IN HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 549 OF 2020

BETWEEN

MBALIMBALI LODGES & CAMPS LIMITED ..... APPLICANT

AND

TIMOTHY MWITA ..... RESPONDENT

JUDGMENT

Date of last order: 04/03/2022
Date of Judgment: 14/3/2022

B. E. K. Mganga, J.

In 2013, applicant employed the respondent as her accountant. On 29th December 2019, applicant served the respondent with termination letter on ground that he committed gross misconduct, gross professional negligence, and occasioned loss to the applicant. Respondent was aggrieved by the termination of his employment, as a result, on 9th January 2020, he filed labour dispute No. CMA/DSM/ILA/16/2020 before the Commission for Mediation and arbitration (CMA) at Ilala claiming to be paid TZS 126,000,000/=for unfair termination. On 20th November 2020, Hon. Mourice Egbert Sekabila, arbitrator, having heard evidence of both sides, delivered the award in favour of the respondent that termination was

unfair both substantively and procedurally. The arbitrator awarded respondent to be paid (i) TZS 33,600,000 as 24 months' salary compensation, (ii)TZS 1,400,000/= as one-month salary in lieu of notice, (iii) TZS 2,261,538/= as severance pay for six (6) years all amounting to TZS 37,261,538/=.

Applicant was unhappy with the said award, as a result, she filed this application seeking the court to revise it. In the affidavit of Benjamin Mtwanga in support of the notice of application, he raised four grounds namely:-

> *That the arbitrator erred in entertaining the matter which it had no jurisdiction because the matter was filed out of time without condonation form.*
>
> *The arbitrator erred in holding that the respondent was unfairly terminated from his employment basing on disciplinary hearing proceedings which did not happen and had no proof of happening.*
>
> *The arbitrator erred in law and facts in deciding awarding compensation of 24 months' salary without giving proper standing on the law to substantiate the award.*
>
> *That the award is unlawful, illogical, and irrational.*

The respondent filed both the notice of opposition and a counter affidavit resisting the application. In his counter affidavit, respondent deponed that termination of his employment was unfair both substantively and procedurally.

When the application was called for hearing, Mr. Benjamin Mtwanga, Advocate, appeared and argued for and on behalf of the applicant while Mr. Yohana Ayal, Advocate, appeared, and argued for and on behalf of the respondent.

In arguing the application, Mr. Benjamin Mtwanga, learned counsel for the applicant, dropped the 1st, 2nd and 4th grounds of revision and argued only the 3rd ground that the arbitrator erred in law and fact in awarding compensation of 24 months' salary in the disregard of the law and facts of the case. Counsel for the applicant submitted that at page 14 of the award, the arbitrator held that respondent started to work with the applicant in 2013 and found that 12 months' salary compensation was not sufficient. Counsel for the applicant submitted that employment of the respondent commenced on 1st April 2018 and not 2013. Counsel submitted that the parties had a fixed term contract of one-year renewable therefore the award of 24 months was based on wrong assumption because respondent had only worked for one year and five months.

Counsel for the applicant submitted further that, Arbitrator found that termination was harsh and inhumane warranting compensation beyond the minimum stipulated in the law. Counsel argued that, that reasoning was not supported by evidence on the CMA record. Counsel went on that;

Arbitrator used his discretion in awarding 24 months not judiciously and that the award was issued in violation of Rule 32(5) of GN. No. 2007. Counsel for the applicant submitted that 12 months would have sufficed as compensation for unlawful termination of the respondent.

On the other hand, Mr. Yohana Ayal, learned counsel for the respondent submitted that respondent started to work with applicant in November 2013 as it was testified by the respondent at CMA. That evidence was unshaken during cross examination. He argued further that, submissions that respondent started to work with applicant in 2018 is not supported by evidence because it is submissions from the bar. He went on that, the parties entered a fixed contract of three years but the record does not show the nature of contract between the two.

Counsel for the respondent also submitted that, the arbitrator was correct in awarding 24 months' salary. Counsel went on that, respondent was reported to Msimbazi Police Station and that, while investigation was still under way, respondent was terminated. Counsel for the applicant submitted that there were allegations of theft of USD 1,000 but later, the amount became more than that. Counsel for the respondent submitted further that, respondent was merely mentioned by a colleague called Kanon to have received a portion of proceeds of money stolen from the

applicant. Counsel for the respondent submitted that it was harsh to terminate applicant and send him to police. Counsel for the respondent submitted that, that was contrary to Section 37(5) of the Employment and Labour Relations Act [Cap R.E. 2019]. Counsel went on that, respondent was terminated without investigation hence no procedure was followed. He cited the case of ***Festo Ngozi Ndalemye & Another v. Knight Support Limited [2013] LCCD 156*** to support his argument and added that the same amounted to double jeopardy. He submitted that it amounted to double jeopardy because disciplinary proceedings were held before conclusion of criminal investigation. Counsel for the respondent submitted that the employer is barred to terminate the employee before conclusion of criminal investigation. Counsel submitted that, termination of employment before conclusion of criminal case was inhumane.

Counsel for the respondent submitted further that, arbitrator properly exercised his discretionary powers because, termination was both substantively and procedural unfair. He cited the case of ***Isaack Sultan v. North Mara Gold Mines Limited consolidated Revision No. 16 and 17 of 2018*** (unreported) and argued that, employee in the said case, was granted 90 months compensation. He insisted that 24 months compensation granted by the arbitrator to the respondent in this

application was proper. He further cited the case of ***Desktop Production v. Joyce Dionise Katto, Revision No. 103 of 2019*** to support his argument that employer had an option to report the matter to police and suspend employee on full pay until determination of criminal charges, or, to institute disciplinary proceeding against employee before initiating criminal charges. He prayed the application be dismissed.

In rejoinder, counsel for the applicant had nothing material to help in determination of the application at hand.

Having heard the submission of both sides and scrutinized the evidence on record, the only issue to be determined by the court is whether; respondent was entitled to compensation of 24 months' salary or not.

As pointed hereinabove, counsel for the applicant dropped all other grounds and argued only the ground relating to compensation of 24 months' salary awarded to the respondent. In arguing this ground, counsel for the applicant submitted that, employment of the respondent commenced on 1st April 2018 and not 2013 because the parties had a fixed term contract of one year renewable therefore the award of 24 months was based on wrong assumption because respondent had only worked for one year and five month. It was submission of counsel for the applicant

that 12 months would have sufficed to compensate respondent for unlawful termination of his employment. On the other hand, it was submitted by counsel for the respondent that submissions that respondent started to work with applicant in 2018 is not supported by evidence as it is submissions from the bar. Counsel for the respondent submitted that parties entered into a fixed contract of three years although the record does not show the nature of contract. Counsel for the respondent maintained that arbitrator properly exercised his discretion in awarding the respondent 24 months' salary compensation.

With due respect to both counsel for the applicant and respondent. I have examined evidence of both sides and find that no witness from either side who testified that the parties had a fixed term contract of two years commencing on 1st April 2018 or that they had three years fixed term contract. Evidence of both parties shows that their employment relationship started in 2013. I have examined CMA record and find that there is a copy of contract showing that on 1st April 2018, parties entered one-year fixed term contract renewable. Unfortunately, the said one-year fixed term contract was not tendered in evidence and that no witness referred to it. As the said contract was not tendered, it is not evidence, and

I will not use it. More so, as there is no witness who testified that the parties had a fixed term contract, I will also disregard those submissions.

It was submitted by counsel for the applicant that 24 months' salary compensation was harsh and, in his view, 12 months' salary compensation would have sufficed. On the other hand, counsel for the respondent was of the view that termination of the respondent was inhumane hence he deserved to be compensated 24 months' salary and that arbitrator exercised his discretion properly.

In awarding the amount the respondent was entitled as compensation, arbitrator exercised his discretionary powers. In this application, I will be guided by the decision of the Court of Appeal in the case of ***Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No.2 of 2010*** it was held that, discretional powers must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrarily. In the case of ***MZA RTC Trading Company Limited v. Export Trading Company limited, Civil Application No. 12 of 2015*** (unreported), the Court of Appeal held: -

"... judicial discretion is the exercise of judgment by a judge or court **based on what is fair, under the circumstances and guided by the rules and principles of law** ..." (Emphasis is mine)

I have examined the CMA record and find that there is no material or reasons justifying the arbitrator to exercise his discretionary powers to award the respondent 24 months' salary instead of the minimum of 12 months' salary provided for under section 40(1)(c) of the Employment and Labour Relations Act [cap. 366 R. E 2019]. In the case of ***Veneranda Maro and Another v. Arusha International Conference Centre, Civil Appeal No. 322 of 2010***, CAT(unreported), it was held that:-

"...although the prescribes the minimum amount to be awarded as compensation for termination which is not less than twelve months" salary, it is settled law that the arbitrator or the labour Court has discretion to decide on the appropriate award compensation which could be over and above the prescribed minimum. However, the discretion must be exercised judiciously taking into account all the factors and circumstances in arriving at a justified decision. Where discretion is not judiciously exercised, certainly, it will be interfered with by the higher court."

In ***Veneranda's case*** (supra), the Court of Appeal gave out circumstances that can justify the superior court to interfere the decision of the lower court. The Court of Appeal gave a guidance that on revision, the High Court is required to consider if the arbitrator evaluated evidence, facts

and circumstances and whether the decision under revision was judicially correct or not.

In the application at hand, the arbitrator was of the view that termination of employment of the respondent while criminal investigation was going on was inhumane. In my view, that alone cannot amount to inhumane. Section 37(5) of the Employment and Labour Relations Act [Cap. 366 R. E. 2019] provides:-

> *"37(5) No disciplinary action in form of penalty, termination or dismissal shall lie upon an employee who has been charged with a criminal offence which is substantially the same until final determination by the court and any appeal thereto".*

I have read the evidence of Timothy Paulo Mwita (DW1) the respondent and find that he admitted under cross examination that there is no pending criminal case in court. Respondent stated further that, he does not have a proof that there is a police case against him. That admission of the respondent tells all. It was not proved by evidence that at the time of termination of employment of the respondent, there was a criminal case pending in court. In my view, the arbitrator erred to award the respondent 24 months' salary on ground that termination of the respondent was inhumane as he was terminated while a criminal case was pending. In fact, as conceded by the respondent in his testimony there was none. Even if it

was there, that alone could have not amounted to inhumane but violation of the law on procedure of termination.

That said and done, I agree with counsel for the applicant that there was no justification for the respondent to be awarded 24 months' salary as compensation. I therefore revise the award and order that respondent be paid 12 months' salary compensation. I uphold the order of one month salary in lieu of notice and severance pay. I therefore hold that respondent is entitled to be paid (i) TZS 16,800,000/= as 12 months' salary compensation, (ii)TZS 1,400,000/= as one month salary in lieu of notice, (iii) TZS 2,261,538/= as severance pay for six (6) years all amounting to TZS 20,461,538/=.

Dated at Dar es Salaam this 14th March 2022.

B.E.K. Mganga
JUDGE