IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 50 OF 2021

(From the decision of the Commission for Mediation and Arbitration of Dar es Salaam at Kinondoni dated 21st day of December 2020 in Labour Dispute No. CMA/DSM/ILA/19/2020 (Ngaruka: Arbitrator)

BETWEEN

SCANIA TANZANIA LTD.....APPLICANT

VERSUS

HUMPHREY DOMINICIAN PONERA.....RESPONDENT

JUDGMENT

29th June 2022 & 30th June 2022

K. T. R. MTEULE, J.

This is an application seeking for this court to call for the record of Commission for Mediation and Arbitration in Labour Dispute No. CMA/DSM/ILA/19/2020 for this Court to satisfy itself as to the correctness, rationale and propriety of the findings and the award issued therein. The application further seeks for this court to revise, quash and set aside the said award and its proceedings and determine the dispute on its merit.

From the record of CMA, the affidavit of the Applicant and the submission in support of the Application, it appears that the Applicant

employed the Respondent as a service advisor on a permanent contract which commenced from 19th February 2018 with a monthly salary of TZS 1785,000. In September 2019, under disciplinary proceedings, the Respondent was charged with the offence of stealing some spare parts and found guilty. The employer initiated criminal proceedings where the Respondent was charged with the offence of stealing at Buguruni Primary Court Ilala District. The Primary Court acquitted the Respondent from the offence he was charged with. On what the applicant alleged to have the Applicant's abscondence from work and basing on the findings of the disciplinary proceedings which confirmed the offence of stealing as charged, the respondent was terminated from the employment.

The termination aggrieved the Respondent who lodged a complaint in the CMA, where the matter commenced by a failed mediation and then arbitration proceedings. In the arbitration, the arbitrator considered the fairness of the reason and procedure in terminating the applicant therein (the instant respondent). The arbitrator found both the reason and the procedures to be unfairly observed and ordered the employer who is the instant Applicant to pay all statutory

terminal benefit and 12 months salaries as compensation all making a total of **TZS 31,786,839.00.**

In this application, the Respondent never responded to the application. He was initially represented by one Nehemia Munga, Personal Representative who appeared on 19th April 2021 and later by one Sammy Katerega, Personal Representative who appeared on 11 October 2021. In all other dates when the matter was called, the Respondent was recorded to be absent hence the court ordered the matter to proceed ex parte and by way of written submissions.

Having considered the submissions of the applicants, I am inclined to address the issue as to **whether the applicant has established sufficient grounds to warrant revising of the CMA award.** The first argument of the applicant's challenged the propriety of the respondent in using the decision in the criminal case in deciding the matter without being satisfied as to which decision came first between the disciplinary decision and the criminal judgment. Having narrated the evidence of DW1, Exhibit tendered RD 4, and Exhibit RD 5 the applicant is of the view that the reason of termination was the Respondents abscondence and not the criminal case.

I have gone through the proceedings and the decision of the CMA. It is true, there was evidence which alleged the respondent to have absconded from the work from 30/9/2019 to 30/10/2019.

Throughout the decision of the CMA, I could not find anywhere the evidence of abscondence was considered. I agree with what the Applicant's counsel submits that abscondence is one of the disciplinary offences which can warrant to termination of employment under **Rule 9 (1) of the Employment and Labour Relations (Code of Conduct) Rules, GN. No. 42 of 2007** as prescribed in the list of offences under disciplinary procedures. Could the CMA addressed itself on the evidence of abscondence, it could have come up with a different finding with regards to reasons for termination. The termination letter which was served to Respondent clearly shows that the applicant was terminated on reasons of abscondence. From the foregoing, I differ with the arbitrator's findings on the issue of reasons.

As to whether the procedure for termination was correctly followed is another question to be determined. The Applicant's counsel is of the view that the act of the Applicant making efforts to find the Respondent through various means of communication amounts to

observance of appropriate procedure. Termination of employment is guided by Rule 4 of the Rule 4 of the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures Embedded in GN. 42 of 2007. It provides:-

> *"(1) Senior managers should be appointed as chairperson to convene a disciplinary hearing in the event of:-*
>
> *(a) further misconduct following a written warning or warnings or*
>
> *(b) repeated written warnings for different offences; or*
>
> *(c) allegations of serious misconduct such as those referred to the Rules relating to termination of employment, and which could on their own justify a final written warning or dismissal.*

In the evidence the employer did not show if there was any disciplinary meeting which dealt with abscondence apart from the one which was held prior to the said abscondence. The applicant's counsel escaped to address whether there was a disciplinary meeting which was held to decide the fate of the Respondent after abscondence. At this point, having found no disciplinary meeting held to discuss the termination, I see no reason to differ with the

arbitrator in finding the termination to be unfair in terms of procedure.

Now what follows is the rationale of the reliefs. The arbitrator awarded the statutory terminal benefits and compensation of 12 months salaries. This has aggrieved the applicant who has opinion that it is too much for a matter where termination was fair in terms of reasons. In determining the reasonability of the relief, I will be guided by the finding of the Court of Appeal in **Felician Rutwaza vs. World Vision Tanzania (Civil Appeal 213 of 2019) [2021] TZCA 2.** The Hon. Justices of Appeal had the following to state:-

> *"We find it convenient to start with the complaint on compensation which was the appellant's bone of contention in ground 4. The learned Judge discussed the remedies flowing from unfair termination in the light of section 40 (1) (c) of the ELRA and held (at page 225 of the record) that it is not mandatory that in all cases of unfair termination, the arbitrator should order compensation of not less than 12 months' remuneration. In the context of the case in which the unfairness of the termination was on procedure only, guided by some decisions of that court, the learned Judge reduced compensation from 12 to 3 months. With respect, we agree with her entirely. In Sodetra (SPRL) Ltd. v.*

Mezza & Another (supra) referred to by Mr. Mkumbukwa, the High Court (Rweyemamu, J.) interpreted section 40 (1) (c) thus:-

> *"...a 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 a heavier penalty than the latter..." (at page 10).*

We respectfully subscribe to the above interpretation, for we think it is founded on logic and common sense; it reflects a correct interpretation of the law. Under the circumstances, since the learned Judge found the reasons for the appellant's termination were valid and fair, she was right in exercising her discretion ordering lesser compensation than that awarded by the CM A. We sustain that award".

From the above decision, it is apparent that each case must be considered on its own circumstances when it comes to assessment of compensation. The Respondent having been terminated on fair reason due to abscondence which falls under a serious disciplinary offence, the Applicant only errored in not holding disciplinary hearing. This happened after another disciplinary hearing which confirmed the Respondent to be involved in a theft incidence although acquitted in a criminal charge. All these indicate that there was a very good reason to terminate the respondent's employment if the procedure

could have been correctly followed. In my view, this is an appropriate case to apply the wisdom in the case of **Felician Rutwaza supra** to find that compensation of 12 months salaries is excessive in the circumstances of this case. This calls for a need to revise the CMA award.

In the above reasons, it is my finding that the issue as to **whether the applicant has established sufficient grounds to warrant revising of the CMA award** is answered affirmatively.

From the foregoing I hereby revise the award of the CMA by reducing the compensation from 12 months to 3 months remuneration. All other contents of award will remain undisturbed. The application is therefore allowed to that extent. It is so ordered.

Dated at Dar es Salaam this 30th day of June, 2022.

KATARINA REVOCATI MTEULE

JUDGE

30/06/2022