IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MKUYE, J.A., GALEBA, J.A., And KAIRO, J.A.)

CIVIL APPEAL NO. 281 OF 2021

BULYANHULU GOLD MINES LIMITED ..... APPELLANT

VERSUS

PASCHARY ANDREW STANNY..... RESPONDENT

[Appeal from the Decision of the High Court of Tanzania (Labour Division) at Shinyanga]

(Mdemu, J.)

dated the 26th day of February, 2021

in

Labour Revision No. 8 of 2020

.....

JUDGMENT OF THE COURT

8th, 15th & 22nd July, 2022

GALEBA, J.A.:

Paschary Andrew Stanny, the respondent, was employed by Bulyanhulu Gold Mines Limited, the appellant on 31st January 2008. He was employed to work in the appellant's Underground Mining Department at Kakola in Kahama, initially as a Mining Trainee. He was promoted from that original title to Miner 1, Miner 2, Miner 3 and his last position with the appellant was Scoop Operator at the time he was terminated on 31st January

2019. His termination was due to ill health following impaired hearing capacity of his right ear.

Before employment, the respondent had to undergo a pre-employment occupational medical examination and during the course of employment, the appellant was to undergo a series of periodic occupational medical examinations to ensure his physical fitness for the job at all material time of his employment. The former test was carried out on the day he was employed, that is, on 31st January 2008 as per the medical examination form at page 503 of the record of appeal, where the respondent was found with normal hearing in the left ear and reduced hearing in his right ear.

The medical examiner's recommendation following the above results are found at page 505 of the record of appeal, at line 22 as follows:

"Should avoid prolonged noise environment."

[Emphasis added]

As indicated above, the respondent was nonetheless recruited and assigned work. However, nine years later, following the respondent's own complaints of hearing problems and through the appellant's routine medical checks, in 2017 the respondent was allowed to attend various experts at

various medical institutions including Excellence in Hearing Care and Regency Medical Center to check him and if possible, provide medication to the respondent's right ear. Later the matter was escalated to the Occupational, Safety and Health Agency (OSHA) which later sent the respondent to Muhimbili National Hospital (MNH) for various ear tests. On 23rd July 2018, MNH experts wrote a letter of reference number MNH/ENT/PL/VOL.II/215 to OSHA. The letter was signed by Dr. Shabani Mawala and Dr. Perfect Kishevo both being Ear, Nose and Throat (ENT) specialists. Further, on 5th January 2019 the appellant requested for a comprehensive report in respect of the respondent's ill health status and addressed it to the above ENT specialists. The reply to that letter (of 5th January 2019 from the appellant) is contained in the Patient Feedback Form contained at page 450 of the record of appeal. In that feedback form, the doctors referred the appellant on their earlier report of 23rd July 2018 addressed to OSHA.

In the meantime, on 3rd November, 2018, OSHA wrote a letter to the respondent and copied it to the appellant confirming that the respondent's

disease was not work related since he was recruited with the sickness he was complaining of.

On 31st January 2019, the appellant terminated the respondent on grounds of ill health. The respondent challenged the termination as unfair to the Commission for Mediation and Arbitration at Shinyanga (the CMA) in Labour Dispute No. CMA/SHY/KHM/16/2019. As per the CMA form No. 1, the respondent prayed for reinstatement because procedures for terminating him were not followed and the reason for doing so was unfair. Consequently, the matter was tried and at the end the CMA found that the respondent's termination was, indeed unfair. It ordered the appellant to pay the respondent a total of TZS. 157,519,473.6 being TZS. 123,022,686.6 which was 36 months salaries as compensation for the unfair termination and TZS. 34,496,787 as insurance relief for the incapacity. This decision of the CMA deeply aggrieved the appellant, who lodged Labour Revision No. 8 of 2020 to the High Court of Tanzania Labour Division at Shinyanga to challenge her defeat. Nonetheless, the application was dismissed after the latter court indicated that it did not find any lawful reason to fault the decision of the CMA. The appellant was further aggrieved by the dismissal

of her application for revision, hence the present appeal which is based on the following six (6) grounds of appeal:

"1. *The learned High Court Judge erred in law for upholding the award of the Commission for Mediation and Arbitration which did not conduct mediation of the dispute before the matter was referred to arbitration.*

2. *To the extent that there was no certificate stating whether or not the dispute had been settled by the mediator, the Learned High Court Judge erred in law for upholding the award of the Commission for Mediation and Arbitration.*

3. *The Learned High Court Judge erred in law in failing to hold that the Commission for Mediation and Arbitration had no jurisdiction to determine matters related to insurance laws.*

4. *To the extent that the insurer was not heard, the Learned High Court Judge erred in law in upholding the award of payment of insurance benefit.*

5. *The Learned High Court Judge misapplied the laws governing termination on grounds of incapacity arising out of ill-health.*

6. *The Learned High Court Judge erred in law in relying on the findings of Muhimbili Hospital doctors instead of OSHA findings."*

When this appeal came up for hearing on 8th July 2022, Mr. Faustin Anton Malongo teaming up with Ms. Caroline Lucas Kivuyo both learned advocates, were appearing for the appellant, whereas Mr. Gervas Geneya also learned advocate, was for the respondent. They both prayed to adopt their written submissions which had been filed for the appellant and the respondent with the Court under rule 106 (1) and (7) of the Tanzania Court of Appeal Rules 2009, (the Rules) respectively.

Before submitting on the 1st and 2nd grounds of appeal, which he indicated that he would argue together, Mr. Malongo contended that the two grounds raised issues of law which this Court has jurisdiction to entertain, even though they had not been raised or discussed in the High Court. To support his position, he cited the case of **Tanzania Pharmaceutical Industries Limited v. Dr. Ephraim Njau (Number 1),** [1999] T.L.R. 255. Although Mr. Geneya objected, seeking to distinguish the above decision, we do not agree with him. The position of the law is that a point

of law need not be discussed in any court below before it can be raised on appeal. The position is deeply rooted in this jurisdiction such that we cannot get into parties' deliberations at any further depth, suffice it to hold that, Mr. Malongo was right and we will entertain the 1st and 2nd grounds of appeal, although they were not raised, discussed or even decided upon by the High Court. We will then go straight to the arguments of counsel for and against the issues raised in those grounds.

Mr. Malongo's complaints in grounds 1 and 2 are; **first,** that mediation as a mandatory process to be engaged along the timeline of a Labour Dispute at the CMA, was in this case, skipped, which according to him was unlawful. His **second** complaint was that, there was no properly filled in Certificate of Settlement/Non-Settlement provided for under rule 34 (1) of the Employment and Labour Relations (General), Regulations, Government Notice No. 47 of 2017. He also referred us to section 86 (3), (4) and (7) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] (the ELRA), in cementing his point that if mediation does not fail first, the arbitrator has no jurisdiction to carry out arbitration hearing of a labour matter. In the circumstances, Mr. Malongo impressed on us to hold that mediation being a

compulsory process in the labour dispute resolution mechanism established under our laws, the arbitrator of the CMA who upheld the respondent's claims had no jurisdiction to handle the matter. He, accordingly, implored us to nullify the proceedings and the award of the CMA and also the decision of the High Court because in any event the valid revision could not have proceeded from a nullity.

In reply, Mr. Geneya, submitted both in his written submissions and orally before us that because there is included in the record of appeal, a Certificate of Non-Settlement of the dispute at page 545 of the record of appeal, mediation was conducted and the same failed. He beseeched us to dismiss the 1st and 2nd grounds of appeal.

We have thoroughly considered the contending arguments of parties, and we think the appropriate point to start from, is to expound the mandate of the CMA. As a judicial body, the CMA is established by section 12 of the Labour Institutions Act, [Cap 300 R.E. 2019] (the LIA). The relevant functions of the CMA are provided for in section 14 (1) (a) and (b) (i) of that Act, which provides that:

"14.- (1) The functions of the Commission shall be to-

(a) ***mediate*** *any dispute referred to it in terms of any labour law;*

(b) *determine any dispute referred to it* ***by arbitration if-***

(i) ***a labour law requires the dispute to be determined by arbitration;***

(ii) *and*

(iii) *N/A"*

[Emphasis added]

Due to the nature of the disparity of the parties' positions as regards these first two grounds of appeal, in our view the issue for us to resolve is whether a reference of the matter to arbitration in the circumstances, was unlawful.

Resolving that issue will not consume a lot of our time because according to the Notice to Refer a Dispute to Arbitration which is contained at page 546 of the record of appeal, it is shown at line 8 that it was filed by

the respondent who was the complainant at that time under section 86 (7) (b) (i) of the ELRA, which provides that:

> *"(7)* ***Where the mediator fails to resolve a dispute within the period prescribed in subsection (4),*** *a party to the dispute may—*
>
> *(a) N/A;*
>
> *(b)* ***if the dispute is a complaint-***
>
> *(i)* ***refer the complaint to arbitration;*** *or*
>
> *(ii) N/A."*
>
> [Emphasis added]

Subsection (4) of section 86 of the ELRA which is referred to above in sub section (7) provides for the time limit within which the mediator must complete resolution of the dispute by mediation. That subsection provides that:

> *"(4) Subject to the provisions of section 87,* ***the mediator shall resolve the dispute within thirty days of the referral or any longer period to which the parties agree in writing."***

[Emphasis added]

We will then determine whether there was justification for the respondent to have invoked section 86 (7) (b) (i) of the ELRA to present his complaint to arbitration without first having to exhaust the mediation process. In this matter, according to the records of the CMA, particularly at page 14 of the record of appeal, it is clear that the matter was called for the first time before the mediator on 5th March, 2019. The record has it at page 15 that the matter was called again before another mediator, on 14th March, 2019. It appears, however, that up to 10th April 2019 when the Notice to Refer a Dispute to Arbitration was presented, the matter had not been mediated by the mediator since 5th March, 2019 when it was first called for mediation. So, under section 86 (7) (b) (i) of the ELRA the respondent referred the matter to arbitration because since when the matter was slated for mediation 30 days lapsed without the said mediation being concluded as required by section 86 (4) of the ELRA. We therefore, find nothing offensive of any law by the respondent presenting his complaint to arbitration as he did, unless Mr. Malongo was submitting that mediation had succeeded before 10th April 2019, which we are certain, was not his argument, because

we understood him as complaining that there was no evidence that mediation was conducted by the time arbitration started, which is why the complainant referred the matter to arbitration under the above provision of the law.

It is true however, that generally and in the normal course of labour dispute resolution legal processes, mediation is necessary under rule 4 (2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, Government Notice No. 67 of 2007, (the Mediation and Arbitration Rules), but we hasten to add that, it is not in every circumstance, that mediation has dogmatically to precede arbitration. There are exceptions to rule 4 (2) of the Mediation and Arbitration Rules, for the rule is not Scripture. One of such exception is where a mediator does not, in thirty (30) days, complete a mediation as provided under section 86 (4) of the ELRA, in which case a complainant may refer his complaint to arbitration under section 86 (7) (b) (i) of the ELRA, as it happened in this case. Another exception is contained at rule 6 (1) and (2) of the very Mediation and Arbitration Rules. That rule provides:

"6-(1) ***The Commission may refer a dispute to arbitration before it has been mediated*** *or set down for mediation and arbitration hearing on the same date. In contemplating this, the Commission may consider the following.*

(a) The consequences of any delay in the mediation process;
(b) The prospects of settlement at mediation;
(c) The effective utilization of the Commission's resources;
(d) The interests of the parties; and
(e) The public interests generally.

2. Parties may agree to submit a dispute to arbitration."

[Emphasis added]

That is to say there are circumstances where a labour dispute may go to arbitration straight without necessarily having to be mediated first. That said, we find nothing alarming for the matter between the parties having been entertained at arbitration without any clear order declaring failure of the mediation particularly in circumstances where mediation was not concluded in thirty (30) days, as required by section 86 (4) of the ELRA. In

the circumstances, the 1st and 2nd grounds of appeal are without merit and we accordingly dismiss them.

Before we proceed, we wish to observe that after hearing this appeal on 8th July 2022 and retired for deliberations, we entertained queries that needed clarification from learned advocates pertaining to documentation in respect of the issues of group health insurance and also the medical guidance that the appellant obtained in terms of rule 19 (3) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 (the Code), before she could terminate the respondent on grounds of ill health. So, we recalled counsel for both parties and they duly appeared before us for the second time on 15th July 2022. We are grateful to them for their valuable additional submissions on the issues posed. The substance of their clarification has assisted us abundantly in the course of composing this judgment.

Considering the scheme and setup of this appeal in terms of the grounds raised, we find it more coherent and logical for the time being to shelf the 3rd and 4th grounds of appeal which have a lot to do with insurance claims, and first tackle the 5th and the 6th, because determination of the

latter two grounds, particularly the 5th, might provide us a definite way forward which may not necessitate coming back to the 3rd and the 4th grounds.

So, we will move to the 5th and 6th grounds, which were argued by Ms. Kivuyo under rule 106 (10) (a) of the Rules. In those grounds the complaints of the appellant were twofold; **one,** was that the learned High Court Judge misapplied or did not apply properly the laws governing termination of employment by an employer on grounds of ill health of an employee. **Two**, the learned High Court Judge was wrong to have taken the opinion of the MNH experts as more credible than that of OSHA, on the point whether the respondent's illness was work related or not.

In elaborating the two points above, the learned advocate referred us to exhibits K10 and K11 which were letters from OSHA one dated 3rd November 2018 and another dated 25th March 2019 at pages 68 and 78 of the record of appeal respectively. According to Ms. Kivuyo exhibit K10 is a more credible report showing that the respondent's disease was not work related because OSHA had a historical background of the respondent unlike the NMH experts who did not have any background medical information of

the respondent. She submitted that MNH experts' opinion that the respondent's illness was work related was based on a misleading information received from the patient when he met the doctors. She insisted therefore that the respondent's disease was not work related as opined by OSHA in exhibit K10 as well as OSHA's explanation in its letter to PEMA advocates, exhibit K11. Ms. Kivuyo's effort was to convince us that the 6th ground of appeal ought to be allowed, because OSHA was the right institution with the right information backed with the historical background of the patient unlike the medical doctors at MNH, which was a general hospital.

In respect of the 5th ground of appeal, when the learned counsel were recalled on 15th July, 2022, based on a query we posed as to which opinion of the registered medical practitioner that guided the appellant to terminate the respondent on grounds of ill health, as required by rule 19 (3) of the Code, Ms. Kivuyo contended that the appellant in terminating the respondent was guided by the opinion of the ENT specialists contained in the letter dated 23rd July 2018. She moved the Court to allow the 5th ground of appeal that, termination of the respondent, in the circumstances, was legally justified.

In reply to the 5th and 6th grounds, Mr. Geneya submitted that the respondent was exposed to extreme noisy environment underground where he worked for over 6 years, which according to him, contributed to his hearing capacity deterioration in the right ear. He referred us to page 35 of the record of appeal where the respondent testified that he was working in environment of extreme noise. Other than the above, Mr. Geneya kept on referring us to the judgment of the High Court, to support his position while that was the very decision that the appellant was challenging in these proceedings. That remained his trend of argument despite our frequent interventions. Nonetheless, we understood Mr. Geneya's position to be that, the learned High Court Judge properly interpreted the relevant laws necessary for termination of employment based on ill-health. He finally implored the Court to dismiss the 5th and 6th grounds of appeal.

We have thoroughly studied the record of appeal and properly understood the arguments of counsel for the parties, particularly after they reappeared before us on 15th July 2022.

The hotly contested matter in the 6th ground of appeal was whether the respondent's illness was work related or not. On this specific issue we

agree with Ms. Kivuyo that the proper report to go with is that of OSHA and not that of MNH experts. And we will explain why. It is because, as submitted on behalf of the appellant, OSHA's opinion is backed by the appellants' diagnostic report which was prepared on 31st January, 2008 whereas the MNH experts' comment on that aspect was based on the oral information from the respondent which was indeed misleading. That is so because, the MNH report of 23rd July, 2018 states that the historical background was received from the patient. So, we do not agree with Mr. Geneya that the right report to attach more credence on the aspect of whether the illness was work related or not is the one from MNH. It is that of OSHA dated 3rd November, 2018. Thus, we find merit in the 6th ground of appeal and we allow it, to that extent.

We will now move to the 5th ground of appeal in which we think, the major issue for us to determine in this appeal is whether the reason for termination of the respondent on grounds of ill-heath was valid or it was not. We will start with substantive fairness and if we will find that the ground for termination was valid, then we will proceed to determine whether the procedure to carry out the termination was legally complied with.

The law relevant for termination of employment based on ill health is contained in sections 37 (1), (2) (a) (c), (4) and 99 (1) (a) of the ELRA on one hand, and rules 19 and 21 of the Code on the other. There is also section 39 of the ELRA, on the burned of proof. Section 37 (1), (2) (a) (i), (4) and 99 (1) (a) of the ELRA provide as follows:

> *"37 (1) It shall be unlawful for an employer to terminate the employment of an employee unfairly.*
>
> ***(2) A termination of employment by an employer is unfair if the employer fails to prove-***
>
> ***(a) that the reason for the termination is valid;***
>
> *(b) N/A*
>
> *(c) that the employment was terminated in accordance with a fair procedure.*
>
> *(4) In deciding whether a termination by an employer is fair, an employer, arbitrator or Labour Court shall take into account any Code of Good Practice published under section 99."*
>
> [Emphasis added]

Section 39 of the ELRA, provides that:

> *"39. In any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair."*

The above section, comes out clearly that where there are allegations of unfair termination, the burden of proof that the termination complained of was fair, lies on the employer, and that is why, in labour disputes it is the employer who starts to give evidence, though, a respondent, unlike in other civil matters and even criminal cases, where a party initiating the proceedings starts to adduced evidence and then a party sued comes next.

Section 99 (1) (a) of the ELRA provides that in respect of all types of terminations, the provisions of the Code must be observed. In this respect, we indicated earlier on that the relevant provisions of the Code for our purposes are rules 19 and 21 which provide for substantive aspects of termination on account of ill health and procedural compliances to carry out termination of sick employees. Rule 19 provides for measures to be taken if a termination is to be deemed substantively fair based on ill health and rule 21, prescribes for the appropriate procedure to implement the spirit of rule

19 of the Code. We will start with rule 19 (1), (2) and (3), which provides that:

> *"19 –(1) An employer who is considering to terminate an employee on grounds of ill health or injury shall take into account the following factors to determine the fairness of the reason in the circumstances :-*
>
> *(a) The cause of the incapacity;*
>
> *(b)* ***The degree of the incapacity;***
>
> *(c)* ***The temporary or permanent nature of the incapacity;***
>
> *(d)* ***The ability to accommodate the incapacity;***
>
> *(e) The existence of any compensation or pension.*
>
> *(2) Where an employee is injured at work or is incapacitated by a work – related illness (the cause), an employer shall go to greater lengths to accommodate the employee (the ability to accommodate).*
>
> *(3)* ***The employer shall be guided by an opinion of a registered medical practitioner, in determining the cause and degree of any incapacity and whether it is of a temporary or permanent nature."***

[Emphasis added]

In our opinion, particularly in view of the contest between the learned advocates for the parties, the most relevant subrule of rule 19, is sub rule (3) of the Code. The rule requires an employer who wishes to terminate an employee to be guided by an opinion of a registered medical practitioner. A registered medical practitioner is defined, under section 3 of the Medical, Dental and Allied Health Professionals Act, No. 11 of 2017 (the Medical Professionals Act) as:

> *"a person holding a degree, advanced diploma, diploma or certificate in medicine or dentistry from an institution recognized by the Council, with his level of competency and registered, enrolled or enlisted to practice as such under this Act;"*

As indicated above, Ms. Kivuyo submitted that the opinion of the medical practitioner that the appellant relied upon to terminate the respondent is a report from MNH dated 23rd July 2018, exhibit PAS 2, contained at page 451 of the record of appeal. Indeed, the report was composed by Dr. Shabani Mawala and Dr. Perfect Kishevo both ENT specialists. There was no contest from Mr. Geneya that these doctors were

not registered medical practitioners within the meaning of section 3 of the Medical Professionals Act. We will therefore take it that the two medical doctors from MNH who issued the report on 23rd July 2018, were indeed registered medical practitioners with ability to render a credible opinion for guidance of employers in terms of rule 19 (3) of the Code.

As we proceed, there is one significant point that underlies the approach we are destined to take in resolving the issue we earlier framed in order to resolve the 5th ground of appeal. The point is that, termination of an employee on grounds of ill health unlike other kinds of terminations depends on a scientific guidance from medical experts. The issue of sickness is a question of medical science. It is not a question of human resource. And we think that is why the termination based on ill health is subjected by law to guidance of an opinion of a registered medical practitioner.

Going forward, we think it is opportune at this juncture to determine whether the appellant in terminating the respondent was indeed, guided by the opinion of the medical practitioners contained in the letter of 23rd July 2018. That letter from MNH experts had medical test results and

recommendations, this is what MNH ENT specialists found out and recommended at page 451 of the record of appeal:

> *"Definitive Diagnosis:*
> *Right ear; moderately severe hearing loss.*
> *Left ear; normal hearing.*
> *Prognosis:*
> *Permanent impairment.*
> *Impairment:*
> *(a) Permanent incapacity 50%.*
> *Recommendations:*
> *History, physical examination and investigation evaluation are in agreement with work related right ear moderately severe hearing loss.* ***We recommend the company to do the following for the betterment of the patient:***
>
> - ***Job relocation to a noise free environment;***
> - ***Use of hearing protective devices (ear plugs, ear muffs);***
> - ***Use of hearing aid on the right ear***
> - ***He needs follow up every 3 months."***
>
> [Emphasis added]

The reason we have reproduced the above medical findings and recommendations, we are looking for guidance of the medical practitioners that the appellant followed to terminate the respondent. In our view, the guidance given in that letter is for the company to carry out the four bullet points, including to place the respondent in a place of work which is noise free. We do not read anything in that letter indicating that the respondent is incapable of working, and that is why the medical practitioners suggested relocating the appellant in a place of work which is noise free and use some medical safety gears. In our considered view, in terminating the respondent the appellant was not guided by the opinion provided by the medical experts as required by the Code.

On 15th July 2022 Ms. Kivuyo informed us that they also had a meeting on 16th June 2019, which was attended by one Dr. Nickson Ismail Nkya who also gave evidence on behalf of the appellant as DW1. She was attempting to convince us that because Dr. Nkya participated in the meeting that resolved to terminate the respondent then, the termination was based on a medical opinion, of this medical doctor who was working at the mine. There are two reasons why we cannot take her argument seriously. **One,** at page

24 of the record of appeal, when adducing his evidence in the CMA, Dr. Nkya stated that he was not a specialist and that he was not an ENT specialist. He also confirmed that at the mine site there was no medical doctor who was a specialist in ENT as a branch of medical science. That is presumably why the appellant had to seek advice from OSHA and MNH. **Two**, Ms. Kivuyo herself told us that the right opinion that the appellant was guided by, is contained in the letter of 23rd July 2018 whose recommendations we have quoted above. So, we take it that other than the opinion of the 23rd July 2018, there is no other opinion which guided the appellant to terminate the respondent. But that is not all.

There was also a letter from OSHA. OSHA under the laws of Tanzania, is an Executive Agency that was established under order 2 of the Executive Agencies (The Occupational Safety and Health) Authority (Establishment)) Order 2001, Government Notice No. 332 of 2001 (the OSHA Establishment Order). Following its establishment, there was, two years later in 2003, enacted the Occupational Health and Safety Act No. 5 of 2003 (the OHS Act). The wide strategic objective behind the OHS Act was to make provisions for maintenance of safety, health and welfare of persons at work

in factories and other work places and to provide for the protection of persons other than persons at work against hazards to health and safety arising out of activities of persons at work. In this case OSHA, as indicated earlier on, was consulted, and it also gave its feedback vide its letter dated 3rd November 2018. Due to the significance of that letter we will quote it in full:

"JAMHURI YA MUUNGANO WA TANZANIA

OFISI YA WAZIRI MKUU,

KAZI, VIJANA NA WATU WENYE ULEMAVU

Mamlaka ya Usalama na Afya,
Mahali pa Kazi (OSHA),
P. O. Box 519,
DAR ES SALAAM

Kumbu. Na. CBA.246/386/01D/51 *3/11/2018*

PASCAL ANDREW STAN
TITLE UNDERGROUND SCOOP OPERATOR

YAH: UTEKELEZAJI WA SHERIA YA USALAMA NA AFYA MAHALI PA KAZI KUKAMILIKA KWA ZOEZI LA UPIMAJI AFYA BAADA YA AJIRA

Tafadhali rejea somo tajwa.

2. *Kwa mujibu wa Sheria ya Afya na Usalama Mahali pa Kazi Namba 5 ya mwaka 2003 kifungu cha 24 (2) Wakala wa Usalama na Afya mahali pa kazi*

umekamilisha upimaji wa afya yako baada ya ajira ***(exit medical examination).***

3. *Katika upimaji huo yafuatayo yamebainika kuhusiana na afya yako.*
   i. ***Una tatizo la kutosikia vizuri upande wa kulia (Moderately Severe 20 SNHL). Tatizo hili halijasababishwa na kazi uliyofanya katika kampuni ya ACACIA mgodi wa Bulyanhulu kwa kuwa lilikuwepo tangu ulipoanza kazi.***
4. ***Hivyo basi, unashauriwa kupata matibabu na ushauri katika hospitali iliyopo karibu nawe kwa taratibu za Wizara yenye dhamana ya masuala ya afya.***
5. *Majibu ya vipimo husika yameambatanishwa.*

Dkt. Edwin M. Senguo *sgd*

Dkt. Agnes Warioba *sgd.*

Kny. MTENDAJI MKUU

Nakala:

MENEJA MKUU
KAMPUNI YA UCHIMBAJI MADINI YA ACACIA,
S. L. P. 1081,
DAR ES SALAAM."

The findings and recommendations in the above letter were made pursuant to the powers derived from section 24 (2) of the OHS Act,

according to the letter itself. OSHA's findings and recommendations were coincidentally supplemental to the findings of the MNH doctors in their letter dated 23rd July, 2018 which we discussed above. According to OSHA's letter there are two points of critical significance to note; **One,** there are two findings as regards the respondent's diminished hearing capacity at item 3 (i) of the letter. The **first** finding is that the respondent had impaired hearing ability in his right ear and; the **second** was that such medical condition was not caused or related to works at the appellant's work place because at the time he was hired, that is on 31st January 2008, the respondent had the same problem.

Two, there is, in that letter at item 4, OSHA's recommendation to the employee following the above findings. OSHA, advised the respondent to continue with treatment and to receive medical advice from appropriate hospitals in terms of existing guidelines of the ministry responsible for health affairs.

It appears also that one law firm called PEMA Advocates, on behalf of the respondent, wrote a letter to OSHA, demanding clarification of what did its letter dated 3rd November 2018 quoted above mean, in terms of whether

the respondent's disease was work related or it was not. On 25th March 2019, OSHA responded to those lawyers *vide* its letter, exhibit K11 included in the record of appeal at page 78, clarifying the point. At item 3 of that letter line 27 to 30 on that page OSHA, clarified thus:

> *"3...Hali ya Bw. Pascal ilionekana kuwa hasikii vizuri upande wa kulia,* ***hali ambayo ipo sawa sawa na vipimo vilivyofanyika wakati wa kuanza ajira yake 2008. Mwaka 2018, Hospitali ya Taifa Muhimbili nayo imetoa vipimo hivyo hivyo husika swala la masikio yake.*** *Tafadhali fanya upembuzi yakinifu wa taarifa zote."*
>
> [Emphasis added]

OSHA's finding is that the medical condition, that is the extent of the respondent's hearing impairment at the time the respondent was employed on 31st January 2008, is exactly the same medical condition, as at the time of OSHA's report, on 3rd November 2018.

What the above means is that the respondent's medical condition at the time of his recruitment in 2008 was the same as the medical condition at the time of his termination over ten years later in 2009. That is as per OSHA. If that is the case, why would then he be terminated for medical reasons? In other words, if his medical condition has always been the same

throughout from 2008 to 2019, why terminate him for a medical condition that he had on the day of his recruitment? OSHA stated in exhibit K11 among other statements that *"Napenda kukujulisha kuwa taarifa zote zitolewazo na OSHA ni taarifa za kitaalam vile vile zipo kisheria".* The report that OSHA is making reference to is that dated 3rd November 2018. The latter report is the one which says, the respondent's medical condition at start and finish was the same.

That is particularly where, we are honestly entertaining difficulty when trying to agree with Ms. Kivuyo, that there were any valid medical reasons for the termination of the respondent's employment. We also took some time to study the matter, in the context of guidance from registered medical practitioners above. Both the MNH and OSHA were at concurrence on the way forward. The ENT experts from MNH advised the appellant to place the respondent at a work place with no excess noise and apply protective medical devices and to continue with medical check-ups every three months. On her part, OSHA made the same recommendation in its letter of 3rd November 2018, where she opined thus: *"Hivyo basi, unashauriwa kupata matibabu na ushauri katika hospitali iliyopo karibu nawe kwa taratibu za Wizara yenye dhamana ya masuala ya afya."* In our view, like the MNH

experts, OSHA did not find any reason to opine that the respondent be terminated, because there was no proved scientific worsening of the respondent's medical condition between 2008 and 2018, otherwise OSHA would have advised that the respondent be terminated because of his deteriorated medical condition.

Both recommendations of MNH experts and that of OSHA, on the way forward regarding the employment of the respondent is complemented by the provisions of clause 8 of the respondent's employment contract dated 31st January 2008 which is included in the record of appeal at page 468. That clause of the agreement states:

> ***"8. Medical Benefits.***
> *"For the duration of your employment with the Company you will be entitled to medical cover for yourself, one spouse and four registered dependents. The company will select the most appropriate medical scheme which could change from time to time."*

This clause took into account that the respondent may feel unwell whether from fresh contracted diseases or worsening of his existing medical condition which was known to the appellant at recruitment. For the above reasons, the appellant failed to discharge the burden of proof placed on her

by section 39 of the ELRA, of proving that the reason for terminating the respondent was valid. We therefore find no substantiated valid reason, for termination of the respondent if the basis was ill health. Hence, we find no merit in the 5th ground of appeal and we accordingly dismissed it.

Having made a finding, that there was no substantive valid reason for terminating the respondent, we find no meaning in discussing whether or not the procedure for termination was lawful. That would be seeking to establish whether a procedure to carry out an illegal process was lawful. That, we cannot do.

Further, having found that the termination based on ill health was not proved, then the reliefs hinged on health insurance on termination (which were not even claimed in CMA F1) cannot arise which means the respondent is not entitled to the insurance award of TZS. 34,496,787.00 by the CMA. In that same context, determining the 3rd and 4th grounds would be seeking to achieve nothing. We are therefore not going to resolve the grounds.

That said and done, this appeal is partly successful and partly dismissed. The decision of the CMA and that of the High Court are reversed such that the appellant is hereby ordered to reinstate the respondent in terms of section 40 (1) (a) of the ELRA while observing the medical

recommendation made by her medical experts when they examined the respondent at the time of his recruitment on 31st January 2008. We make no order as to costs.

DATED at **SHINYANGA**, this 21st day of July, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

This Judgment delivered this 22nd day of July, 2022 in the presence of Mr. Imani Mfuru, learned counsel for the Appellant, and Mr. Gervas Geneya, learned counsel for the Respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

W. S. NG'HUMBU
For: **DEPUTY REGISTRAR**
COURT OF APPEAL