IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., NDIKA, J.A., And SEHEL, J.A.)

CIVIL APPEAL NO. 17 OF 2018

TANZANIA CIGARETTE COMPANY LIMITED.....APPELLANT

VERSUS

HASSAN MARUA.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania (Labour Division) At Dar es Salaam

(Mashaka, J.)

Dated 30th day of June, 2015
in
Revision No. 154 of 2014

JUDGMENT OF THE COURT

3rd & 27th June,2019

LILA, J.A.:

Hassan Marua, the respondent, successfully initiated proceedings for constructive termination against his employer, Tanzania Cigarette Company, the appellant, before the Commission for Mediation and Arbitration (The Commission). He was awarded payment of his terminal remuneration and thirty six (36) months' remuneration as compensation for unfair termination. Aggrieved, the appellant unsuccessfully preferred a revision to the High Court (Labour Division) which fully agreed with the Commissions' findings and orders. It was its finding that there are no

grounds for disturbing the Commission's findings and the award. The appellant's quest to overturn the findings and award remained unfulfilled, hence the present appeal.

The background of the matter is simple and straight forward. The respondent was the sole witness and he informed the Commission that he was employed as Administrative Assistant on 16/12/1996 and was later elevated to a Branch Manager and was stationed at Iringa. He said his last performance evaluation was done between 04/01/2010 and 11/01/2010 and was found to be good. On 09/07/22010 he was called to Dar es Salaam where he was given a letter of suspension pending investigation for underperformance which was finalized on 22/10/2010 on which date he was called in a meeting attended by Mr. Mosses Gunda, Ms. Pamela Atengo, Mr. Damas Kinemo and Ms. Caroline Kavishe. In that meeting, he said, he was served with a letter dated 21/10/2010 which had the effect of demoting him from a Branch Manager to a Branch Supervisor and was transferred to Shinyanga (Exhibit DW1C). He claimed that he was not heard on the allegation of underperformance or misconduct before being served with that letter on Status Change and Transfer to Shinyanga.

Dissatisfied, he wrote two letters to the General Manager dated 25/10/2010 and 27/10/2010 appealing against that decision but the reply was not forthcoming. To him, such conduct by the appellant amounted to a repudiation of the contract of service hence his letter to the General Manager dated 05/11/2010 to the effect that he treated that conduct as constructive termination of his contract of service.

The appellant, on other side, completely denied the appellant's allegations. Two witnesses, namely Onesmo Kabeho and Moses Vitalis Gunda, testified for the appellant. Apart from conceding that the respondent was their fellow worker with the appellant at the capacity of Branch Manager at Iringa and his status was changed from a Branch Manager to a Branch Supervisor and that he was transferred to Shinyanga, they informed the Commission that he was suspended on full pay so as to allow investigation be carried out on the alleged underperformance. That, on 22/10/2010 he was called and attended a meeting held in Dar es Salaam to discuss on the revealed underperformance. That, in the meeting the respondent conceded to the underperformance and it was mutually agreed that his status be changed from a Branch Manager to a Branch

Supervisor and he be transferred to Shinyanga where he was to work under an experienced Branch Manager so as to improve his performance. That, to signify his acceptance, the respondent signed the letter dated 21/10/2010 on "Status Change and Transfer to Shinyanga". In respect of the letter indicating 21/10/2010 instead of 22/10/2010 which is the date when the meeting was held, both attributed it to a typographical error. They insisted that the meeting was designed to discuss the respondent's underperformance and was not a disciplinary meeting. Elaborating on underperformance revealed, they stated that the respondent failed to build team work, failed to comply with the management directives and jabbering. They also insisted that despite the respondent's status change, all his entitlements were retained including salary. In that accord they refuted the allegation that the demotion and transfer amounted to a constructive termination.

In its decision, the Commission was satisfied that the underperformance accusations were untrue bearing in mind that the performance evaluation done in that year showed good performance; he was not only not accorded an opportunity to be heard on the accusations

but was also not served with the investigation report. And, worse still, his appeal letter was not replied. It therefore concluded that the respondent was unilaterally dealt with hence observed that:-

> *"Na kama ni ndio kwa nini Tume isiamini kuwa alikuwa amewekewa mazingira magumu hasa kiakili/kimawazo juu ya kuendelea kufanya kazi tena hasa kwa kuchafuliwa namna hii.*
>
> *Kwa kuzingatia hayo yote, Tume hii imeona ni sahihi kuamini kwamba PW1 aliwekewa mazingira magumu ya kikazi (constructive and intolerable condition) na kwa ushahidi wake ameweza kuthibitisha kesi yake kwa kiwango kitakiwacho kisheria....."*

The Commission thereafter proceeded to award the respondent's ıs which were ordered to be paid within 14 days thus:-

> *"Na kwa maana hiyo basi natengua rasmi uamuzi huo wa mlalamikiwa na kuutupilia mbali, na sasa kubadilisha kwa uamuzi/tuzo ifuatavyo;*
> *Kwamba, kwa kuwa uachishaji kazi wake ulikuwa wa kikatiii zaidi/batili sana ninaamua kwamba alipwe mishahara ya mara tatu ya ile itakiwavyo kisheria yaani miezi 12 chini ya kifungu cha 40(1) ya THE EMPLOYMENT AND LABOUR RELATIONS ACT 2004.*

Hivyo atatakiwa kulipwa mishahara ya miezi 36 kwa mamlaka yaliyotolewa kwenye kesi ya ***MAXON PAPER CONVERTED VS JOYNESS D. KILWA*** *Mahakama Kuu Kitengo cha Kazi Rev. 309/2008, ambayo inaipa mamlaka ya kuamuru ulipwaji wa zaidi ya miezi 12 (mishahara) kwa mlalamikaji kama wa shauri hili endapo inaona kuna sababu za msingi za kufanya hivyo.*

Kwa maana hiyo sasa PW1 atatakiwa kulipwa jumla ya shilingi 2,416,400/=(mshahara wake wa mwezi) mara 36 = 86,990,400/=.

Pamoja na nauli ya kumrudisha alikoajiriwa awali (his place of recruitment) yeye pamoja na mizigo yake isiyozidi tani tano kwa kiwango cha shilingi 3,000,000/=, mshahara wa mwezi mmoja badala ya notisi, likizo ya mwaka wa mwisho akiwa kazini ambayo hakwenda na kiinua mgongo cha miaka. kumi tu 6,505,692.306/=. Jumla ya malipo yote ni 101,328,892.3/= [shilingi milioni mia moja laki tatu ishirini na nane elfu mia nane na tisini na mbili nukta tatu tu.]"

The foregoing findings and award discontented the appellant consequent upon which a revision application was preferred to the High Court. The same was unsuccessful. The High Court (Mashaka, J.) agreed with the Commission that the respondent was not accorded the right to be

heard on the accusations of underperformance which were however not established by the appellant hence contravening the procedure provided under the Employment and Labour Relations (Code of Good practice) Rules, GN. No. 42 of 2007 in handling issues of misconduct. The High Court further found that the letter of Status Change and Transfer which was written before the meeting was held shows that the appellant had made a decision to demote the respondent without giving him the right to be heard and the respondent was coerced to sign it. It therefore held that the appellant created the intolerable working relationship in a deliberate manner to induce the resignation by the respondent.

In respect of the award by the Commission, the High Court found that the Arbitrator gave reasons for the 36 month's salary award as compensation. The award was found to be proper.

Incensed by the above outcome of the revision application, the appellant preferred the present appeal in which she, initially pivoted it on six grounds of complaints seeking to impugn the High Court decision. However, in the course of submitting on the grounds of appeal and upon being reminded by the Court that an appeal to the Court is restricted to

only matters of law in accordance with section 50(5)(b) of Employment and Labour Relations Act, No. 6 of 2004 (The ELRA), Ms. Blandina Kihampa, learned counsel for the appellant, opted to abandon all the grounds except grounds 4 and 5 of appeal. She, however, urged the Court to consider the submissions she had made on the other grounds as supportive of the two grounds. The two grounds state that:-

> *"4. The Court erred in law and in fact in holding that the Respondent was terminated under constructive termination.*
>
> *5. The Court erred in law and fact in confirming the payment of 36 months' salary as compensation to the Respondent without adducing or affixing any special circumstances to justify the compensation which is beyond the 12 months provided by law."*

The appeal did not have a swift reception by the respondent who, in resisting it, came up with a notice of preliminary objection which was lodged on 6/2/2018 that the notice of appeal was fatally defective for referring to an incorrect number of the High Court case subject of this appeal hence contravening the provisions of Rule 83(3) of the Tanzania Court of Appeal Rules, 2009 (The Rules). That instead of indicating

Revision no. 154 of 2014 the notice of appeal indicated Revision No. 349 of 2013. That was followed by another set of notice of preliminary objection lodged on 30/4/2018 which claimed that the appeal was time-barred in that it was lodged beyond the sixty days period as stipulated under the provisions of Rule 90(1) of the Rules.

Ms. Blandina Kihampa, as indicated above, appeared for the appellant at the hearing of the appeal before us while Mr. Mashaka Ngole, learned counsel, appeared for the respondent.

In compliance with the long-standing practice that the notice of preliminary objection should be determined ahead of the substantive matter, we asked counsel for the parties to, first, address us on the two sets of preliminary objection.

Alive to the recent introduction of the principle of overriding objective into the Appellate Jurisdiction Act, Cap.141 R. E. 2002 (the AJA), Mr. Ngole readily conceded that the error regarding the number of the case sought to be assailed in the notice of appeal could be remedied by inserting number 154 of 2014 in lieu of number 349 of 2013. We agreed with him and we accordingly effected that amendment into the notice of appeal.

In respect of the second set of preliminary objection, Mr. Ngole contended that while the certificate of delay at page 333 of the record excluded the period from 10/7/2015 when ASYLA ATTORNEYS for the applicant filed the notice of appeal and applied for copies of proceedings, ruling and drawn order to 30/11/2017 when the said documents were ready to be supplied to the applicant, the period from the date the decision of the High Court was delivered to the date the notice of appeal and the letter applying for the documents were lodged was not accounted for. That, according to Mr. Ngole, rendered the appeal incompetent for being filed outside the sixty days stipulated under Rule 90(1) of the Rules.

On her part, Ms. Kihampa was emphatic that the appeal was lodged within time as revealed by the record of appeal.

We reserved the decision and intimated to the parties that the same will form part of the judgment.

We, in the premises, propose to pause here and consider the issue raised by Mr. Ngole. We, in the first place, agree with Mr. Ngole that under the provisions of Rule 90(1) of the Rules, the appeal is required to be lodged within sixty days from the date the notice of appeal is lodged. As

regards the period of exclusion, we find it apposite to recite the relevant part of that provision for clarity, thus:-

> *"save that where an application for a copy of the proceedings in the High Court has been made within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted be excluded such time as may be certified by the Registrar of the High Court as having been required for the preparation and delivery of that copy to the appellant."*

It is clearer from the above excerpt that the period as will be certified by the registrar in the certificate of delay shall be excluded in computing the time prescribed for lodging an appeal. In the present case Mr. Ngole did not challenge the competence of the certificate of delay. Instead, he has contended that the period from when the High Court's decision was delivered to the date when both the notice of appeal and the letter applying to be supplied with the requisite appeal documents were lodged was not accounted for. The record bears out that the High Court decision was delivered on 30/06/2015. The certificate of delay plainly states that both the notice of appeal and the letter applying for copies of the

documents were lodged on 10/7/2015. There is about nine days or so in between. This forms the basis of Mr. Ngole's contention. In terms of Rule 90(1) of the Rules, the sixty days period within which to file the appeal is reckoned from the 10th July, 2015 when the notice of appeal is lodged not from the date the High Court decision was delivered (30/06/2015) as Mr. Ngole seems to suggest. We are, in the circumstances, unable to find the basis of Mr. Ngole's complaint. That aside, considering that the record of appeal was lodged on 29/1/2018, a simple calculation shows that the appeal was lodged on the last day (60th day). The preliminary point of objection is therefore without merit and is hereby overruled.

Reverting to the appeal, Ms. Kihampa, opted to argue, at first, ground 5 of appeal. Amplifying it, she had it that in terms of section 40 of the ELRA, the arbitrator has discretion to award compensation of not more than 12 months' remuneration and in case he considers that he should award more than that he should give sufficient reasons or special circumstances for doing so. She therefore faulted the arbitrator for awarding 36 months' salary as compensation without assigning special reasons. She similarly faulted the presiding judge on appeal for concurring

with the arbitrator without deducing if the arbitrator assigned special circumstances hence arriving at an erroneous finding that the arbitrator did so. She implored us to find the award improper and therefore set the same aside.

In respect of ground 4 of appeal, Ms. Kihampa submitted that the decision to change the respondent's status and transfer him was not a disciplinary action. Instead, she asserted, the respondent's actions amounted to underperformance not a misconduct that's why the appellant found it appropriate to demote the respondent and transfer him to another branch to work under an experienced Branch Manager for him to improve his performance. That, according to the appellant's letter to the respondent (exhibit DW1) and as testified by PW1, the respondent's terms and conditions of service remained the same. This, she stressed, revealed absence of ill-motive with the respondent as opposed to the judge's finding. She further submitted that the respondent admitted the findings of underperformance that's why he signed the letter DW1 on "Status Change and Transfer to Shinyanga" Branch.

In faulting the finding that the respondent was constructively terminated, Ms. Kihampa insisted that the appellant and the respondent reached an agreement that there was underperformance on the part of the respondent hence he be transferred to Iringa to work under a well performing Branch Manager so as to improve his performance. In sum, she urged the Court to find that the respondent resigned from employment.

In response, Mr. Ngole strongly resisted the appeal. Arguing in respect of ground 5, he said there is no requirement under section 40 of the ELRA for the Arbitrator to assign special circumstances in case he was minded to exercise his discretion to award more than 12 months' salary as compensation. He was of the view that all that was required of the Arbitrator in exercising his discretion was to consider the circumstances relevant to the case and that the reasons were stated by the Arbitrator at page 152 of the record and the High Court did the same at page 318 hence arriving at the same finding with the Arbitrator that the respondent was constructively terminated.

From the evidence on record and the submissions by counsel of the parties it is common cause between the parties that the respondent was an

employee of the appellant and was elevated to the level of a Branch Manager and at the time the dispute arose he was the Branch Manager at Iringa. It is also common cause that the respondent was called and attended a meeting with the Management held on 22/10/2010 after which a letter on "Status Change and Transfer to Shinyanga" and another letter on"Issues of Underperformance" dated 21/10/2010 were served on the respondent who duly acknowledged by signing them. It is further apparent and uncontroverted that just five days later (on 27/10/2010), the respondent wrote a letter to the appellant appealing against the "Status Change and Transfer to Shinyanga" giving an ultimatum to the appellant to respond within a period of five days which would last on 4/11/2010. It is noteworthy that earlier on 25/10/2010 the respondent had written a letter to the appellant complaining on the demotion from the position of Branch Manager to Branch Supervisor on allegations of failure to comply with Company Policies and Procedures (underperformance).

It can also be discerned from the record that the respondent, through his letter dated 5/11/2010, tendered a letter treating the appellant's conduct as amounting to a constructive termination. In

response, the appellant, by a letter dated 10/11/2010, accepted the respondent's letter terminating his services with the appellant and demanded the respondent to pay the company a one month salary in lieu of notice as required by law. No doubt, the letter presupposed the respondent had voluntarily terminated his services with the appellant (resigned). Apart from the respondent's contention in his testimony that he was coerced to sign the letter on "Status Change and Transfer to Shinyanga" and that on "Issues of underperformance", there was no serious dispute on the remaining facts. Thereafter, the respondent accessed the Commission with the aforesaid labour dispute.

Based on the above set of facts, the Commission framed, and in our view correctly, only two issues for determination which we hereunder recite as follows:-

> *"1.Iwapo mlalamikaji aliwekewa mazingira magumu yaliyopelekea kuacha kazi (constructive termination)*
> *2.Ni nini stahili za kila upande"*

As demonstrated above both the Commission and the High Court arrived at a concurrent finding that the respondent was constructively

terminated and the award of 36 months' remuneration as compensation was justified.

In view of the above, it is not surprising that even the appellant's two grounds of appeal quoted above revolve around those two issues.

Although the counsel for the parties first submitted on ground 5 and then ground 4 of appeal, we, in this judgment, propose to deal with the grounds of appeal seriatim.

In ground 4 of appeal, the Court is actually being asked to consider whether on the conspectus of the facts availed before the Commission, the legal test for ascertaining whether an employee who resigned had been constructively terminated was properly applied.

The provisions of section 36 of the ELRA, outline various forms of termination of employment. Sub-section (a)(ii) of section 36, takes cognizance of constructive termination as one form of termination of employment. That section provides:-

> *"36. For purposes of this Sub-Part-*
> *(a) "Termination of employment" includes-*

(ii) a termination by an employee because the employer made continued employment intolerable for the employee"

The import of the foregoing provisions of the law is that constructive termination arises in situations in which the employee terminated employment with or without notice because the employer made continued employment intolerable for the employee.

Rule 7(2) of the Code of Good Practice Rules, 2007 (The Rules), provides for the conducts of the employer which if proved renders employment intolerable as being, **first**, sexual harassments or the failure to afford the employee enough protection against sexual harassments at the place of work and **second**, unfairly dealing with the employee. Only the later situation is relevant to our case.

In our endeavor to bring to light the applicability of the notion of constructive termination, we wish to borrow a leaf from the definition of the phrase from the decisions of the courts in South Africa of which its law, section 186(1)(e) of the Labour Relations Act, No.66 of 1995 (the LRA), is

pari materia to our section 36(a)(ii) of the ELRA. That section defines constructive termination to mean:-

> *"An employee terminated employment with or without notice because the employer made continued employment intolerable for the employee"*

Further elaborating on that form of termination, the Employment Appeal Tribunal in **Woods v WM Car Services (Peterborough)** (1981) IRLR 347 cited in the case of **Member of the Executive Council for the Development of Health, Eastern Cape and Dr. J P Odendaal and 2 Others**, Case No. PS504/07, stated that:-

> *"It is clearly established that there is implied in a contract of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee:* ***Courtaulds Northern Textiles Ltd v Andrew*** *[1979] IRLR 84. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged*

reasonably and sensibly, is such that the employee cannot be expected to put up with it:....the conduct of the parties has to be looked as a whole and its cumulative impact assessed."

In another case of **Pretoria Society for the Care of the Retarded v Loots** [1997] 6 BLLR 721 (LAC) the Labour Appeal Court went on to say the following:-

"When an employee resigns or terminates the contract as a result of constructive dismissal such an employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfill what is the employee's most important function, namely the work. The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so on the basis that she does not believe that the employer will ever abandon the pattern of creating an unbearable work environment. If she is wrong in this assumption and the employer proves that her fears were unfounded then she has not constructively dismissed and her conduct proves that she has in fact resigned.

Where she proves the creation of an unbearable work environment she is entitled to say that by doing so

the employer is repudiating the contract and she has a choice either to stand by the contract or accept the repudiation and the contract comes to an end..."

The threshold for ascertaining whether there was constructive termination was summarized in **Eagleton v You Asked Services (Pty) Ltd** [2008] 111 BLLR 1040 (LC). In that case the Court set out the requirements for a constructive termination as follows:-

"In order to prove a claim for constructive dismissal, the employee must satisfy the Court that the following three requirements are present:

(i) The employee terminated the contract of employment (the employee has resigned),
(ii) Continued employment has become intolerable for the employee;
(iii) The employer must have made continued employment intolerable."

The foregoing legal propositions from the Courts in South Africa, with which we fully subscribe, establish one crucial fact that onus is on the employee to prove that the resignation constituted constructive

termination. He has to establish that the resignation was not voluntary but was instigated by the employer's conduct. Once this is established, the Commission's duty is to inquire on whether the employer had without reasonable cause and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust with the employee. In other words, the Commission has to assess the conduct of the employer as a whole and determine whether in its cumulative impact, judged reasonably and sensibly, was such that the employee could reasonably not have been expected to put up with the conduct of the employer. And, we wish to add that the mere fact that the employee resigns because he anticipates work would become intolerable does not, in and by itself, make for a constructive termination.

More so, in another South African case of **Asara Wine Estate 7 Hotel (Pty) Ltd v Van Rooyen & others** (2012) 33 IL J 363 (LC), it was held that:-

> *"...it is was held in **You Asked Services** that resignation in the face of poor performance management does not give rise to a constructive dismissal claim. What about resignation in the face of*

possible dismissal following a disciplinary hearing ...in terms of the dictum in ***Smithkline Beecham****, an applicant who resigns pending a disciplinary hearing would have a hard case to meet in order to prove constructive dismissal."*

Now, gauged on the foregoing factors, the issue before us for determination is therefore whether the respondent sufficiently discharged his duty by proving that the conduct of the appellant (the employer) viewed reasonably and sensibly was such that it made continued employment intolerable to him such that he could reasonably not be expected to put up with hence amounting to unfair dealing with the employee as prescribed under Rule 7(2) of the Rules.

As we have amply demonstrated above and having regard to the conspectus of the facts as summarized above, we are satisfied that the respondent's termination of services was precipitated by his status change from being a Branch Manager to a Branch Supervisor and transfer to Shinyanga. That can be deduced from the respondent's letters (exhibit PW1D) dated 25/10/2010 and 27/10/2010 appealing against that decision by the Management in which the respondent complained of being demoted

without being afforded an opportunity to be heard on the accusations of underperformance. For ease reference, we find it apposite to reproduce them.

The letter dated 25/10/2010 (Exhibit. DW1B or PW1D) states:-

"HASSAN MARUA
P.O BOX 10822
DAR ES SALAAM

DIRECTOR,
HUMAN RESOURCES,
TCC, DAR ES SALAAM.

Dear Sir

STATUS CHANGE AND TRANSFER TO SHINYANGA

On 9th July 2010 suspended my service in writing pending free and fair investigation into allegations in relation to my failure to company with Company policies and procedure in my day to day activities. The particulars of the allegations were for the reasons better known to yourself not disclosed to me.

Surprisingly, on 21st October 2010 you wrote another letter to me demoting me from the position of Branch Manager to Branch Supervisor. In the said letter, you leveled new serious allegations against me and made a decision on them without affording me are opportunity to be heard. For instance, you accused me of using divide and rule tactic to split staffs who go for van selling and those who stay at the branch office. This allegation and the others contained in the two letters are devoid of any merit.

To the best of my understanding, your office has no authority in law to determine it validity and correctness of any allegation against me without affording an opportunity to be heard and without following the mandatory procedures provided for in it Employment and Labour Relations Act.

The general allegations in the letter dated 9th July 2010 and the new allegations in letters dated 21st October 2010 amount to misconduct in terms of the Employment Labour Relations Act which cannot be determined without complying with mandatory procedure including fair hearing.

Your attempt to demote me without following the procedure may amount constructive termination of my service. By this letter, I strongly request you to without your letter dated 21st October 2010 and clear me with the allegations contained previous letter dated 9th July as well as in the new letter. The period from 21st October 2010 was more than enough for you to conduct the investigations hearing in case they had a legitimate case against me

Due to statutory limitation of time within which to pursue my rights in legal forum, I would kindly request you to respond to this letter within the period of my two weeks leave which will last on 5th November 2010. I am always ready to meet with you and discuss this matter amicably.

Yours faithfully

HASSAN MARUA

CC- Director, C & TM Operations
Director – Finance"

That letter dated 27/2010 (Exhibit. DW1B or PW1D) states:-

"HASSAN MARUA
P.O BOX 10822
DAR – ES – SALAAM
27/10/2010

GENERAL MANAGER
TANZANIA CIGARETTE COMPANY
BOX 40114
DAR- ES – SALAAM

Dear Sir

APPEAL AGAINST STATUS CHANGE AND TRANSFER TO SHINYANGA

On 9th July 2010 the Director of Human Resources and National sales Manager suspend my service in writing pending free and fair investigation into allegations in relation to my failure to comply with Company policies and procedures in my day to day activities. The particulars of the allegations were for the reasons better known to them not disclosed to me.

Surprisingly, on 21st October 2010 they wrote another letter to me demoting me from the position of Branch Manager to Branch Supervisor. In the said letter, they leveled new serious allegations against me and made a decision

on them without affording me an opportunity to be heard. For instance, they accused me of using divide and rule tactics to split staffs who go for van selling and those who stay at the branch Office. This allegation and the others contained in the two letters are devoid of any merit.

To the best of my understanding, they have no authority in law to determine the validity and correctness of any allegation against me without affording an opportunity to be heard and without following the mandatory procedures provided for in the Employment and Labour Relations Act.

The general allegations in the letter dated 9th July 2010 and the new allegations in the letters dated 21st October 2010 amount to misconduct in terms of the Employment and Labour Relations Act which cannot be determined without complying with the mandatory procedure including fair hearing.

The attempt to demote me without following the procedure may amount to constructive termination of my service. By this letter, I strongly request you to withdraw that letter dated 21st October 2010 and clear me with the allegations contained in the previous letter dated 9th Jul 2010 as well as in the new letter. The period from July to October 2010 was more than enough for them to conduct the investigation and a hearing in case they had a legitimate case against me.

Due to statutory limitation of time within which to pursue my right in legal forum, I would kindly request you to respond to this letter within the period of five working days which will last on 4th November 2010 I am ready to meet with you and discuss this matter amicably.

Your faithfully

Sgd:
HASSAN MARUA 27/10/2010

CC: Director Human Resource – for information
Director Legal affairs for information
Director C & TM Operations – for information
Director Finance – for information"

The two letters were referred in the respondent's letter dated 5/11/2010 (Exhibit. DW1B or PW1D) terminating his services with the appellant:

" ***HASSAN MARUA***
P.O BOX 10822,
DAR ES SALAAM.

05th November, 2010

To;
GENERAL MANAGER,
TANZANIA CIGARETTE COMPANY,
P.O. BOX 40114

REF: YOUR CONSTRUCTIVE TERMINATION OF MY SERVICE

Kindly refer to my letter addressed to Human Resource Director dated 25th October 2010 as well as my appeal to you dated 27th October 2010.

This is to formally notify you that I have treated your conduct as explained in my letter dated 26 October 2010 and 25 October 2010 attached hereto as constructive termination of my contract of service.

Yours faithfully

Sgd:

HASSAN MARUA

CC. Human Resource Director."

We have seriously considered the respondent's complaint that he was not heard on the accusations raised against him. The record bears out and it was a common cause that the respondent was invited and he actually

attended a meeting with the Management on the 22/10/2010 in which issues of his underperformance which formed the basis of the inquiry were discussed. The respondent conceded to this at pages 97 to 99 of the record. The respondent also conceded signing the letter (Exhibit DW1A) on "Change of Status and Transfer to Shinyanga" in that meeting though he said the letter was dated 21/10/2010 and that he was told that it was the decision of the Mangement. That letter (Exhibit. DW1A) reads:-

"***TCC***

21 October 2010
Hassan Marua
C & TM Operations Department
Iringa Branch

Dear Hassan,

Re: Status Change and Transfer to Shinyanga Branch

Reference is made on the above underlined subject.

This is to inform you that your status has changed from Branch Manager to Branch supervisor effective 01 November 2010. Due to this status change, you are being transferred from Iringa Branch to Shinyanga. Your work station will be in Shinyanga, report directly to Branch Manager.

The reasons for the status change have already been communicated to you in a meeting with Management, and a copy containing such reasons the job description detailing your responsibility is hereby attached. You will have further discussions with your Supervisor in particular reference to your objectives and other performance related factors.

All other terms and conditions remain the same as stipulated in your contract of employment.

Kindly sign and return to me the attached copy of this letter to indicate your understanding and acceptance of the conditions outlined above.

Best Wishes

Sgd
Caroline Kavishe
Director,Human Resources

Sgd
Moses Gunda
Director, C & TM Operations

I, Hassan Marua, hereby accept the above position under the terms and Conditions stipulated.

Sgd

Signature

22/10/2010
Date"

Read closely, it is evident and it was a common cause that the respondent signed the above letter accepting the status change and the terms and conditions stipulated in that letter. Amongst the crucial matters contained in that letter is that **he accepted his Status Change from Branch Manager to Branch Supervisor effective 01/11/2010, he was transferred to Shinyanga, the reasons for status change were already communicated to him and that other terms and conditions remained the same as stipulated in his contract of service.** More so,

the respondent also signed the letter on issues of underperformance dated 21/10/2010. That letter is hereunder reproduced:-

"TCC

21 October 2010
Hassan Marua
C & TM Operations Department
Iringa Branch

Dear Hassan,

Re: *Issues of Underperformance – Hassan Marua*

1. ***Failure to Lead and Build the team***
Branch Manager is responsible for all staff matters in the branch including building team spirit, staff motivation, disciplinary issues, and maintain effective communication between the branch and head office. It has come to the Management's attention that as a Branch Manager, you have failed to build the team. Instead you have divided the branch staffs using 'divide and rule' tactic i.e.between staffs who go for van selling (sales reps and retail associates) and those who stay at the branch office (branch cashier, branch store keeper and general worker).

2. ***Failure to stop Jobbering activities***
October 2009, Ex-Regional Sales Manager, Andrew Bundala detected allegations concerning Jobbering activities conducted by staff under your direct supervision. The said allegation includes the raising of invoices in the name of existing dealer N Mtewele of Kifanya area). The dealer later complained for not being serviced for over 3 weeks. As a Branch Manager despite of being fully instructed by Regional Manager (as he then was) to take serious action against the alleged Perpetuator, it took you three months so issue the warning letter after several reminders from RSM to take the said allegation seriously.

3. ***Failure to communicate / share with the team on adherence to Company Policies and Procedures***

The previous audit report 2009 covering the period from 25th March 2009 to 27th November 2009 has not been issued and discussed with the branch staffs. As you are aware that such audit reports as mandatory need to be shared and discussed with the team immediately after being issued. As a Branch Manager you ought to have known that importance.

4. ***Failure to Execute Marketing Plans***
it is indeed very disappointing to the management to note that despite of the directives given to you from HQ in 2008 to remove Sportsman materials in the market, Iringa market is reported to still have some old Sportsman Materials

Moses Gunda
Director, C & TM Operations

Employees Name: Hassan Marua
Sgd:
---------- *20/10/2010*
Signature *Date"*

It is vivid that the respondent signed the above letter. That signified he was heard on the accusations raised against him and accepted the decision to change his status and transfer to Shinyanga. The mere allegation that he was told that was the decision of the management, in our view, was insufficient to show that he was forced to sign the two letters. We are inclined to hold so, for, in the two letters written by the respondent, (the one appealing against demotion dated 27/10/2010 (PW1D) and the one dated 25/10/2010 complaining on status change and transfer to Shinyanga) the respondent did not raise issue that he was coerced to sign the two letters. That aside, we have duly examined the

record and we are unable to find any indication whatsoever suggestive of any coercion. Instead, as was rightly stated by DW1, the two letters reflected what was agreed in the meeting between the appellant and the respondent. We are satisfied, therefore, that the allegation that the respondent was forced to sign was an afterthought. The respondent, therefore, freely signed the two letters and was at liberty to decide either way.

Another factor considered and relied by the Arbitrator to arrive at a finding that the respondent was unilaterally demoted is the date the letter on "Change of Status and Transfer to Shinyanga" did bear, that is 21/10/2010, a day before the meeting was held which the respondent allegedly took it to be an indication that the Management (Appellant) had made up its mind to demote and transfer him before the date on which the meeting was held (22/10/2010). The appellant's response (through DW1) was that there was typographical error. In view of our finding that the appellant was not coerced to sign the letters and bearing in mind that the appellant did not raise it in his appeal and resignation letters to the management, we also find that contention to be an afterthought. Had the appellant's contention not been the true position of the matter, the

respondent would have been prejudiced by the letters and would have definitely not signed them. We, in the circumstances, agree with the appellant's account on issue of dates on the letters. Accordingly, the Arbitrator's finding which was also upheld by the High Court that the respondent was unfairly treated by the appellant is unfounded.

It is noteworthy that the respondent's Status Change and Transfer were effective on 1/11/2010 and the respondent attended the meeting held on 22/10/2010 coming from Iringa. He was therefore yet to report and work at his new work station (Shinyanga). One would have expected a reasonable person in the respondent's position to have reported at his new work station and would have given space to see if the working environment would be intolerable to him in the sense that he could not fulfill his important function, namely to work. He instead, chose not to do so but resigned. It appears that he anticipated that with the new status and new working station, the working environment would still be intolerable to him. In our view, that was speculative. The respondent's decision was, therefore, not only premature but was also unwarranted, in the circumstances. It can, instead, justifiably be said that the respondent's

conduct was suggestive of his resistance to demotion and transfer to Shinyanga.

In line with the above we wish to consider albeit briefly on the issue which seemingly featured occasionally whether the meeting held on 22/10/2010 was a disciplinary one or not. Although at one point DW1 said some of the allegations amounted to a misconduct he all the same later maintained that no disciplinary meeting was held. That apart, there is ample evidence by both sides that the meeting was essentially intended to discuss the underperformance issues involving the respondent. Further, a serious examination of the record reveals that neither of the letters by the respondent to the management (appellant) nor those of the appellant to the respondent made reference to disciplinary issues. They all concerned issues of underperformance. As indicated above the parties agreed that there was underperformance on the part of the respondent hence the mutual agreement to demote and transfer the respondent to Shinyanga. That being the case, it is obvious that the appellant did not conduct disciplinary proceedings against the respondent hence the right to be heard did not arise. We are fortified in that holding by the Court's decision in the

case of **Lugano S. Kalomba and 21 Others v The Permanent Secretary Ministry of Education and Vocational Training and Another**, Civil Appeal No. 78 of 2008 (Unreported). In that case, the appellants who were employees of the National Examination Council of Tanzania (The NECTA) were transferred from NECTA to various schools and teachers' training colleges under the Ministry of education and Vocational Training by the 1st respondent upon exercising powers delegated to him by the Permanent Secretary (Establishment). The decision to transfer the appellants was prompted by the letter written by Acting (Ag.) chairperson of NECTA in which he expressed his dissatisfaction with the appellants' work performance. Aggrieved by that decision, the appellants preferred a judicial review to the High Court so as to fault that decision. In that application the appellants raised three grounds that the 1st respondent acted ultra vires, the respondent's decision is bad for want of reason and **that there was failure of justice since the 1st respondent unilaterally decided to interfere with the contract between the appellants and the national Examination Council of Tanzania without hearing them on the accusations of unsatisfactory work performance.**

In the submission in respect of that ground that the 1st respondent's decision is a nullity before the High Court, counsel for the appellants stated that since the appellants' transfers were a result of the allegations raised by the Ag. Chairperson of the NECTA in her letter dated 18/4/2006, they ought to have been afforded the right of hearing before being transferred. Relying on the cases of **De Souza v. Tanga Town Council** [1961] EA 377 and **Donald Kilala v. Mwanza District Council** [1973] TLR 19, the learned counsel submitted that the 1st respondent's decision was a nullity because the appellants were denied the right to be heard.

In respect of the decision being unreasonable, the learned counsel for the appellants based his contention on, to mention but two factors, that the appellants were removed from the NECTA **without letters of suspension, dismissal or termination and the uncertainty as to whether their new positions amounted to demotions or promotions**. In his reasoned judgment the learned judge, addressing the issue that the appellants were not heard, stated that the transfer did not have the effect of terminating the appellants' employment of affecting continuity of their employments and if there was anything relating to

payment of their salaries and the fate of their pensions, the same would be dealt with by the appellants' relevant employment bodies. The application was thereby dismissed. As expected, the appellants were dissatisfied hence they lodged an appeal to this Court. The Court, after considering the arguments of the counsel for the parties on the issue of the appellants' contention that they were not heard, stated:-

> *"Having considered the submissions made by the learned counsel for the appellants and the learned Senior State Attorney,* ***we agree with the learned High Court judge that, since the exercise of transferring the appellants was not a disciplinary process whereby they should have been entitled to a hearing, the contention that the 1st respondent denied the appellants that right or that his decision was biased are without merit.*** *In the letters of transfer, the 1st respondent stated clearly that the purpose was to strengthen the teaching activities ("katika kuimarisha shughuli za ufundishaji").* ***There is nothing in their letters of transfer which***

shows that their employment benefits would be affected. *Like in the 1st ground of appeal, therefore, we also find the 3rd and 4th grounds of appeal devoid of merit."*

On the authority above, it is crystal clear that an employee's transfer not affecting his benefits, like in the instant case, does not amount to a disciplinary action. As amply demonstrated above, the meeting was held and the respondent attended in which the discussion centered on matters of underperformance. The respondent was therefore not, as of right, entitled to a hearing although he attended in the meeting. The procedure applicable in disciplinary proceedings which of necessity required the employee (respondent) be accorded an opportunity to be heard was, in the circumstances, not applicable. Resignation of the respondent after the discussion on the matters of poor performance and later transfer from Iringa to Shinyanga without affecting his employment benefits does not, therefore, give rise to a constructive dismissal or termination claim.

Further to the above, we have considered the chronology of events that eventually led to the respondent's resignation. The letter on Status

Change and transfer to Shinyanga was served on and signed by the respondent on 22/10/2010. The appellant wrote to the appellant on 25/10/2010 complaining on the steps taken. This letter was followed by another letter dated 27/10/2010 appealing against the Status Change and Transfer to Shinyanga which gave the appellant only five (5) days within which to respond. More so, on 5/11/2010, the respondent terminated his services on allegation of constructive termination. The respondent complained that the appellant remained quiet and that, to him, signified that he was not required. This is what he is recorded at page 102 of the record to have told the Commission:-

> *"Kwa kutojibu mimi niliona kama hawanitaki tena "constructive termination" ya ajira yangu."*

The issue here is whether the respondent's feeling was justified or rather whether the time given to the appellant was reasonable enough to enable it deal with matters raised in those letters. It is crystal clear that within a span of hardly fourteen (14) days the respondent wrote three letters to the appellant. That time taken by the respondent to write three letters to the appellant from the date he was issued with the letter on Status Change and Transfer to Shinyanga, on the one part, and his letter

on the alleged constructive termination, on the other part, was considerably too short. No ample time was given to the appellant to consider any of the issues raised in any of those letters, more particularly the appeal in which the appellant was given only five days within which to give a response. That raises eye-brows on the respondent's conduct. What comes out clearly is that the respondent was impatient. That conduct, in our considered view, demonstrated that he was minded to quit from the employment.

All the circumstances considered, the respondent's conduct in this regard objectively viewed is unreasonable and indeed indicated that he intended to sever the employment relationship between him and the appellant and cannot be said to have been unfairly terminated. We find that his resignation could not have been as a result of employment relationship or working conditions becoming intolerable. We entirely agree with the appellant that the only reasonable inference that can be drawn from the evidence is that there was no constructive termination. The respondent failed to discharge his burden of proof that he was constructively terminated. The arbitrator and the High Court incorrectly

found that there was termination and that the termination was of a constructive nature. We take it that the respondent resigned. Ground 4 of appeal accordingly succeeds and is hereby allowed.

We now turn to the arbitrator's award. He awarded, and the High Court upheld, thirty six (36) months' salary payment as compensation. The appellant attacked that award in ground 5 of appeal on the basis that no exceptional circumstances were indicated to mandate him award more than twelve (12) months' salary pay as compensation. Before we consider that ground, it is important to have regard to the legal position obtaining on the matter.

We are alive that in terms of section 40(1) and (2) of ELRA the arbitrator or a Labour Court is empowered to make, among others, an order the employer to pay compensation to the employee. That section states:-

> *"40-(1) If an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer:-*
>
> *(a) to reinstate the employee from the date*

the employee was terminated without loss of remuneration during the period that the employee was absent from work due to unfair termination ; or

(b) to re-engage the employee on any terms that the arbitrator may decide; or

(c) to pay compensation to the employee of not less than twelve months' remuneration.

2. An order for compensation made under this section shall be in addition to, and not a substitute for, any other amount to which the employee may be entitled in terms of any law or agreement."

It stems out clearly that, **first**; an order for payment of compensation is discretionary and, **secondly**; is awardable to an employee only when the arbitrator or the Labour Court finds that his or her termination was unfair. The two conditions apply conjunctively or must cumulatively exist. To say it in other words, an order of payment of compensation is discretionary and is consequential to unfair termination.

We have endeavored to demonstrate the circumstances that obtained in the present case and we have held that the respondent's termination

was not unfair. He actually resigned. Since we have found that both the arbitrator and the High Court incorrectly found that there was constructive termination it is wholly unnecessary to consider the fourth (5th) ground of appeal on payment of compensation. There is nothing justifying payment of compensation. The order for compensation is hereby accordingly set aside. We allow this ground of appeal on these bases other than the ground raised by Ms. Kihampa.

For the foregoing reasons the appeal is allowed. The findings and orders of both the Commission and the High Court are hereby quashed and set aside.

DATED at **DAR ES SALAAM** this 24th day of June, 2019.

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL