IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

CONSOLIDATED REVISION NO. 295 AND 304 OF 2022

MONGATEKO MAKONGORO MONGATEKO..... .....1st APPLICANT

LUCY GEORGE MUSHI.....2nd APPLICANT

VERSUS

NATIONAL BANK OF COMMERCE LIMITED ..... RESPONDENT

(From the decision of the Commission for Mediation and Arbitration of DSM at Ilala)

(Mpulla, Arbitrator)

Dated 3rd August, 2022

in

REF: CMA/DSM/ILA/105/2021/57/2021

JUDGEMENT

16th & 28th February 2023

Rwizile, J

In this consolidated application for revision, this court is asked by the parties to revise the decision of the Commission for Mediation and Arbitration, (to be referred herein as the Commission), in two grounds. **First**, whether the awarded amount of compensation was legal, fair and adequate. **Second**, the legality of assessing compensation basing on basic salary instead of remuneration.

But incidences leading to this highly contentious dispute originate from termination of the employment of the applicants. Whereas the 1st applicant was employed as the Head of Sales on 8th January 2014, the 2nd applicant was employed as Manager; Customer Experience and Sales on 7th November 2011 (exhibit P1). Their employment contracts were of unspecified period of time.

After some years of peaceful employment relationship between the parties, the applicants were terminated on 23rd April 2021 and 27th April 2021 respectively in terms of exhibits D10 and D11. The reasons for termination were stated in their termination letters, relating to gross negligence in carrying out their duties. Before termination, the applicants were subjected to the disciplinary hearing and found guilty of the charges and hence termination.

Because they were not satisfied with termination, they filed a labour dispute claiming for terminal benefits due to unfair termination. According to the record of the Commission, the 1st applicant claimed the total amount of compensation of 1,360,861,736.00TZS being compensation for 48 months, the sum of 860,861,736.00TZS and general damages for gross mistreatment, mental torture and discrimination, the sum of

500,000,000.00TZS. The second applicant on her part claimed the total sum of 517,844,432.00TZS as compensation for 48 months, 317,844,432.00TZS and 200,000,000.00TZS as general damages for gross mistreatment, mental torture and discrimination.

The Commission after a hearing, found that termination was both substantively and procedurally unfair.

It awarded 442,895,680.00TZS which is 24 months salaries and general damages assessed at 100,000, 000.TZS for the 1st applicant. For the 2nd applicant, it was the sum of 176,662,400.00TZS as salaries for 24 months, the sum of 126,662,400.00TZS and general damages assessed at 50,000,000.00TZS.

This award however did not please both parties. They all applied for revision attacking the Commission for awarding inconsiderably little amount of compensation for the applicants, while the respondent cried for the huge amount of compensation awarded.

On 26th October 2022, it was agreed that the two applications be consolidated and the two issues be argued. The hearing was by written submissions. Advocate Rahim Mbwambo was for the applicants, while for

the respondent, Joseph Sylvester Ndazi learned advocate of Brickhouse Law Associates represented the respondent.

The applicants' submission was clear that the Commission in awarding compensation did not consider important things such as; **first**, that the applicants have been out of employment for over 18 months at the time the award was given and that there is no possibility of getting any other employment given the restrictions available in the banking industry. **Second**, that it did not consider as well, the crucial question on how the applicants are supposed to live for the rest of their lives from the date of the award, given the fact that they are unemployed and unlikely to be employed in the banking industry. The learned counsel for the applicants took support in the cases of;

i. **Veneranda Maro & Another vs Arusha International Conference Center**, Civil Appeal 322 of 2020 at page 9 and 18, where in consideration of Rule 32 and 34 of the Labour Institutions (Mediation and Arbitration) Rules, 2007 and the decision of the South African Labour Court of **KEMP t/a CENTRALMED VS RAWLINS** [2009] 30 ID 2677. The Court

of Appeal upheld compensation of 48 months just as the applicants pleaded in the CMAF1.

ii. **Isack Sultan v North Mara Gold Mines Limited,** Consolidated Labour Revision Application No. 16 & 17 of 2018, High Court Labour Division at Musoma, where 84 months were awarded by the court.

iii. **Anna Mbakile v DED Geita,** Labour Revision No. 114 of 2019 High Court Labour Division at Mwanza, the award was 60 months and

iv. **North Mara Gold Mine Limited v Khalid Abdallah Salum,** Revision No. 25 of 2019 High Court Labour Division at Musoma.

He therefore asked this court to award 48 months as compensation.

Dealing with the second issue, it was submitted that the Commission was wrong in considering compensation basing on basic salary instead of remuneration. It was the learned counsel's view that the Commission left out all other entitlements clearly stated in the CMA F1 such as housing allowance and medical/life insurance. He insisted that the same were proved because there was no dispute through cross examination. He argued, that a point not cross-examined on, is taken as admitted as held in the case of **Kilanya**

General Suppliers Ltd & Another vs CRDB Bank Ltd & Others, Civil Appeal 1 of 2018 Court of Appeal of Tanzania at Dar es salaam

It was further argued that since compensation under section 40(1)(c) of the Employment and Labour Relations Act (ELRA), provides payment of compensation to the employee of not less than twelve months remuneration. And that the term remuneration as defined under section 4 of the ELRA is not limited to salary, the Commission ought to consider all-other remuneration due to the applicants. The learned counsel then held the view that since the employment contracts of the applicants (exh. P1) considered among others house allowance as remuneration, then the sanctity of contract stated in the case of **Erolink Limited v Vicent C. Kimaro**, Revision No. 195 of 2022, High Court Labour Division at Dar es salaam, should be respect. He asked this court to award compensation in line with the law.

Opposing the application, the respondent's submission has material disagreement on the amount of compensation awarded, while the Commission did not assign reasons. Mr. Joseph argued that the law provides minimum compensation for unfair termination as salaries of 12 months under section 40(1)(c) of the ELRA. Awarding any amount higher than 12 months,

he pointed out, should be done with reasons. He said, the Commission didn't assign any reason for doing so. If the same applied discretion, the law requires that discretion must be exercised judiciously and reasons be given. He added, the Commission failed in this regard and improperly exercised discretion to award a higher compensation without according proper legal reasons for doing so. Failure to give reasons was a bad exercise of discretion and is not in line with decision of the Court of Appeal in the case of **Veneranda Maro and Winfrida Ngasoma v Arusha International Conference Centre** (supra). When concluding this point, he argued that, this court has to interfere with the finding of the Commission on compensation. It was his view that this court is clothed with such powers as under the case of **Pangea Minerals Limited v Gwandu Majali**, Civil Appeal No 504 of 2020.

On the second issue, the learned counsel was of the view that compensation awarded is excessive and improper. It was added that, general damages are awarded in order to redress the suffered wrong. In this case, he argued further, general damages are in respect of discrimination, but there is no evidence on how the applicants suffered as a result of the alleged

discrimination. The extent of suffering would have informed the Commission on the general damages to be awarded to redress the situation.

Above all, the learned counsel held the firm view that, the Arbitrator awarded general damages without addressing any specific injury or stating the reasons or legal basis for the award. Here reference was made in the case of **Ashraf Akber Khan v Ravji Govind Varsan,** Civil Appeal No. 5 of 2017, court of Appeal of Tanzania. It was his further argument that the award of general damages was wrong.

He added, it was done without considering the loss of Tanzanian Shillings Four Billion One Hundred and Thirty Million Only (TZS 4,130,000,000) that the respondent suffered due to gross misconduct of the applicants. The learned counsel said as well that, if they had performed their duties properly and with due diligence on Peertech Company Limited, the loss would not have been occasioned to the respondent. In conclusion, this court was asked to interfere with the award by nullifying it.

By way of a rejoinder, apart from nearly reproducing what was sometimes submitted in chief, it was substantially added that section 40(1)(c) of ELRA provides for compensation which is not less than 12 months. Further, it was

rejoined that an award of general damages is in the trial court's domain. To interfere with the amount awarded, it must be shown that the same was inordinately high or low as held in the case of **Reliance Insurance Company Limited & Others v Festo Mgomapayo**, Civil case No 23 of 2019 at page 21.

Having carefully considered rival submissions of the parties, my determination on the contested issues is brief and straight to the point. To me two issues have to be determined generally since they are centred on compensation.

The position of the law on damages has been clearly stated in the cited authorities.

Of importance is the binding decision of the Court of Appeal in **Veneranda Maro & Another vs Arusha International Conference Center** (supra). I consider this case very crucial since both counsel have cited it to support their respective positions. In my considered view, the case has attained the status of the double-edged sword, which even the user gets hurt to some extent.

To start with, as held in the above case, section 40(1) of ELRA provides compensation in case of unfair termination. But the manner in which

compensation is to be considered under the section, is stated under Rule 32(5) of the Labour Institutions (Mediation and Arbitration Guideline) Rules 2007, GN.67 of 2007, it includes assessment of;

i. *Any prescribed minimum or maximum compensation*

ii. *the extent to which the termination was unfair*

iii. *the consequences of the unfair termination for the parties including the extent to which the employee was able to secure alternative work or employment*

iv. *the amount of the employees' remuneration*

v. *the amount of compensation granted in previous similar cases*

vi. *the parties conduct during the proceedings; and any other relevant factors.*

In applying the above criteria, the commission has to exercise its jurisdictional discretion carefully and in compliance with the law. This court, therefore has no room to interfere with discretion of the arbitrator unless it is satisfied that the arbitrator did not observe as held in the case of **Veneranda Maro and Winfrida Ngasoma v Arusha International Conference Centre** (supra) at page 12, the following:

*"... **one**, if the inferior Court misdirected itself; or **two**, it has acted on matters it should not have acted; or **three**, it has failed to take into consideration matters which it should have taken into consideration and **four**, in so doing, arrived at wrong conclusion..."*

Or

As held in the case of **Relance Insurance Company (T) Ltd and 2 Others v Festo Mgomapayo**, (supra) that, where a wrong principle is applied.

Applying the principles in the case at hand, it is as clear as crystal that the arbitrator found out that termination was not grounded on neither substantive nor procedural fairness. This means, it is not true as submitted by the respondent that the arbitrator had to consider the loss of 4,130,000,000.00TZS the respondent suffered due to gross negligence of the applicants. This submission is wrong because, **first** it was not held by the Commission that the misconduct of gross negligence was proved. **Second**, the respondent admitted so. If the respondent felt the finding of the Commission on this point was a misdirection, she would have challenged the same. Keeping mum, is a clear indication that there was no evidence to support that allegation against the applicants.

As it has been shown before in the authorities cited, section 40(1)(c) of the ELRA, provides the minimum amount of compensation for unfair termination as not less than 12 months. It does not provide the maximum limit. There are a litany of authorities including the cases of **Veneranda Maro and Winfrida Ngasoma v Arusha International Conference Centre, Isack Sultan v North Mara Gold Mines Limited, Anna Mbakile v DED Geita and North Mara Gold Mine Limited v Khalid Abdallah Salum** (supra) as cited by the parties. The amount awarded in the above cited cases was not less than 48 months. That notwithstanding, despite providing the minimum of not less than 12 months, that did not take away the discretion of the court or the Commission.

In opportune cases, even far below the minimum has been awarded when there are valid reasons for termination but without following the procedure. The case of **Felician Rutwaza v World Vision Tanzania**, Civil Appeal No. 213 of 2019 is a clear example.

It follows therefore that rule 32(5) of GN. 67 of 2007, is important. It states that an arbitrator may make an award of appropriate compensation based on the circumstances of each case. And of course, based on the six principles

as already stated above. In addition, the court have to take into account the principal object of the labour laws, which is to promote economic development through economic efficiency, productivity and social justice, stated under section 3(a) of the ELRA.

As to whether compensation made is appropriate, it is a matter of evidence. The available evidence is that applicants were terminated upon unproved allegations of gross negligence. I do not see any reason therefore to hold for the respondent that the amount of compensation is too high.

It is not too high because, the law does not provide the maximum and that there is no evidence that the applicants committed misconduct charged.

As to whether the same is too low, I have also to look at the reasons advanced by the applicants. First is that they were not proved to have committed a misconduct and so believe it was an act or an incidence of discrimination. It was submitted so and the commission held that they were discriminated. The reason for believing they were discriminated is that they were singled out from their departments and charged when the duty was done by many others. As well, and that their salaries were withheld and their loans interest status changed to commercial from staff. In the view of the

Commission discrimination was direct as pointed out under section 7 of ELRA.

I think, discrimination referred under section 7 is based on colour, nationality, tribe or place of origin, race, national extraction, social origin, political opinion or religion, sex, gender, pregnancy, marital status or family responsibility, HIV/AIDS, age or station of life. Having reviewed the evidence I see nothing in my view, that suggests that the applicants were discriminated. The evidence on discrimination is not apparent. Failure to prove their misconduct in my view, may in itself be an act of negligence on part of the respondent and no a discriminatory act.

There is no dispute that the applicants had the so-called staff loans. The evidence on how the loans were dealt with was stated in their termination letters exh. D 10 and 11. They were asked to settle the same immediately rest, interest is converted into market rate. I do not think this is an act of direct discrimination all together. Therefore, based on the nature of the application and the fact that neither the applicants nor the respondent showed how the arbitrator awarded low or high by abuse of his discretion or applying a wrong principle, I find nothing to suggest that I have to interfere

with the amount of compensation award. By any standard, the amount of compensation cannot be taken as too low or too high.

Dealing with whether it was wrong to award compensation based on the salary alone. I think this should not detain me. It is trite that the governing law is section 40(1)(c) of ELRA.

For clear understanding of the section, it states as follows;

> *40.-(1) 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.*** (Emphasis added)

The meaning in section 40(1)(c) is plain. Two things are apparent, **one,** as it has been held before, it provides compensation for not less than 12 months. That is 12 months is the minimum stated amount. **Second**, and now most importantly, it plainly refers to "**Remuneration"** and not **Salary**.

As submitted, Remuneration includes, a salary and other benefits due to an employee. It has been defined under section 4 as hereunder;

> *"Remuneration" means the total value of all payments, in money or in kind, made or owing to an employee arising from the employment of that employee*

From the wording of the term, it does not need further construction since the wording is plain. This means, the applicants were right in challenging the award of compensation based on the salary alone in exclusion of other benefits provided they fall due under their employment. In line with the above is subsection 2 of section 40. It also cements the position that what is stated under sub c of the section is not sole.

It is in addition to what the employee is entitled in terms of law or agreement. For easy reference it states as hereunder:

section 40(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.*

I have no doubt from the foregoing that since the award restricted itself on the salary, it was wrong and the same therefore should be in compliance to

section 40(1) (c) and (2) of the ELRA. This means, in as much as I do not find it is too low or too high to be interfered with as the applicants have tried to intimate. I find the amount of compensation as assessed by the Commission and the amount of general damages awarded fair. I quash the compensation 24 months salary and substitute for it **24 months remuneration.** Now therefore compensation should be calculated to include what is stated in their termination letters exhibits D10 and D11. That is;

I. 24 months salary
II. Notice
III. House allowance
IV. Leave due
V. Substance allowance

The rest of the award remains unaltered. This means, the application partly succeeds to the extent explained. I make no order as to costs.

A.K. Rwizile

JUDGE

28.02.2023