IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 1430 OF 2024

(Arising from an Award issued on 29/12/2023 by Hon. L.C. Chacha, Arbitrator, in Labour Dispute No. CMA/DSM/KIN/561/2022/288/2022 at Kinondoni)

DELLAH MLAY..... APPLICANT

VERSUS

MG HOME & ESTATE COMPANY LTD ..... RESPONDENT

JUDGEMENT

Date of Last Order: 06/03/2024
Date of Judgement: 08/04/2024

B. E. K. Mganga, J.

Brief facts of this application are that, on 1st January 2017 Dellah Mlay, the herein applicant, signed a contract of employment with MG Home & Estate Company Ltd, the herein respondent. In the said contract, applicant was employed as residence supervisor at monthly salary of TZS 1,450,000/=. The parties maintained their employment relationship up to 28th September 2022 when respondent terminated employment of the applicant based on three allegations namely:- (i) Abscondment from duties for five(5) consecutive days from 19th September 2022 to 23rd September 2022 without any communicated notice to her supervisor;(ii) insubordination as it was alleged that she

ignored the orders of management communicated to her on 1st September 2022 to report to Mr. Makauki; and (iii) failure to recover loss of invoice number MG0031 of USD 7,285; in tune of TZS 16,864,775.

Applicant was aggrieved with termination of her employment, as a result, on 4th October 2022 she filed Labour complaint No. CMA/DSM/KIN/561/2022/288/2022 before the Commission for Mediation and Arbitration (CMA) complaining that respondent terminated her employment unfairly. In the referral form (CMA F1), applicant indicated that respondent had no valid reason to terminate her employment and that did not follow fair procedures of termination. In the said CMA F1, applicant indicated that she was claiming to be paid TZS 2,000,000,000/= being 48 months' salary compensation, loss of benefits, severance pay, notice in lieu of notice, damages and any other statutory benefits.

On 29th December 2023, Hon. Lucia Chrisantus Chacha, arbitrator, having heard evidence of the parties, issued an award that, there was a valid reason for termination hence termination was fair substantively, but it was unfair procedurally. The arbitrator, therefore, awarded applicant to be paid TZS 4,350, 000/= being three (3) months' salary compensation for unfair termination.

Applicant was aggrieved with the said award, as a result, she filed this application for revision. In the affidavit in support of the Notice of Application, applicant raised six (6) grounds namely: -

1. *That, the arbitrator erred in law and fact by stating that respondent established valid reasons for termination.*
2. *That the arbitrator erred in law for failing to award compensation as required by the labour laws after establishing that the respondent did not follow the procedures for termination.*
3. *That the arbitrator erred in law and facts by not properly evaluate weight of evidence adduced by the applicant.*
4. *That the arbitrator erred in law and facts by stating that the applicant failed to prove damage incurred and raised complaint on leave benefits have not been brought by way of condonation.*
5. *That the arbitrator erred in law and fact for not determining compulsory remuneration on suspension period of the applicant.*
6. *The arbitrator erred in law and facts by dismissing all the reliefs sought.*

Resisting the application, Respondent filed both the Notice of Opposition and the Counter Affidavit of Aman Moria.

At the time of hearing this application, applicant was represented by Mr. Dismas Raphael, learned advocate, while the respondent was represented by Ms. Miriam Bachuba and Ms. Fatuma Mgunya, learned advocates.

Arguing in support of the 1st and 3rd grounds, learned counsel for the applicant submitted that, in 2016 respondent employed the applicant for unspecified period contract of employment in the position of Resident

supervisor. He submitted further that, on 11th August 2022, respondent suspended applicant on ground that respondent incurred loss of USD 7,285 due to failure of the applicant to follow policies and procedures. He added that, in the suspension letter(exhibit D13) respondent informed applicant that investigation was being carried out. He went on that, on 28th September 2022, respondent served applicant with termination letter (exhibit D15) with three reasons namely (i) abscondment from duties for five consecutive days from 19th to 23rd 2022 without communication to supervisor, (ii) insubordination namely, that; on 1st September 2022 applicant ignored orders of management communicated to her to report to Mr. Makauki and (iii) failure to recover loss of invoice No. MG 0031 of USD 7285 equivalent to TZS 16,864, 775/= due to failure to follow the policy and procedures of the respondent. Learned counsel for the applicant submitted further that, the arbitrator found these to be fair reasons, but they were not. Learned counsel for the applicant cited the provisions of Section 37 of the Employment and Labour Relations Act[Cap. 366 R.E. 2019] arguing that, the said section requires the employer to terminate an employee based on valid reasons. He was of the firm view that there were no valid reasons for termination.

On allegations of abscondment, Mr. Raphael submitted that, respondent called DW1 and DW2 to prove this allegation, but their evidence is based on the counter book they purported to be attendance register (exhibit D3) which did not prove the allegation. He further submitted that, exhibit D3 shows previous years before 2022 even before applicant was employed but there is nowhere applicant after being employed, signed, or was supposed to sign. He added that, only technicians including DW1 were signing in exhibit D3. He went on that, exhibit D3 does not show that it is attendance register. He also submitted that, since applicant was not signing exhibit D3 from 2016, then, the said exhibit cannot prove the allegation of abscondment.

On the allegation relating to insubordination, learned counsel for the applicant submitted that, there was no proof of insubordination. He further submitted that, DW1 testified that, applicant refused to comply with his orders but during cross examination, admitted that he did not have evidence because he instructed applicant verbally. He went on that, DW1 testified further that, on 20th September 2022, he sent a letter to the applicant through WhatsApp message showing that applicant failed to give feedback. He added that, while under cross examination, DW1 admitted that he was not sure whether applicant

received it. He went on that, in the award, the arbitrator concluded that applicant failed to follow instructions of DW2.

On the allegation relating to failure to recover loss of invoice No. MG0031 valued at USD 7285, learned counsel for the applicant submitted that, it was evidence of DW2 that, guest arrived at the respondent's premises at night, and they were received by Fred Chengula as per registration form (Exhibit D6). He submitted further that, Applicant arrived at work in the morning and found guests in the rooms and asked whether they have paid or not, but she was answered that they arrived at night while tired. He submitted further that, applicant reminded Fred Chengula as to why the said guests have not paid and that the matter was reported to DW2, as a result, guests negotiated discounts so that they can stay for long time. He went on that, later on, DW2 directed applicant to make sure that she recovers the said debt. He added that, Applicant reported to Kawe Police station that there are guests who have stayed without paying but she did not get assistance and reported to DW2 who directed her to report at Oysterbay Police where she was issued with RB. No. OB/RB/53/3/2022. Learned counsel further submitted that, it was unfair to terminate applicant based on this ground because those guests were not received by the applicant rather, they were received by Fred Chengula, who has

not been terminated. Mr. Raphael submitted further that, Applicant made all efforts to recover the said debt including to report at police stations as she was directed. He went on that, according to exhibit D6, it was the duty of the receptionist who received the guests to recover the said debts because, applicant was not a receptionist and that, payments were being received by the cashier. He submitted further that, Respondent did not tender policies and procedures alleged to have been breached by the applicant. He added that, DW2 testified in chief that applicant was the cashier but during cross examination failed to prove that applicant was a cashier. He added that, Job description (exhibit D5) does not show that applicant was a cashier. He therefore concluded that, there was no valid reason for termination hence arbitrator failed to properly evaluate evidence.

Arguing the 2nd, 4th, 5th, and 6th grounds, learned counsel for the applicant submitted that, section 40 of the Employment and Labour Relations Act[Cap. 366 R.E. 2019] provides that, if termination is unfair, the employee shall be awarded compensation not less than 12 months. He submitted further that, for termination to be regarded as fair, there must be fair reason and fair procedure. To support his submissions, learned counsel for the applicant cited the case of ***Bati Services Company Limited v. Shargia Feizi,*** Civil Appeal No. 38 of 2021,

CAT(Unreported), ***Flavio Ndesanjo v. Serengeti Breweries Ltd***, Civil Appeal No. 357 of 2020, CAT(unreported), ***Stanbic Bank(T) Limited v. Iddi Halfani***, Civil Appeal No. 139 of 2021, CAT(unreported), ***Pangea Minerals Limited v. Joseph Mgalisha Bulabuza***, Civil Appeal No. 282 of 2021, CAT(unreported), and ***National Microfinance Bank(PLC) v. Elizabeth Alfred Khairo***, Civil Appeal No. 398 of 2020, CAT(unreported). He added that, in all the above cited cases, the Court of Appeal discussed section 40 of Cap. 366 R.E. 2019(supra) and held that, whenever termination is unfair substantively or procedurally, the employee is supposed to be awarded not less than 12 months' salary compensation. He further submitted that, DW2 testified that they did not follow procedure for termination and that, the arbitrator also found that termination was unfair procedurally. He further submitted that, arbitrator found that termination was fair substantively but, in his view, there was no fair reason for termination. Learned counsel for the applicant concluded his submissions praying that the application be allowed.

Responding to submissions relating to the 1st and 3rd grounds, Ms. Miriam Bachuba, advocate for the respondent submitted that, applicant had one-year fixed term contract as per exhibit D4 and not unspecified period. On reason of termination based on abscondment, she submitted that, DW1 and attendance register (exhibit D3) proved the allegation of

abscondment. She submitted further that, DW1 stated that, applicant did not attend at work for 5 days and that applicant did not want to sign exhibit D3. She went on that, exhibit D3 was operative on the dates applicant absconded and covered also previous years. She added that, Applicant never signed exhibit D3 as it was also testified by DW2 as she was the overall supervisor. She submitted further that, submissions that exhibit D3 was supposed to be signed by technicians is not reflected in evidence as such, it is submissions from the bar hence should be disregarded. She added that, exhibit D3 was admitted without objection.

On insubordination as a fair reason of termination, learned counsel for the respondent submitted that, respondent proved this allegation. Learned counsel submitted that, DW2 testified that management issued a letter (exhibit D13) dated 1st September 2022 directing applicant to handover her duties to Mr. Joseph Makauki and report to the said Joseph Makauki, but applicant did not comply. She added that, applicant sent WhatsApp Message dated 2nd September 2022 (exhibit D10) to DW2 showing that she refused to report to Joseph Makauki. She went on that, a letter dated 20th September 2022 (exhibit D1) written by DW1 to applicant shows that applicant refused to report to him as also reflected in WhatsApp Massage (exhibit D2). Ms. Bachuba submitted that, that

evidence was not discredited under cross examination. She added that, in cross examination, DW1 was only asked whether he has original letter(exhibit D1) but did not state that he was not sure whether applicant received the said letter. She added that, exhibit D13 was written by DW2 hence the arbitrator was justified to hold that applicant did not follow instructions of DW2.

On failure to recover the loss of USD 7,285 as a fair reason of termination, Ms. Bachuba, learned counsel for the respondent submitted that, DW2 testified that applicant was the supervisor of the apartment and had overall management and supervision role of the said facility as reflected in applicant's job description (exhibit D5). She further submitted that, in her evidence, PW1 testified that, the guests arrived at night while tired. She went on that, DW2 testified that applicant allowed guests to stay without payment. She added that, check in Form(exhibit D6) shows rules that were supposed to be followed by the applicant. Ms. Bachuba further submitted that, exhibit D6 does not show that Fred Chengula is an employee. When probed by the court, Ms. Bachuba submitted that, according to exhibit D6, guests were Bimax Mwangi and Michael Anthony and conceded that, at CMA DW2 testified under cross examination that, the said guests were received by Fred Chengula and

further that, in her evidence, applicant stated that Fred Chengula is an employee of the respondent.

Ms. Bachuba further submitted that, according to exhibit D5, applicant was supposed to ensure profitability of the facility as she was the one who was communicating to the director as corroborated by exhibit D7. She further submitted that, there was no evidence adduced that applicant reported at Kawe Police station rather, she reported only at Oysterbay Police after she has allowed one guest to depart. She added that, evidence that applicant allowed one of the guests to depart without paying was not challenged. She went on that, Applicant apologized to directors namely Sadoki Magai and DW2 as evidenced by WhatsApp massage (exhibit D10) and an email (exhibit D11) dated 29th August 2022 that was written by Applicant to Sadoki Magai. She further relied to an invoice dated 7th August 2022(exhibit D14) showing USD 7,285. She further submitted that, DW2 was not cross examined on loss, apology, failure to make sure that guests pay the loss hence that evidence is deemed to have been accepted as true. Learned counsel for the respondent cited the case of ***Paul Yustus Nchia, v. National Executive Secretary Chama Cha Mapinduzi & Another***, Civil Appeal No. 85 of 2005, CAT,(unreported) and ***Bomu Mohamed v. Hamis Amiri***, Civil Appeal No. 99 of 2018, CAT(unreported) to support

her submissions. She added that, Applicant did not adduce evidence to contradict evidence of the respondent. She submitted that, in her evidence, applicant admitted that the two guests did not pay. She strongly submitted that, Applicant being the overall supervisor, was supposed to make sure that money is paid regardless she was a cashier or not. In her submissions, learned counsel conceded that, there is no evidence as to who had a role of receiving money and how money was paid and received from guests. With those submissions, learned counsel for the respondent concluded that respondent proved that there was valid reason.

Arguing the 2nd ground, Ms. Bachuba, learned counsel for the respondent submitted that, the arbitrator was right not to award applicant 12 months' salary compensation because the law abhors substantive termination fairness than procedural. To support her submissions, learned counsel for the respondent cited the case of ***Felician Rutwaza v. World Vision Tanzania,*** Civil Appeal No. 213 of 2019, ***Tredcor Tanzania Ltd v. William F. Green***, Revision No. 28 of 2016, HC(unreported), ***Nassoro Khatau yahya v. Toyota Tanzania Limited***, Revision No. 192 of 2016, HC, ***Vedastus S. Ntulanyenka & 6 Others v. Mohamed Trans Ltd***, revision No. 4 of 2014, HC, ***Utore Lema v. Ecobank Tanzania Limited,*** Revision No. 546 of 2020, HC

and ***Daniel Celestine Kivumbi v. CCBRT Hospital***, Revision No. 925 of 2018, HC(all unreported) arguing that if termination is unfair only procedurally, an employee can be awarded less than 12 months compensation. She further submitted that, Section 40(1)(c) of Cap. 366 R.E. 2019 (supra) that provides discretion to the arbitrator to award and 12 months' salary compensation is not applicable in all cases. She added that, in the application at hand, the arbitrator exercised discretion and awarded the applicant 3 months' salary compensation. She went on that, there is nothing on record warranting this court to interfere with that discretion as it was justified. Ms. Bachuba further submitted that, factors that can be used by this court to interfere with the discretion of the arbitrator are (i) whether the arbitrator misdirected in the exercise of her jurisdiction, or (ii) acted on matters she should not have acted upon or (iii) failed to take into consideration matters she was supposed to take into consideration and (iv) in doing so arrived in a wrong conclusion. To support those submissions, learned counsel for the respondent cited the case of ***Pangea Minerals Limited v. Gwandu Majali,*** Civil Appeal No. 504 of 2020, CAT(unreported). She therefore invited the court not to interfere with the amount that applicant was awarded. She further submitted that, in ***Bati's case*** (supra) and ***Bulabuza's case*** (supra) cited by learned counsel for the applicant, the

Court of Appeal looked into circumstances of those cases and did not lay, as a principle, that, the court cannot go below 12 months compensation. In short, counsel for the respondent submitted that, in all the cases cited by counsel for the applicant, the Court of Appeal did not depart from its decision in ***Rutwa's case***(supra). With these submissions, learned counsel for the respondent prayed the application be dismissed for want of merit.

In rejoinder, learned counsel for the applicant submitted that, exhibit D3 has nothing to do with applicant, because, at all times she was not signing it. He added that, there was no proof or instruction that applicant was supposed to sign exhibit D3 for the whole period she was an employee of the respondent. He further submitted that, in WhatsApp Messages, applicant challenged that she was reporting to the director and that to be directed to report to the technician was unfair. He went on that, Applicant complied with directive in exhibit D13 hence there was no insubordination. Rejoining on submissions relating to loss, learned counsel for the applicant submitted that, loss recovery is not among the applicant's duties in her job description. He further submitted that, there is no proof that applicant allowed one of the guests to leave without pay. He added that, it is not in applicant's job description to ensure that guests are not leaving without paying. He also submitted

that, DW2 was cross examined hence his evidence was challenged. On the nature of contract of employment, learned counsel for the applicant conceded that, according to exhibit D4, applicant had one-year fixed term contract.

I have examined evidence in the CMA record and considered rival submissions of the parties in this application and I should, thank them for their valuable submissions and research. That aside, central issues in this application are whether (i) termination was fair in terms of reason and procedure and (ii) to what relief(s) are the parties entitled to.

I should point out from the start that, fairness of employment termination is grounded under section 37(2)(a), (b) and (c) Cap. 366 R.E. 2019(supra) namely that, there must be valid reason and procedures must be adhered to.

As pointed out hereinabove, termination of employment of the applicant was based on three grounds namely, (i) abscondment from duties for five consecutive days from 19th to 23rd September 2022 without communication to supervisor, (ii) insubordination namely, that; on 1st September 2022 applicant ignored orders of management communicated to her to report to Mr. Makauki and (iii) failure to recover loss of invoice No. MG 0031 of USD 7285 equivalent to TZS 16,864,

775/= due to failure to follow the policy and procedures of the respondent. The issue is whether, respondent proved these allegations by evidence.

I will start with the allegation relating to abscondment. Respondent relied on evidence of Joseph Deogratias(DW1) and Amani Moria (DW2) to prove this allegation. I have examined evidence of DW1 and DW2 and find that in their evidence they did not state the dates applicant did not attend at work. The allegation that applicant did not attend at work from 19th to 23rd 2022 without communication to his supervisor is only in the termination letter (exhibit D15) because it is not supported by evidence. DW1 who was the supervisor at the time of termination of employment of the applicant was, in my view, supposed to clearly give evidence as to the dates applicant did not attend at work without communication. On the other hand, DW2 depended on the information received from DW1 and did not testify that he made follow and find that applicant did not attend at work for the alleged period. Respondent also relied on the attendance register(exhibit D3) to prove this allegation. I entirely agree with submissions by counsel for the applicant that exhibit D3 did not prove the allegation of abscondment of the applicant because in the entirely exhibit there is no signature of the

applicant. It was testified by DW2 that applicant used not to sign exhibit D3 even prior to the allegation of abscondment. Therefore, tendering of exhibit D3 alone without further evidence from both DW1 and DW2 proving that applicant did not attend at work on the alleged dates was not enough. I have examined evidence of the parties in the CMA record and find that applicant(PW1) did not testify that only technicians were supposed to sign exhibit D3. In her evidence, applicant(PW1) testified that it was the duty of respondent to keep record of her attendance. I entirely agree with her and add that respondent was duty bound to bring evidence showing the dates applicant did not attend at work. I further agree with submissions by Ms. Bachuba, learned counsel for the respondent that submissions that, only technicians including DW1 were signing exhibit D3 is not supported by evidence. For the foregoing, I conclude that respondent did not prove the allegation of abscondment of the applicant from 19th to 23rd 2022.

It was submitted by counsel for the respondent that exhibit D3 was admitted without objection meaning that applicant admitted the contents therein. With due respect to counsel for the respondent. It is my view that, admission of exhibit into evidence without objection is not a conclusion or a proof of the content therein. In other words, admission

of exhibit without objection does justify that the other party has admitted the content therein. Admission of exhibit without objection may, as well mean that, the other party found it advancing his case or that it is not relevant, or it does not affect his evidence. In my view, once an exhibit is admitted in evidence with or without objection, its relevance and probative has to be considered by the court when considering the entire evidence of the party who tendered it and that of the adverse party. In the application at hand, as pointed hereinabove, exhibit D3 did not prove the allegation against the applicant.

It was alleged that, ignored the orders of the management communicated to her on 1st September 2022 requiring her to report to Mr. Makauki. It was evidence of DW2 that he directed applicant to handle over her duties to DW1 and report to DW1. It was evidence of DW1 that applicant refused to report to him. Evidence of DW1 that applicant did not report to him was not discredited or shaken during cross examination. I therefore find that respondent proved this allegation.

It was alleged that applicant occasioned loss of USD 7285 equivalent to TZS 16,864, 775/= due to failure to follow the policy and procedures of the respondent. I have carefully examined evidence of the

parties and find that respondent did not prove this allegation. I am of that view because, job description (exhibit D5) does not show that recovery of money was one of the duties of the applicant. More so, neither DW1 nor DW2 gave evidence relating to policies and procedures that applicant was supposed to follow in recovering the said money. What is clear in evidence is that two guests stayed at the respondent's apartment and did not pay. Evidence of DW2 and applicant(PW1) shows that, the said guests stayed at the respondent's premises since March 2022. It is my view that, respondent knew the whole situation and took no action. None- payment of the said amount by the Bimax Mwangi and Michael Amen Antony cannot only be associated to the applicant alone. I am of that view because, guest form (exhibit D6) that was tendered by the respondent shows on 26th March 2022 one Fred Chengula, a Tanzanian national with passport Number TAE 382838 and mobile phone Number 0685051771 filled the said exhibit D6 showing that the guests were Bimax Mwangi and Michael Anthony. It was evidence of the applicant that, the said guests arrived at night and were received by Fred Chengula because at the time of their arrival she was at home. It was further evidence of applicant(PW1) that the person who occasioned loss is the one who received the said guests namely Fred Chengula and not herself. That evidence was not shaken by that of the respondent. In

fact, DW2 when testifying under cross examination, stated that the said guests were received by Fred Chengula. In her evidence, applicant (PW1) stated further that, after noting that the said guests have failed to pay, she reported to the director that the person who received them said that they will pay. She further stated that the director issued an order that they should be removed from the room. Whether applicant complied timely with the order or not, cannot in my view, a ground for termination that she failed to recover the said loss. It was duty of DW2 to make sure that his order is complied with and that, the said guests pay their bill. I have considered the period the said amount remained unpaid while the said guests still staying in the respondent's apartment. It would appear that, respondent, like the applicant, was optimism that the said guests will foot the bill. In my view, if anything, DW2 also shares a blame on the said loss.

It was submitted by counsel for the applicant that respondent did not tender the policies and procedures that applicant did not follow leading respondent to incur the stated loss. On the other hand, it was submitted on behalf of the respondent that procedures and policies that applicant was supposed to abide by the applicant. With due respect to counsel for the respondent, on exhibit D6 there are no procedures and

policies that can be said were violated by the applicant. It would appear that counsel for the respondent is relying to Policy No. 5 which states that:-

"5. A room deposit of at least one night is required."

There is no dispute that the said guests stayed at respondent's apartment for more than one day. There is also no dispute that at their stay, the said guests paid some of their bills though they did not fully for their stay. There is no evidence to show that the said guest did not deposit payment for a room at least for one stay. Since the requirement was for the guests to deposit money for accommodation of a room at least for a single night, and since there is no proof that no deposit was done, then, applicant cannot be said that she violated the quoted policy.

It was submitted by counsel for the respondent that applicant was directed to report at police that the said guest has failed to foot their bill, but she reported at Oysterbay police station after she has allowed one guest to depart. It was further submitted on behalf of the respondent that evidence that applicant allowed one of the guests to depart without paying was not challenged. With due respect to counsel for the respondent, I have examined evidence of both DW1 and DW2, the only witnesses for the respondent and find that none of them

testified that applicant allowed one of the guests to leave without paying. It was evidence of the applicant that she reported at Oysterbay police station as a result the said guests were arrested. Applicant is recorded in her own words stating:-

"…Nilimweleza Director naye alieleza niende Kawe nikaripoti, Niliripoti polisi hawakufanya kitu nilipomwambia Director akaeleza kama polisi wa Kawe hawajafanya kitu basi niende Osterbay polisi pale walinipa RB na polisi waliwakamata na wakawa chini ya polisi…"

From the quoted evidence of the applicant(PW1) that was not shaken during cross examination, the said two guests were arrested and detained at police after applicant has reported. Evidence that the said guests were arrested by police is corroborated by what DW2 stated in his evidence at the time he was praying to tender a copy of passport No. 5341392558 (part of exhibit D6) issued to Michael Amen Anthony on 7th August 2015 in Texas in the United States of America. DW2 is recorded in his own words stating :-

"… Passport hiyo original yake ipo polisi wanayo polisi."

The issue is how did the original passport fall into hands of police officers without the said person being arrested. But the follow up question is, if the said person was arrested and his passport was in the hands of police officers at the time DW2 was giving his evidence at CMA, then, how did DW2 fail to make sure that the said person pays the

amount that was not paid which, he (DW2) alleged that applicant occasioned loss to the respondent.? As pointed out hereinabove, DW2 has a share of blame on this issue, or he blessed what happened and made applicant a scape goat.

In addition to the foregoing, respondent did not prove that one of the duties of the applicant was recovery of funds. I am of that view because, applicant's job description(exhibit D5) does not show that collection of fund or recovery of money was one of her duties. I therefore hold that respondent did not prove the allegation relating to failure to recover USD 7285 equivalent to TZS 16,864, 775/= relating to invoice No. MG 0031.

For the foregoing, I conclude that , out of the three allegations, respondent proved only the allegation relating to insubordination. Therefore, termination was fair substantively.

It was submitted by counsel for the applicant that termination was unfair procedurally. I entirely agree with him and the findings of the arbitrator because in his evidence, DW2 stated that:-

> *"…Kabla ya kusitisha ajira, alipewa tu barua ya kusitisha ajira. Hakukufuatwa kikao kwa kuwa mlalamikaji alikuwa analipwa tu mshahara na hasara amesababisha na hafuati utaratibu wa kurudisha hizo pesa…"*

When testifying under cross examination, DW2 stated that: -

> *"…Mlalamikaji kumpa tuhuma zake kwa maandishi alikuwa anazijua kabisa na hata katika suspension ilionesha tuhuma na pia sikumbuki kama kulikuwa na maandishi yaliyojitegemea juu ya tuhuma zake au wasaha wa maandishi kujitetea …Kikao cha nidhamu kwa barua hatujafanya hivyo na pia hatukukaa kikao cha nidhamu…"*

It is clear from the quoted evidence of DW2 that, applicant was not served with the charge and that, no disciplinary hearing was conducted prior to termination of her employment. In short, applicant was terminated without being afforded right to be heard. This was violation of natural justice principle. It has been held several times by this court and the Court of Appeal that any decision made in violation of the principles of natural justice principles cannot stand. See for example the case of ***Wegesa Joseph M. Nyamaisa vs Chacha Muhogo*** (Civil Appeal 161 of 2016) [2018] TZCA 224 (27 September 2018), ***Said Mohamed Said vs Muhusin Amir & Another*** (Civil Appeal 110 of 2020) [2022] TZCA 208 (25 April 2022) and ***CRDB Bank PLC vs The Registered Trustees of Kagera Farmers Trust Fund & Others*** (Civil Appeal No. 496 of 2021) [2024] TZCA 94 (23 February 2024) to mention but a few. For the foregoing, I hold that termination was unfair procedurally.

It was submitted by counsel for the applicant that, applicant was entitled to be compensated not less than twelve (12) months' salary. It was, in my view, correctly submitted by counsel for the respondent that, termination of employment does not automatically entitle the employee to be awarded not less than twelve months salaries compensation. The amount to be awarded to the employee is a discretion of the arbitrator but that should be judiciously made. That also will depend on whether, termination was both substantively and procedurally unfair or it was substantively fair but only procedural unfair. See the case of ***Pangea Mineral Limited vs Joseph Mgalisha Bulabuza*** (Civil Appeal No.282 of 2021) [2023] TZCA 17471 (4 August 2023) cited by counsel for the applicant wherein the Court of Appeal held *inter-alia* that:-

> *"We have also considered the fact that the remedies flowing from unfair termination are not mandatory for an arbitrator to order compensation of more than 12 months remuneration. We are saying so because the unfairness of termination is on procedural ground, therefore, obviously, it counts less in favour of awarding 30 months' compensation since the termination is partly procedurally unfair than in the case, if it is both substantively and procedurally unfair.*
>
> *Moreover, we are aware that the arbitrator has a discretion to decide on the appropriate compensation which could be over and above the prescribed minimum. However, the discretion must be exercised judiciously taking into account all the factors and circumstances in arriving at a justified decision. Where discretion is not judiciously exercised, certainly, it will be interfered with by the higher courts…"*

See also the case of ***Felician Rutwaza vs World Vision Tanzania*** (Civil Appeal 213 of 2019) [2021] TZCA 2 (2 February 2021) cited by counsel for the respondent. I should add that, the award of 12 months' salary compensation depends on the nature of the employment the parties had. I am of that view, because it is illogical to award the employee with a fixed term contract to be paid 12 months salaries compensation while the remaining period of the fixed term contract remaining prior termination was less than 12 months.

Initially it was submitted by counsel for the applicant that applicant had unspecified period contract of employment. But, in rejoinder, learned counsel for the applicant concurred with submissions by counsel for the respondent that applicant had a one-year fixed term contract of employment. I entirely agree with both counsel that applicant had one-year fixed term contract as evidenced by the employment contract (exhibit D4). According to employment contract (exhibit D4), the parties entered a one-year fixed term contract of employment starting from 1st January 2017. It appears that, after expiration of the said contract, the parties renewed the contract automatically without signing another contract. In fact, there is no other contract apart from exhibit D4 that was entered by the parties. More so, in her evidence, applicant (PW1)

did not state that she was employed for unspecified period contract of employment and did not tender another contract showing that she was employed for unspecified period. Therefore, the only evidence relating to contract of the parties is exhibit D4.

Since applicant was employed for one-year fixed term contract that was commencing on 1st January that contract was automatically expiring on 31st December each year. According to termination letter (exhibit D15) applicant was terminated on 28th September 2022 while three months were remaining before expiry of her contract of employment. Normally when a fixed term contract is unfairly terminated, the employee is entitled to be compensated salary for the remaining period of the contract and not the minimum of twelve months salaries provided for under section 40(1)(c) of Cap. 366 R.E. 2019(supra). The reason and logic is clear that, the remaining period of the fixed contract sometimes is less than twelve months as it has happened in this application because the contract was supposed to be terminated automatically after expiry of the said period. In some instances, the remaining period of the fixed term contract may be more than twelve months hence, to award the employee only twelve months might be contrary to what the parties agreed in relation to the period of contract. In it is my view, but for a

different reason, that, the arbitrator was right to award applicant to be paid three months' salary compensation and not twelve months salaries compensation. I therefore find that submissions by counsel for the applicant faulting the arbitrator to award applicant three months salaries compensation lacks merit.

In the CMA award, applicant was awarded to be paid TZS 4,300,000/= only being three months salaries compensation. I have noted that applicant was not paid TZS 1,450,000/= being one month salary and TZS 4,300,000/= in lieu of notice and leave that is applicant's entitlement under the provisions of section 41(5) and 44(1)(c) of Cap. 366 R.E. 2019(supra) respectively. From the foregoing, applicant is entitled to be paid a total of 7,250,000/=. It is clear from the foregoing that, applicant's termination was due to misconduct, therefore, in terms of section 42(3)(a) of Cap. 366 R.E. 2019(supra), she is not entitled to be paid severance pay. See the case of ***Bati Services Company Limited vd Shargia Feizi*** (Civil Appeal No.38 of 2021) [2023] TZCA 17595 (5 September 2023) cited by counsel for the applicant.

For all stated hereinabove I partly allow the application and revise the CMA award and order respondent to pay applicant a total of Seven

Million Two Hundred Fifty Thousand Tanzanian Shillings (TZS 7, 250,000/=) only for procedural unfair termination.

Dated in Dar es Salaam on this 8th April 2024.

B. E. K. Mganga
JUDGE

Judgment delivered on this 8th April 2024 in chambers in the presence of Dellah Mlay, the Applicant and Fatuma Mgunya, Advocate for the respondent.

B. E. K. Mganga
JUDGE