Appeal of Tanzania, sitting at Bukoba (unreported) at Page 15.

The counsel prayed, the application be granted and CMA award be quashed and set aside.

Replying, Mr. Kitua stated that section 40(1)(c) of the Employment and Labour Relation Act, [Cap 366 R.E 2019] provides for compensation to be of 12 months, but that does not mean, awarding more as the arbitrator did is illegal. Supporting this argument, he cited the case of **BOA (T) Ltd vs.**

Karim A. Hassan, Revision No. 123 of 2020, High Court of Tanzania, at Dar es salaam(unreported) at Pg. 19.

He argued further that, Dw2 admitted that with or without any misconduct that could not change anything. Therefore, 24 months compensation were given because it was the first offence. Mr. Kitua was of the view that the respondent could have other alternative punishments as provided for under Rule 12(2) of the Employment and Labour Relations (Code of Good Practices) GN. No. 42 of 2007.The first offence does not warrant termination.

Submitting on the first ground, the counsel argued that, the evidence of Dw3 was perhaps found to have no merit. That is why the CMA did not see it important to consider the same. This means even if considered, it does not change anything. He thus prayed for the application to be dismissed.

In rejoinder, the applicant's counsel submitted that section 40(1)(c) of the Employment and Labour Relation Act, does not bind the court to award 12 months compensation. According to him, this discretion must be exercised in exceptional circumstances. The discretion must be exercised judiciously and not arbitrarily. He stated that the case cited also reduced

compensation to 6 months after finding there was a valid reason for termination.

It was further submitted that the evidence of Dw3 was vital, therefore CMA had to consider his evidence and say it was of no effect. He added that failure to consider the same, is a material irregularity, contravening Rule 27(3)(d) of The Labour Institutions (Mediation and Arbitration Guidelines) GN 67/2007. His prayer was therefore that this application be granted as prayed.

Having considered parties submissions, records and advanced grounds for determination, I think, there are two key points to determine. *Whether dishonesty as a misconduct merits termination, and second whether the arbitrator was justified to award 24 months as a compensation?*

Dealing with first point of determination, there is no dispute that the respondents were charged of misconduct involving dishonesty. The Commission upon assessment of the evidence, it was of the view that dishonesty is not a misconduct that warranted termination, because it was the first offence. Under rule 12(3) among the misconducts that may fetch a termination penalty even if it is the first offence includes, gross dishonesty among many others. Dishonesty, is however not defined by the

law, but I think, it may include the acts done without honesty. It is used to describe a lack of integrity, cheating, lying, or deliberately withholding information, or being deliberately deceptive or a lack in integrity. But Dishonesty has traditionally been seen as a serious offence and one that could render an employment relationship intolerable. This is because dishonesty damages the ability of the employer to trust the employee.

But under the Code of Good Practice, rule 12 (4), dismissal imposes a number of requirements on an employer who is contemplating dismissing an employee for misconduct. The employer should first consider factors such as the employee's length of service, his employment records, previous disciplinary record, as well as personal circumstances. The matter before me, is that the respondents, seemingly were good employees, that is why perhaps, they were sent for studies in South Africa. They are alleged to have spent money for taxi and concealed the information on the amount used. This in my view, is a misconduct, applying the scenario to the dictates of the code, I think, the arbitrator was right to hold that given the justices of this case, the acts of their dishonesty could not merit termination of their employment. They deserved another penalty relatively lower than termination.

This should not be taken to mean however, that doing so condones acts of dishonesty among the employees. But it is due to employers being fair in application of the code of good practice. It should not be taken, that the law should be applied with animosity between the two sides.

On the second point, the applicable provision in the disputed facts regarding reliefs is section 40(1) of the Employment and Labour Relations Act, which provides that; -

> *Where an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer –*
>
> *(a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or*
>
> *(b) to re-engage the employee on any terms that the arbitrator or Court may decide; or*
>
> *(c) to pay compensation to the employee of not less than twelve months remuneration.*
>
> *(2) An order for compensation made under this section shall be in addition to, and not a substitute for, any other amount*

to which the employee may be entitled in terms of any law or agreement.

(3) Where an order of reinstatement or reengagement is made by an arbitrator or Court and the employer decides not to reinstate or re-engage the employee, the employer shall pay compensation of twelve months wages in addition to wages due and other benefits from the date of unfair termination to the date of final payment.

From the above provisions, it is an established principle of law that in case of unfair termination, the affected party is entitled to be paid at least 12 months wages as compensation. Section 40 is plain and does not need serious interpretation. Awarding 12 months is a minimum amount to be imposed by the Commission or Court, provided the same meets ends of justices of a particular case. This is not a new finding, this court in the case of **Tanzania International Containers Terminal Services (TICTS) vs Fulgence Steven Kalikumtima and 7 Others,** Revision No. 471 of 2016, Labour Division at Dar es Salaam (unreported) held: -

"In line to the above, I am of the considered view that, it is the discretion of a Judge or Arbitrator to give an award that is considered just and fair depending on the circumstances of

each case, though is restricted to comply- by what is or are indicated in CMA FI"

However in the case of **North Mara Gold Mine Ltd vs. Khalid Abdallah Salum,** High Court Labour Division, Revision No. 25 of 2019 (MSM) and **Tanzania Cigarette Company Limited vs. Hassan Marua,** High Court Labour Division, Revision No. 154 of 2014 (DSM) (reported in 2014 LCCD) The findings were made that, if termination is to a greater extent unfair both substantively and procedurally, the arbitrator is justified to order compensation above 12 Months salaries which this court would not interfere with.

From the above position this application does not fall in situations warranting 24 months compensation as awarded. The CMA did not show how was it important to go over and above 12 months compensation. There is a shared with the applicant, that there were no special circumstances leading to the award. Consequently, when this court dismisses, the application for lack of merit. The, 24 months wages awarded

in compensation is reduced to 10, months, for the reason that, they were proved to have committed a misconduct, although it deserved no termination. No order as to costs is made.

AK. Rwizile

Judge

07.09. 2021