

TANZANIA / JUDGMENT

Michael Ngeleja

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT MUSOMA CONSOLIDATED LABOUR
REVISION NO. 15623 AND 16405 OF 2024 REFERENCE NO. 202407021000015623 AND REFERENCE
NO. 202407101000016405 MICHAEL NGELEJA..... APPLICANT
VERSUS NORTH MARA GOLD MINE LIMITED..... RESPONDENT

JUDGMENT

2Cfh February & 11th March, 2025. M. L. KO MBA, J.: This is a across appeal, I may call it, as on 02/7/2024 applicant herein, Michael Ngeleja, (employee) filed an application for revision on matter decided by the Commission for Mediation and Arbitration (CMA) on 30th day of May, 2024 originating from labour dispute number CMA /MUS /86/2023. Further on 10/07/2025 above named respondent filed revision against the decision of the same CMA issue on date 30th day of May, 2024 resulted from labour dispute number CMA /MUS /86/2023. Page 1 of 17 While at the CMA, applicant registered a labour dispute against his former employer, North Mara Gold Mine Limited claiming for unfair termination which was conducted unprocedural. It was complained that applicant was involved in stealing GBM (Gold Bearing Material) property of then employer. He was taken to police and further disciplinary hearing by the employer proceeded. On 28/9/2023 he was terminated for misconduct of dishonest or any other major breach of trust contrary to BARRICK Disciplinary Code, and decided to refer the matter to CMA by using CMA F.I dated 04/10/2023. The Commission found there was no good cause for termination of the applicant and ordered him (the applicant) to be paid 15 months salary, payment in leu of notice and severance payment. Both parties were not amused by CMA decision and knocked the door of this court. Applicant Under Section 91 (1) (a) (b), 91 (2) (a) (b) (c) and Section 94 (l)(b)(i) of the Employment and Labour Relation Act No. 6/2004 (ELRA) as amended by section 14 (b) of the Written Laws (Miscellaneous Amendment) Act No. 03/2010 and Rule 24 (1), 24 (2) (a) (b) (c) (d) (e)(f), 24 (3) (a) (b) (c) (d) and Rule 28 (1) (c) (d) (e) of the Labour Court Rules 2007 filed application praying this court to call, revise and set aside the Page 2 of 17 Arbitrator's decision in respect of labour dispute number CMA /MUS /86/2023 by the Commission for Mediation and Arbitration at Musoma and be pleased to grant the applicant, compensation of 60 months salaries and any other terminal benefits as prayed in the CMA Fl. On the other hand, North Mara Gold Mine Limited (Employer) filed an appeal praying for this court to call for the record and proceedings of the Commission for Mediation and Arbitration of Musoma in Labour Dispute No. CMA/MUS/86/2023 and proceed to revise and set aside the CMA award issued on 30/05/2024 and any other relief(s) this Court deems

fit to grant. Both parties supported their cases by affidavit and there is counter affidavit. When the matter was ready for hearing, employee had legal service of Mr. Ernest Mhagama while the employer enjoyed that service of Mr. Faustine Malongo both are learned advocates. Mr. Mhagama was the one who started to address this court and started by first issue on whether the compensation awarded to employer was huge after he ruled that there was unfair compensation, Mr. Mhagama insisted that when there is proof of unfair termination the compensation should be Page 3 of 17 huge and cited to me the case of Veneranda Maro and Winfrida Ngasoma vs Arusha International Conference Centre Civil Appeal No. 322 of 2020 where Justices awarded 48 months' salary. Comparing to the case at hand, he said in CMA Fl employee applied for 60 months which to him and was fair as pleaded. Counsel then combined the 2nd and 3rd issue about procedures and his issue was whether there were fair procedures in termination. He complained that employer did not follow procedures as employee was terminated on ground of stealing GBM and after that saga, basing testimony of DW2 (Zera) employee was arrested by police and was charged with economic case at Tarime District Court. While under bail, he went on submitting that employee was charged by employer on 13/8/2023 for dishonest and breach of trust as he was involved in GBM stealing and was terminated from employment. He stressed that because employee was involved in GBM theft, and because employer did not at first opt to exercise internal mechanism of termination and because the matter was pending before Tarime District Court, then, North Mara was prohibited to take any disciplinary action against employee under section 37 (5) of ELRA. Page 4 of 17 He went on argue that if employer opted for criminal, then were supposed to wait for decision of the court otherwise the action by employer to proceed with disciplinary action before completion of criminal case led to unfair termination because the outcome of criminal case is unknown. He cemented his submission with CCBRT hospital vs Daniel Celestine Kivumbi Civil Appeal No. 437 of 2020 CAT at DSM page 12-17. Further he complained that Arbitrator failed to note pending criminal case when rule that there was no valid reason for termination, he found that was important matter to be addressed. On the 4th issue he was brief that Arbitrator issued terminal benefits but he did not order one month salary basing on remuneration at the basic salary while the law is clear that the same has to be calculated basing on remuneration as under S 41(5) ELRA as was in Donald Jidey Elkieza vs North Mara, Revision No. 16 of 2023. He prayed the remuneration as recorded in exhibit C1 to be considered. Mr. Malongo for employer presented five issues as picked from affidavit. He started with the first issue on whether it was proper for arbitrator to rule it was unfair termination. He elaborated that employee was charged by employer with major breach of trust as he was mentioned by Ramadhani Page 5 of 17 Tufigy to be involved in stealing GBM. Following arrest of Ramadhani, he said employee left office prior to the settled date of his leave, to him, that shows employee was involved in the stealing the said GBM and DW2 was not cross examined when testify at CMA. By failure to cross examine, he insisted that employee admitted what was testified and find refuge in Hatari Msharubu @ Babu Ayoub vs Republic, Criminal Appeal No. 590 of 2017. He went on submitting that, so far as employee admitted to commit an offence, then employer had reasons not to believe employee and therefore dishonest and breach of trust was proved to the required standard. Citing the case of Nassoro Khatau Yahya vs Toyota Tanzania Limited, labour Revision No. 192 of 2016 at page 10-11 he alleged that employer may terminate employee on dishonest and

so far as employee admitted while at police then it was not proper for CMA to rule termination was unfair. On the 2nd issue he submitted that if employer had lawful reason for termination as submitted in previous issue, then arbitrator errored to award 15-month salary. The same applies on the 4th and 5th issued that because there was fair termination then arbitrator was wrong to award payment in Page 6 of 17 leu of notice and severance allowance as it was fair termination. Arguing further on the 4th issue, he said payment in leu of notice is issued when employer decided to terminate employee by notice when on employment contract and he don't wish the employee to perform his duties as found in S 41(5) ELRA. However, in case at hand the termination was caused by misconduct. At the 3rd issue about compensation of 15 months' salary (TZS 54 mil) he was of the submission that the calculation was based on TZS 3,638,083/= which was not correct salary of employee because it has quarterly bonus which is paid each quarter as clarified by employee when cross examined by counsel for the employer and therefore, TZS 485,753/ was not supposed to be part of monthly salary of the employee. He went on complained of second overtime, PPH of 22 hours (TZS 205,935.59) which is paid to employee for his labour beyond the usual time and it is not paid each month as it appears in exhibit A 17 (pay slip) which show there was no PPH. In case this court will find the termination was unfair, he prayed bonus and PPH not to be included in calculations. Responding to submission by Mr. Mhagama, on the issue of huge compensation Mr. Malongo submitted that it is not requirement of law Page 7 of 17 rather it must be appropriate depending on circumstance of the court. He clarified that Minimum compensation is 12month salary and the arbitrator grant 15 months which is beyond minimum rate while subscribe to decision in Veneranda Maro and Winfrida Ngasoma vs Arusha Inte Conference Centre (supra) on mandate of Arbitrator. Further he cited the case of Pangea Mineral Limited vs Joseph Mgalisha Bulabuza (Civil Appeal No.282 of 2021) [2023] TZCA 17471 in which it was decided that CMA has discretion and compensation is not punishment, interference is allowed only when discretion was not exercised judiciary. On the 2nd and 3rd issue raised by Mr. Mhagama on unfair termination counsel was of the submission that employee was not terminated for theft rather dishonest and breach of trust which was not be tried by any court. While acknowledging that that there is pending criminal case, he insisted that there was no evidence of the offence which employee was facing and therefore it was not easy for the CMA to know what was the charge in criminal case. However, he insisted it was not employer who reported employee to police but it was police in their investigation and that he was aware of Section 37(5) of ELRA. Relating the section and the case at hand, Mr. Malongo submitted that in the case at hand there was no charge sheet Page 8 of 17 tendered as exhibit and therefore the case of CCBRT is distinguishable. On the 4th issue he reiterates his submission that employee was not supposed to be paid payment in leu of notice. He prays the application by employee to be dismissed entirely and arbitrators award be nullified. Responding to issues raised by Mr. Malongo, employee advocate submitted that the base of the case is exhibit A1 and A2 which are investigation and charge sheet made by employer which indicates that the said dishonest is from stealing of GBM. He insisted that dishonest has to emanate from certain facts and to him, employer believe that employee was involved in stealing. He did not dispute that employee was mentioned by another person in criminal case, but that person was not among the witnesses testified at CMA for employer to conclude in dishonest and further there was no caution

statement tendered neither task force report which prove that person mentioned employee. Mr. Mhagama disputed the fact that employee left the office earlier that set date as there was no proof of charge of absent in employment. While subscribe to the precedent in Nassoro Khatau Yahya vs Toyota Tanzania Limited (supra) he insists in the present case there is no origin of that breach of trust to employee other than annexure A1 and that why, Page 9 of 17 he concluded, arbitrator found the termination was unfair. On the second issue of compensation, he insisted it was supposed to be more than 15 months and he prayed for more months as there was no valid reason for termination while insisting that penalty must be heavier not appropriate. 3rd issue calculation of compensation he submitted that the amount was reached based on exhibit C1 which was monthly remuneration while complaining 15 months to be not enough while insisting that PPH and 22 hours overtime forms part of remuneration as per section 4 of ELRA he was supposed to get all that if they could not terminate employee as per annexure C1. He clarified about heavier and appropriate compensation basing on the decision in Veneranda Maro and Winfrida Ngasoma vs Arusha International Conference Centre (supra) while insisting that section 40(1) (c) is infinity as it provide minimum rate. Because Form F1 is pleading he insisted the one who depart must explain reason of departing from pleading which is F1. About unfair termination he submitted that there is relationship between criminal case and the disciplinary proceedings instituted by the employer as A1 (Charge sheet) clearly incriminate employee with the offence of stealing and therefore they were supposed to Page 10 of 17 wait. Incidence occurred within the employment premise. Commenting on the case of Pangea Mineral Limited vs Joseph Bulabuza, (supra) he noted that the case insist compensation is not punishment which he agree, however he prayed for compensation for loss of employment and income. In his rejoinder Mr. Malongo submitted that it is true that the law has set minimum amount and the arbitrator in this case award more than minimum and therefore he doesn't find reason to fault Arbitrator as CMA F. 1 alone is not the only criteria to grant what was prayed and in Veneranda Maro and Winfrida Ngasoma vs Arusha International Conference Centre (supra) there is no fix number of months to be paid as compensation but discretion. On the complaint of unfair termination he insisted that the issue of breach of trust has no connection with stealing in GBM and prayed this court to dismiss the prayer by employee and grant employer prayers. That makes the end of summary of submission by counsel for parties. After careful consideration of the parties' competing submissions, reading CMA decisions and Court records as well as relevant law, my duty is to analyse each issue raised by each party before I set position of this court. While employee complained of compensation and other payment to be minimal and contrary to law, on the other hand, employer complained that Page 11 of 17 employee entitled to nothing as it was a fair termination. All issues as raised are rooted from the issue on whether or not termination done by employer was fair. Mr. Mhagama complained of unfair procedure by the employer when condemn employee to be involved in stealing of GBM. Employer conducted disciplinary proceedings and terminated the employee. As submitted by Mr. Mhagama under section 37 (5) of ELRA restrict disciplinary action against the employee who is charged with criminal offence. Mr. Mhagama insisted that disciplinary action against his client was conducted while criminal proceedings were in progress and his client, employee was under police bail. Mr. Malongo did not dispute the existence of criminal case at Tarime District Court, however he maintained that

employee was terminated for dishonest and breach of trust as there was no charge sheet tendered at the CMA. His submission is supported by exhibit A1 where the employee was charged for dishonest or any other major breach of trust contrary to offences category 4 of Noth Mara Gold Mine Disciplinary Code. However, statement of the offence explains the company lost the trust to employee after being arrested and subsequently detained by Police force following Page 12 of 17 allegation of his involvement in the attempt theft of GBM. At this juncture I understand submission of Advocate Mhagama that dishonest must have a reason and from exhibit A1 which was supplied by employer it is clear that employer lost trust due to allegation of employees' involvement in attempt theft. It was allegation which was not proved. During hearing of the case employee testified that the criminal charge against him was filed on 22/8/2023 and the employer charge against him for dishonest was 30/8/2023 following disciplinary hearing. Mr. Mhagama complained that disciplinary hearing was initiated when criminal case was already filed, it might be true but I failed trace exhibit tendered to prove criminal charge. It was just an oral testimony. Although employer ought to know status of his employee, under the law, criminal charge is not proved what is confirmed is allegation of existence of criminal charge. While I subscribe to position in *Nassoro Khatau Yahya vs Toyota Tanzania Limited* (supra) that dishonest is among the reason to justify termination of employment, in the case at hand, dishonest was not proved. The action of taking day off more than expected was elaborated during hearing that employee compensated his days which was on duty. However, if employee run from office for the reasons of arrest of other people, he Page 13 of 17 could not return to working station because by the time he returns, fate of those other people was not known. So, his absence at working station which was not proved but elaborated by employee himself cannot be subjected to criminal allegations. That being the position of this court, can it be said dishonest or major breach of trust was proved? Exhibit A1 is about attempt stealing of GBM and during disciplinary hearing employer paraded witnesses to testify how employee was involved in the allegation. Page 19 and 20 of the CMA award, the arbitrator analyses the employer witnesses testimony and find key witness to whom confession was done and or a person who mentioned employee to be involved in connection with stealing GBM was not called to testify before disciplinary committee. Even members of task force were not paraded as witnesses to verify their report. Failure to have those key witnesses the disciplinary committed were not able to prove misconduct. Just as analysed by arbitrator, employer had no good reason to terminate employee. Another issue raised by parties is concerning payment of compensation. Employee prayed for 60 months compensation in F1 but the arbitrator award 15 months. While I subscribe to the case of *Veneranda Maro* and Page 14 of 17 *Winfrida Ngasoma vs Arusha International Conference Centre* (supra) that it set no fixed number of months to be fair in compensation, I am also aware that compensation is not punishment as was in *Pangea Mineral Limited vs Joseph Bulabuza*, (supra) thus; '7/7 determining the CMA award, we have considered the fact that the arbitrator is required to make an appropriate award by having in mind that in labour cases, issuance of compensation is not to punish the employer but rather to compensate the loss incurred by the employee'. In the case at hand, Mr. Mhagama submitted that employee lost his job and income so he is entitled for compensation. Arbitrator award 15 months salary as compensation. So far as both parties agree that the law has set minimum of 12 months and employee was awarded 15 months which is above

the minimum, I find arbitrator utilized well his discretion which was exercised judiciously as he provides reasons for award, that employer had no reasons for termination of employment. About calculation, employer complained of inclusion of bonus, PPH and 22 hours overtime in salary claiming that those items are not paid monthly. Mr. Mhagama insisted that items mentioned are part of remuneration and was liable to be included in calculations. Let us see what is provided under the law; Page 15 of 17 40.-(1) Where an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer, (a)..... (b).....

- (c) to pay compensation to the employee of not less than twelve months remuneration. The word remuneration has been defined under section 4 to mean; "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 cited provision, compensation involve remuneration which is all money payable to employee. So, the issue that there some payment which was not given every month or he was not working on overtime bases has no feet to stand as remuneration includes allowances as the word used is all payments in money or kind. Employee complained of calculation of one month salary which was contrary to law. In the award arbitrator issued one month salary but counsel complained of calculations. Mr. Malongo disputed payment of one month's salary in leu of notice. I find the law is clear under section 41(1)
- (b) ii that employee is supposed to be paid 28 days for employee who was Page 16 of 17 under monthly payment, the amount to be paid has been clarified under section 41(5) that; 'Instead of giving an employee notice of termination, an employer may pay the employee the remuneration that the employee would have received if the employee had worked during the notice period.' Having provide the definition of the word remuneration, it is the position of this court that one-month payment in leu of notice is based on remuneration of employee which include all payments which employee would have been paid if he was at work. In the upshot, the application is allowed to the extent as analysed. This being the labour matter, each party to bear his own costs. DATED at MUSOMA this 11th of March, 2025 K M. L.
KOMBA Judge Page 17 of 17

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