

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

REVISION NO. 135 OF 2020

BETWEEN

COMPREHENSIVE COMMUNITY

BASED REHABILITATION TANZANIA APPLICANT

VERSUS

JESCA RUTTA RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J.

The applicant has filed the present application challenging the decision of the Commission for Mediation and Arbitration for Ilala ("CMA") dated 21st February, 2020 delivered by Hon. Muhanika in Labour Dispute No. CMA/DSM/ILA/R.184/17/1178 ("the Dispute"). The application is made by notice of application supported by an affidavit of Ms. Edd Sauwa, Human Resource Officer of the applicant, deponed on the 01st day of April, 2020. On the other hand, the respondent challenged the application through counter affidavit sworn by herself on the 14th May, 2020. In this court, the applicant was represented by Ms. Samah Salah, learned advocate while the respondent was represented by Ms. Agnes Ndazi, learned advocate. The application was disposed by way of written submissions.

Before I go into the determination of the merits of the application, the brief background of the matter is narrated. The respondent was employed by the applicant as a Procurement Officer from 15th November, 2011 on a permanent pensionable basis. On 06th October, 2017 the respondent was terminated from employment after being charged and found guilty of the misconduct for breach of trust. Aggrieved by the termination, the respondent referred the dispute of unfair termination to the CMA. After considering the evidence of the parties, the CMA found that the respondent was unfairly terminated both substantively and procedurally and subsequently awarded her compensation equivalent to 36 months' remuneration. Aggrieved by the CMA's award, the applicant filed the present application urging the court to determine the following legal issue: -

- i. Whether the Arbitrator was right to find that the termination was unfair both substantively and procedurally.
- ii. Whether the Arbitrator was right to award compensation of 36 months for unfair termination.
- iii. Whether the Arbitrator was right to order payment of one month salary in lieu of notice.

Submitting on the first issue on whether the Arbitrator was right to find that the termination was unfair both substantively and procedurally; Ms. Salah started with the validity of the reason for termination. She submitted that the respondent was terminated for major breach of trust and dishonesty for submitting to the applicant quotation for the purchase of a borehole pump which contained higher prices compared with the quotations obtained by the applicant from the same suppliers. That based on the evidence on record, the applicant proved on balance of probability that the respondent committed the misconducts charged.

Ms. Salah elaborated that as testified by DW1 and DW2 at the CMA, the respondent was instructed (exhibit D15) to submit quotations for the purchase of the borehole lump from three suppliers namely Davis and Shirtliff, Merry Water and Egidius Rutinwa (ERF) in order to get the indicative price of the market. That in contravention with the applicant's instructions the respondent requested and obtained quotation from two suppliers only. She added that the quotations obtained were too high which could not be afforded by the applicant. Thereafter the applicant decided to request for another quotation from the same suppliers and surprisingly there was a huge difference of price for the same pump (exhibit D2 and D9)

It was further submitted that the respondent, being a procurement officer, had a duty to take care of her employer but she breached such duty when she failed to exercise her skills as a Senior procurement officer to obtain reasonable quotations for the benefit of the employer.

On the procedural fairness, Ms. Salah submitted that the Arbitrator made a contradictory finding in relation to the issue of investigation, while on one hand she concluded that there was no investigation conducted, on the other hand she confirmed that investigation was conducted and the report was served to the respondent prior to the disciplinary hearing. She argued that the applicant conducted investigation as per the law, and it was the investigation that revealed the differences in price quotations. Ms. Salah further argued that in unfair termination proceedings it is sufficient under the law for the employer to provide oral evidence that an investigation was conducted thus, there was no need to prove such fact through a written document.

Ms. Salah went on to submit that Rule 13 (1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN 42 of 2007, ("the Code") require employers to conduct investigation prior to the disciplinary hearing. That however, the law is silent on the manner in which such investigation should be conducted. She added that the

relevant provision does not provide for requirement that a formal written investigation report must be prepared at the end of such investigation. The Learned Counsel urged the court to interpret the relevant provision on its literal interpretation.

Ms. Salah further urged the court to review all termination procedures applied by the applicant to find that the same were complied in line with the decisions of **Bollore Africa Logistics Tanzania Ltd vs Magreth Luther Shumbi (Labour Revision 473 of 2019) [2020] TZHCLD 3751 (30 November 2020)**.

As to the award of 36 months' salaries compensation, Ms. Salah argued that 12 month's salaries is the only certain figure mentioned by the law thus, any amount above must be justified. To support her submission, she sought support from the case of **International Medical and Technology University Vs. Eliwangu Ngowi, Revision No. 54 of 2008** (unreported). Ms. Salah alluded that based on the evidence on record, there are no facts to justify the grant of 36 months' salaries. She added that no evidence tendered to justify the finding that the termination was malicious as found by the Arbitrator.

Regarding the award of one month salary in lieu of notice, Ms. Salah argued that the law allows employers to terminate employment contracts without notice for any cause recognized by the law pursuant to section 41 (7) (b) of ELRA. That the respondent was terminated for misconduct therefore being one of the causes recognized by the law, the applicant rightly terminated her without notice.

In alternative Ms. Salah submitted that the claim of one month salary was not part of the respondent's claim mentioned in CMA F1 which initiates disputes at the CMA. She argued that the CMA is guided by what is pleaded in CMA F1 by the applicant and nothing more. On those submissions, Ms. Salah persuades the Court to uphold all grounds of revision and set aside the award.

In reply to the first issue, Ms. Ndazi submitted that the respondent received instructions from her boss (Director of support services) on where to obtain quotations and she complied with the same. That the allegation that the respondent sought quotation from two suppliers only is not true because one of the suppliers delayed and she informed her boss as reflected in the email conversations (Exhibit P3). Ms. Ndazi alluded that the quotations obtained by the respondent was in accordance with the pump specification that is from Italy brand

and the applicant opted to change the pump specification from China Brand to get low price.

It was submitted that the supplier namely Aqua was not in the respondent's list therefore her quotations cannot be compared with that supplier. Ms. Ndazi added that the applicant requested quotations from Merry Water on 13/09/2017 while disciplinary hearing was conducted on 11/09/2017. She strongly alleges that the respondent was infringed her right to be heard on the quotations from Merry Water (exhibit P9). It was firmly submitted that the applicant had no valid reason to terminate the respondent and that as correctly testified by DW2, suppliers have a tendency of changing prices.

As to termination procedures, Ms. Ndazi submitted that the employer did not conduct investigation pursuant to Rule 13 (1) of the Employment and Labour Relations (Code of Good Practice) GN 42 of 2007 (GN 42/2007). She added that investigation was conducted after the disciplinary hearing. Ms. Ndazi argued that as per Rule 13 (1) of GN 42/2007 it is mandatory for the employee to be made aware of the investigation report and the same be served to him/her. She stated that departing from such procedure renders the whole termination process unfair as it was the position in the case of **KBC (T) Limited v. Dickson**

Mwikuka, [2013] LCCD 132. Ms. Ndazi urged the court not to fault the CMA's findings on both reason and procedures for termination.

On procedural aspect she persuaded the court to rely on the case of **Maleza Security Services Ltd v. Samson Andrew and Paul Makwinya, 2013 LCCD 3.** Regarding the award of 36 months' compensation for the alleged unfair termination, Ms. Ndazi submitted that section 40 (1) (c) of the ELRA provided only the minimum amount of compensation however, the Arbitrator may award more depending on the circumstance of each case. To support her submission, she referred the court to the cases of **Tobacco Ltd v. George Msingi, 2013 LCCD 2011-2012.** That basing on the evidence on record and considering the fact that the respondent was pregnant and had complications following the termination, decision as reflected in exhibit P13, the Arbitrator properly awarded her 36 months.

Turning to the payment of one month salary in lieu of notice, Ms. Ndazi argued that if the employee has materially breached the contract, then notice will be exempted as provided under Rule 8 (1) of GN 42/2007. She stated that in the matter at hand there is no proof that the respondent breached trust to the applicant as alleged thus; notice was rightly paid to her. On the allegation that the respondent did not claim

for the awarded relief, her argument was that it is immaterial because the same is among the terminal benefits provided by the law as it was decided in the case of **Eddy Martin Nyinyoo v. Real Security Group & Marine, Revision No. 114/2014 LCCD 2013**. In the upshot, the Learned Counsel prayed that the court uphold the CMA's award and dismiss the application for being baseless.

In rejoinder Ms. Salah and Mr. Nyika reiterated their submissions in chief. As to the cases cited by Ms. Ndazi, they stated that they are not applicable to the circumstances of this case. Regarding the award of 36 months' salaries as compensation, she submitted that the respondent did not tender evidence at the CMA to prove that she was pregnant apart from sick sheet (exhibit P13). Thus, the alleged pregnancy complications were not proved. On the award of one month salary in lieu of notice, Ms. Salah submitted that it was the duty of the respondent to prove the same but she failed to do so. She therefore urged the court to set aside the CMA's award.

I have careful gone through the parties' rival submissions and the records of this application, I find the court is called upon to determine the following issues; firstly, whether the respondent was fairly terminated from employment both substantively and procedurally and

whether the award of 36 month's salaries as compensation and one month's salary in lieu of notice was proper.

As to the first issue of whether the respondent was fairly terminated from employment both substantively and procedurally, looking at the CMA award, the Arbitrator found that the respondent was unfairly terminated. After thorough examination of the record, I am in agreement with the Arbitrator that the applicant failed to prove the misconduct levelled against the respondent. The record shows that the respondent was terminated from employment for major breach of trust and dishonest as reflected in the termination letter (exhibit D12).

The applicant alleges that the respondent was instructed to submit quotations for the purchase of the borehole pump from three suppliers namely Davis and Shirtliff, Merry Water and Egidius Rutinwa (ERF) in order to obtain indicative price in the market (exhibit P2). It was further alleged that the respondent obtained the quotation with high price compared to the ones obtained by another applicant's employee (DW3). In my view the applicant failed to prove that the respondent had ill motive in obtaining the quotations in question. The respondent obtained quotation from two companies Merry Water which was Tshs. 7,975,276.29 and from ERF which was Tshs. 3,435,000.00. The

respondent advised the applicant to buy the borehole pump from ERF which had lower price compared to the one from Merry Water. In my view if the respondent had any ill motive should have insisted the quotation with the highest price.

Further to that, the applicant's witnesses who testified at the CMA stated clearly that suppliers have a tendency of changing price depending on the person who is negotiating. This is reflected in DW3's testimony as reflected at page 11 and 12 of the typed CMA proceedings.

For easy of reference, the verbatim testimony is reproduced: -

'Suppliers wanakuwa na tabia ya kubadilisha bei kwa kitu kimoja ni tabia ya suppliers wote sio kitu cha ajabu, kawaida utaenda kwenye gharama ndogo wanaangalia kampuni au muonekano wa anaenda na pia negotiation skills zinatofautiana....'

During cross examination, the same witness further testified that the products of Merry Water are from Denmark while the one brought by the applicant is from China. This is reflected at page 12 of the CMA typed proceeding. I quote: -

'... Pump ya bei ya chini inatoka China na Merry Water inatoka Denmark.'

DW3 further testified that the pump quotations submitted by the respondent had different specification from the ones submitted by him. That is reflected at page 16 in re-examination of DW3 where he stated the following: -

'Specification ya pump aliyoleta Jesca na mie zilikuwa na tofauti ya Jesca ni kama alikuwa anafanya installation upya kama vile unafunga kisima upya hivyo accessory nyingine hazina maana hivyo hazihitajiki.'

Therefore, on the basis of the above evidence, it is my further finding that the applicant failed to prove the misconduct levelled against the respondent.

As to the termination procedures, the reason of termination being misconduct, the same are provided under Rule 13 of GN 42/2007. Looking at the matter at hand it is crystal clear that the applicant did not conduct thorough investigation before terminating the respondent. DW3 testified that he submitted the quotations after the respondent was terminated from employment. On that basis it is crystal clear that the respondent was terminated before investigation was conducted. Thus, in this case the respondent was unfairly terminated both substantively and procedurally.

On the second issue as to whether the respondent was properly awarded 36 month's salaries. The record shows that the respondent prayed for reinstatement in her CMA F1. The Arbitrator awarded her 36 months remuneration. Following the findings of unfair termination and taking into consideration that the respondent did not dispute the award of compensation instead of reinstatement, it is my view that the she is entitled to compensation for unfair termination.

On the amount awarded, I see no reason to interfere with the amount awarded because the award of compensation is discretionary to the arbitrator. He is the one who heard the parties, the respondent had applied for a reinstatement, but on page 17 of the award, the arbitrator made clear reasoning as to why he awarded the compensation instead. He explained how the condition of the respondent was (pregnant), she also directed himself on Rule 32(5) of the Labor Institutions (Mediation and Arbitration) Rules, G.N No 67/2007 as well as citing the case of **Branch Director CRD Vs. Titoh Kwareh, Revision No. 14/2011.** All those observations show that there is a reason behind the arbitrator's award of compensation.

It is trite law that when orders of compensation are issued as a matter of discretion, therefore the appellate court's interference to the

discretion should be minimal based on crucial issues like illegality, misapprehension of the law etc. In the case of **Veneranda Maro & Another Vs. Arusha International Conference Centre, Civil Appeal 322 of 2020** [2022] TZCA 37 (18 February 2022) while faced with the same situation whereby the appellant was disputing the amount of compensation awarded by the High Court, the Court of Appeal (Hon. Lady Justice S. E. Mugasha, JA) had this to say:


Currently, although the law 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 courts.

Having observed that the arbitrator awarded the amount judiciously, I see no reason to interfere with that part of the award.

As to the award of one month salary in lieu of notice, I find the respondent is entitled to the same pursuant to clause 5 of the employment contract. Therefore, the same is hereby confirmed. All said and done, on those findings, I find the present application to be lacking merits and it is hereby dismissed in its entirety.

Dated at Dar es Salaam this 21st day of February, 2022.




S.M. MAGHIMBI
JUDGE