IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 235 OF 2022

(Arising from Labour Dispute No. CMA/PWN/MKR/90/2021)

HASSAN NAMTEMA..... APPLICANT

VERSUS

DESTINY PRE AND PRIMARY SCHOOL..... RESPONDENT

JUDGMENT

K.T.R, Mteule, J

13th February, 2023 & 16th February,2023

This application is seeking for revision of the decision of the Commission for Mediation and Arbitration of Pwani in Mkuranga (CMA) in **Labour Dispute No. CMA/PWN/MKR/90/2021.** In the CMA the applicant complained to have been unfairly terminated from his employment and claimed in the CMA Form No. 1 to be paid all salaries, entitlements, and remuneration in full without loss of income in accordance with the laws of the Land.

From what I gather from the CMA record and the affidavits of the parties, the applicant was working with the respondent as driver. On 2 June 2021, by a way of letter, the applicant asked a permission from the respondent to go to visit his family in Mtwara to attend his

sick children. On 9th June 2021 having seen no response to his letter, he decided to travel to Mtwara. He returned to work on 7th July 2021 when the school resumed from midterm holiday and found a letter which refused permission to travel. On 19th July he received another letter which terminated his employment with effect from 31st July 2021.

In the CMA, the arbitrator considered three issues. The first issue was whether there were sufficient reasons for the termination of employment; the second issue is whether procedures for termination were followed and the third one being what relief are the parties entitled to.

After evaluating the evidence adduced by the parties, the arbitrator considered the act of the applicant to travel for 26 days without a permission as an act which constituted sufficient reasons for the termination of his employment.

As to whether the employer followed the procedure to terminate the applicant, the arbitrator was satisfied that there was no proper procedure used to terminate the applicant. The arbitrator found no right to be heard was accorded to the applicant in accordance with **Rule 13 of G.N No. 42 of 2007**. The arbitrator found no compliance with **Rule 13 (2) (3) (4) of G.N No 42 of 2007** since

the applicant was not given any notice concerning the allegations against him and no disciplinary proceedings were held against the applicant.

After the above findings, due to failure to comply with the procedure, the arbitrator awarded the applicant a compensation of two months salaries which is TZS 560,000.00. He further awarded the applicant Severance allowance which was computed to TZS 75,384.00 and one month leave which is TZS 280,000.00. All these made a total of TZS 915,384.00.

The applicant was not satisfied with the award hence lodged this application for revision. The Application is supported by the affidavit of the personal representative of the applicant who raised four grounds of revision as follows:-

1) The arbitrator erred in awarding the applicant only 2 months compensation instead of the minimum of 12 months.
2) The arbitrator erred in deciding that the Respondent had fair reasons to terminate the applicant.
3) The arbitrator erred in not awarding notice pay to the applicant.
4) The arbitrator erred in not awarding the subsistence allowance and repatriation costs.

The application was heard by oral submissions where the applicant was represented by Mr. Joseph Salira while Mr. Ibrahim Makuhi, the administrator of the respondent appeared on behalf of the respondent.

In the applicant's submissions, Mr. Salira abandoned the 2nd ground concerning the fairness of the reasons for termination. He proceeded to submit on other grounds.

Regarding ground No. 1, Mr. Salira referred to page 8 of the CMA award, and stated that the arbitrator having found the applicant was terminated to have been terminated without proper procedure it was contrary to **section 40(1) (c) of the Employment and Labour Relations Act, Cap 366** to award 2 months as compensation due to unfair termination.

He referred to the case of **David Reuben Senge vs. Solar Security Service Limited, Labour Revision No. 20 of 2019**, High Court Moshi at page 7 which interpreted **section 40 (1) (c) of Cap 366** to mean that 12 months is the minimum the arbitrator can award after finding unfair termination of employment. According to him, in this case the Court held that the arbitrator does not have mandate to award below the minimum amount provided by the law. The applicant sought for compensation of 24 months. The arbitrator

had power to allow all 24 months. He further cited the Court of Appeal decision in **Veneranda Maro and Winifrida Ngasoma vs. Arusha International Conference Centre, Civil Appeal No. 322 of 2020** where the Court of Appeal of Tanzania at Arusha page 11 held that the CMA had capacity to award more than 12 months.

Regarding the 3rd ground, Mr. Salira blamed the arbitrator for having not awarded notice payment which is the requirement of **section 41(5) of Cap 366.**

Mr. Salira argued grounds 4th and 5th in consolidation. He submitted that the applicant was not awarded subsistence allowance and repatriation costs which contravenes **section 43(1)(a) of Cap. 366 and (c)**. He therefore prayed for this Court to revise the decision of the CMA and issue any remedies as the Court may deem appropriate.

In reply to the applicant's submission, Mr. Ibrahim, the respondent's Administrator submitted that he agreed with the arbitrator's findings and decision as he decided to withdraw his revision which he initially instituted to challenge the CMA award.

Responding to the first issue, Mr. Ibrahim submitted that the applicant was not an employee as he was just a probationer not yet confirmed to work. He proceeded to state further that the laws cited

by the arbitrator at pages 8, 9, 10 and 11, are relevant to the matter and correctly applied by the arbitrator.

Regarding ground 3, he submitted that the applicant was issued with notice by being paid one month salary. Regarding the last ground concerning repatriation and subsistence allowance, Mr. Ibrahim submitted that the applicant was employed from Vikindu where the school is situated and therefore there was no need to pay repatriation costs. In his believe, the arbitrator did not commit any error.

From what I gather from the history of the matter in the CMA and the supporting evidence as well as the parties submission, I am to decide on one issue as to "**whether the applicant has adduced sufficient grounds to warrant revision and setting aside of the CMA award**" and the second issue is to "**what reliefs are the parties entitled?"** In determining these issues, the grounds of this application will be considered one after another.

In the first ground the applicant is claiming an error on the part of the arbitrator for having not awarded the minimum compensation of 12 months after having found unfair termination of the applicant's employment. I have read the case laws cited by Mr. Salira. It is true in **David Reuben Senge**, the High Court was of the view that an arbitrator or a judge cannot award less than 12 months

compensation. However, it is an established principle of law that the discretion to award compensation needs to be exercised judiciously taking into account all the factors and circumstances in arriving at a just decision. **(See Veneranda Maro supra at page 12).** It is now an established principle that substantive unfairness in termination attracts heavier penalty that procedural unfairness which attracts lesser penalties. **(See Veneranda Maro supra).**

The discretion in awarding compensation for procedural unfairness is now guided by the case of **Felician Rutwaza versus World Vision Tanzania, Civil Appeal No. 213 of 2019** from which I shall seek guidance. In this case, the Court of Appeals categorically stated that when there is only procedural unfairness involved with no substantive unfairness, then an amount lesser than the minimum prescribed in **Section 40 (1) (c) of Cap 366** can be awarded. It is from this ground I cannot agree with the applicant that the arbitrator lacks power to award lesser months than 12.

As to whether the award of 2 months compensation is insufficient, I have to take into account the entire circumstances surrounding the matter. It is not disputed that the respondent had a reason to terminate the applicant's employment. It is on record that the said reason is the act of the applicant to leave his work and travel to

Mtwara for 26 days without permission. In my view this is a serious disciplinary offence which should have been sufficient to terminate the applicant if proper procedure was followed. Since the only problem was on procedural compliance, I think the arbitrator was right to assess the quantum to two months remuneration. I see no reason to interfere with the finding and the decision arrived upon exercise of lawful discretion.

Regarding the third ground of revision on notice payment the arbitrator declined to pay it because the respondent testified that the said notice payment was paid and the applicant did not object. I have gone through the CMA record, neither in the CMA Form No 1 is the payment claimed nor in the evidence did the applicant challenged the respondent's assertion of having paid the said notice payment. What I see, the arbitrator did not have any basis to pay that notice payment.

On the issue of repatriation and subsistence allowance, it was not claimed in the CMA. As well it is asserted by the respondent that the applicant was employed form Vikindu where the school he was employed with is situated. It appears that the claim of repatriation and subsistence allowance surfaced for the first time at this revisional level. It was not an issue in the CMA. In my view, I cannot address it

at this level of revision. Nevertheless, the respondent's claim to have employed the applicant in Vikindu where the duty station is located needs to be disapproved by evidence which ought to have produced in the CMA. Again, I will find this ground unfounded.

From what I have found in grounds 1, 3 and 4, I am to find the first issue as to whether there are sufficient grounds for this court to revise and set aside the CMA award answered negatively.

As to relief, having found none of the grounds is answered in favor of the applicant, then the application carries no merit. As such, the only remedy is to dismiss it. Consequently, this application is dismissed. The decision of the CMA is upheld. Each party to take care of its own costs. It is so ordered.

Dated at Dar es Salaam this 16th Day of February 2023.

KATARINA REVOCATI MTEULE

JUDGE

16/2/2023