

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MWARIJA, J.A., LEVIRA, J.A. And KIHWELO, J.A.)**

**CIVIL APPEAL No. 302 OF 2020**

**MARY MBELLE.....APPELLANT**

**VERSUS**

**AKIBA COMMERCIAL BANK LTD.....RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania, Labour Division  
at Dar es Salaam)**

**(Nyerere, J.)**

**dated the 27<sup>th</sup> day of July 2017**

**in**

**Revision No. 262 OF 2016**

**.....**

**JUDGMENT OF THE COURT**

5<sup>th</sup> July & 20<sup>th</sup> October, 2021

**KIHWELO, J.A.:**

The appellant, Mary Mbelle, seeks the reversal of the decision of the High Court of Tanzania, Labour Division (Nyerere, J.) dated 27<sup>th</sup> July, 2017 upholding the decision of Lyimo, Deputy Registrar in respect of the application for execution of the Decree of the trial court (Mashaka, J.) in Labour Dispute No. 9 of 2013. By the impugned decision, the appellant's remedy of her reinstatement to the position of Head of Marketing and Communications Department without loss of salary and benefits was to be

executed by the respondent paying the appellant compensation of twelve (12) months wages in addition to wages due and other benefits from the date of unfair demotion to the date of final payment.

In order to facilitate an easy appreciation of the case, we think, it is desirable to preface the judgment with a brief historical background. The appellant, Mary Mbelle, was employed by the respondent as Public Relations Officer and she worked in different departments before she was later promoted to the position of Head of Marketing and Communications. On 14.05.2013 she was demoted to the position of Marketing Officer on allegations that she recommended a fake and non-existing orphanage center to receive Euro 16,000.00 and thereby causing potential financial and reputational loss to the respondent following the failed Corporate Social Responsibility (SCR) activity.

Aggrieved by the demotion, the appellant filed a labour complaint to the Labour Court challenging the fairness and legality of the respondent's decision to demote her. The Labour Court entertained the complaint and decided that the appellant's demotion was unfair and ordered the respondent to reinstate the appellant to her position of Head of Marketing

and Communication Department without loss of remuneration from the date of demotion to the date of final payment.

Subsequently, the appellant filed an application for execution, Execution No. 389 of 2015 before the Labour Court seeking to execute the order of the trial court for reinstatement of the appellant to her original position of Head of Marketing and Communication Department without loss of salary and benefits thereof; and alternatively, if the respondent failed, then the respondent's Managing Director, one Israel Chasosa be detained as a civil prisoner for six months. Upon hearing the parties, the Deputy Registrar was convincingly of the view that the relationship between the appellant and the respondent has broken down and therefore, she invoked Section 40(3) of the Employment and Labour Relations Act, Cap 366 R.E. 2002 (now R.E. 2019) (henceforth "the Act") and reached to the conclusion that the respondent has discretion to pay the appellant compensation in lieu of reinstatement.

Aggrieved by the decision of the Deputy Registrar, the appellant further sought assistance of the High Court, Labour Division by challenging the decision of the Deputy Registrar through Revision No. 262 of 2016 subject of the present appeal. As hinted earlier, the learned Judge

(Nyerere, J.) on revision was of the settled view that the Deputy Registrar rightly found that the respondent could invoke section 40(3) of the Act by paying the appellant compensation of twelve (12) months' salary in lieu of reinstatement. In the end, the learned Judge found no reasons to fault the Deputy Registrar's decision on execution and thus dismissed the application on account of lack of merit, hence this appeal.

The appellant's Memorandum of Appeal is comprised of six grounds of complaint namely;

- 1. That Honourable A.C. Nyerere Judge erred in law and fact by her failure to consider the Judgment and Decree of the presiding Honourable L.L. Mashaka Judge who had ordered the reinstatement of the appellant to the former position of the Head of Marketing and Communications Department which was vacant at the time of judgment on 9<sup>th</sup> October, 2015.*
- 2. That Honourable A.C. Nyerere Judge erred in law and in procedure by upholding the Ruling of the Deputy Registrar who proceeded with and made execution during the period of stay of execution on 13.06.2016 knowingly that the respondent had filed a Notice of Appeal and lodged stay of execution vide application No. 232 of 2015 in the Court of Appeal of Tanzania at Dar es Salaam which was pending till 30.10.2018.*

3. *That the Honourable A.C. Nyerere Judge erred in law and fact by blessing and upholding the Ruling of the Deputy Registrar who had no power nor (sic) jurisdiction to interfere or correct the award of the Decree given by the presiding Honourable L.L. Mashaka Judge on 9<sup>th</sup> October, 2015 who ordered reinstatement of the appellant, instead, the Deputy Registrar ordered payment of compensation in lieu of reinstatement by invoking section 40(3) of the Employment and Labour Relations, Act No. 6 of 2004 without any reasonable or justifiable cause taking into account that the appellant's case was of unfair and illegal demotion and not unfair termination.*
4. *That Honourable A.C. Nyerere Judge erred in law by overlooking the act of the respondent infringing and deducting the monthly salaries of the appellant from TZS. 5,465,302.15 to 936,225.00 soon after the Judgment and Decree of Honourable L.L. Mashaka Judge on 9<sup>th</sup> October, 2015 effective from December, 2015 without reasonable or justifiable cause.*
5. *That Honourable A.C. Nyerere Judge erred in law and in procedure by revising and changing the Judgment and Decree of the presiding Honourable L.L. Mshaka Judge of the same court on the same matter, a move that was contrary to section 4(3) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019.*
6. *That Honourable A.C. Nyerere Judge erred in law and in procedure in not considering the fact that the respondent on 9<sup>th</sup> November,*

*2015 had lodged stay of execution against the judgment and decree of Hon. L.L. Mashaka Judge vide application No.232 of 2015 which was still pending in the Court of Appeal at Dar es Salaam.*

When, eventually, the matter was placed before us for hearing on 5<sup>th</sup> July, 2021 the appellant was fending for herself, unrepresented, whereas the respondent had the services of Ms. Oliva Mkanzabi, learned counsel. Both the appellant and the learned counsel for the respondent lodged written submissions and supplementary written submissions either in support or in opposition to the appeal which they, respectively, fully adopted during the hearing. In the upshot, the appellant invited us to allow the appeal with costs, whereas Ms. Mkanzabi urged us to dismiss the appeal.

We propose to approach the grounds of complaint in a pattern preferred by the parties themselves.

The appellant took the floor and argued the first ground of appeal to the effect that the learned judge on revision failed to reinstate the appellant to her original position which was vacant at the time of delivery of judgment on 9<sup>th</sup> October, 2015. The appellant further contended that the position was only temporarily filled by one Fredrick Archard Kamugisha

from 14<sup>th</sup> May, 2013 to 12<sup>th</sup> August, 2013 when he resigned and later the position was held on acting basis for six months by Ms. Dora Saria who came to be confirmed in that position on 5<sup>th</sup> October, 2016. She stressed that it is on record, referring to pages 195 and 198 of the record of appeal, that the position of Head of Marketing and Communications Department was vacant at the time when the trial judge delivered her judgment on 9<sup>th</sup> October, 2015.

The appellant argued the second and sixth grounds of complaint conjointly. Briefly, she submitted generally by criticizing the learned Judge on revision for entertaining what she curiously termed same matter in the same court knowingly that the respondent had already filed a notice of appeal in this Court and ignoring the fact that the High Court had ceased to have jurisdiction in revision.

Arguing in support of the third ground of complaint the appellant contended that whereas the judgment and decree of the trial court ordered reinstatement of the appellant to her former position of Head of Marketing and Communications Department, the execution by the Deputy Registrar which was upheld on revision treated the matter as if it was unfair termination. The appellant forcefully argued that the Deputy Registrar had

exceeded her powers and the learned Judge on revision did not fault the Deputy Registrar who wrongly invoked section 40(3) of the Act by ordering the applicant to be paid compensation of twelve (12) months' salary in lieu of reinstatement. She fortified her position relying on Order XXI and Order XLIII Rule 1(f) to (k) of the Civil Procedure Code, (Cap 33 R.E. 2019) read together with Rule 48 of the Labour Court Rules G.N. 106 of 2007 (henceforth "the Rules"). Reliance was also placed on the cited foreign cases from Republic of South Africa in **Ndlela v. Stevendores Ltd** (1999) 13 ILJ and **Sass v. African Life Assurance** (2005) 6 BALR 682.

In support of the fourth ground the appellant criticized the learned Judge on revision for overlooking the act of the respondent deducting monthly salaries of the appellant from **TZS. 5,465,302.15** to **TZS. 936,225.00** soon after judgment of the trial court on 9<sup>th</sup> October, 2015 and without reasonable or justifiable cause. The appellant contended that this contravenes the provisions of section 28 of the Act. It was the appellant further telling that the respondent since 27<sup>th</sup> July 2017 stopped remitting statutory contributions to the pension fund despite deducting the same from the appellant's monthly salary.



Finally, arguing in support of the fifth ground the appellant curiously submitted that the learned Judge on revision revised and changed the decision of the trial judge of the same court and on the same matter contrary to section 4 (3) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019. To buttress her position, she relied on the decision of the Court in the case of **Tanzania Teachers' Union v. The Chief Secretary and Others**, Civil Appeal No. 96 of 2012 (unreported). We wish to remark in passing that the learned Judge on revision subject of this appeal was revising the decision made by the Deputy Registrar in Execution No. 389 of 2015 which was before Lyimo DR and not the judgment and decree in Labour Dispute No. 9 of 2013 (Mashaka, J. as she then was) as the appellant sought to make this Court believe so.

In reply Ms. Mkanzabi began her reply submission by addressing this Court that in principle all appeals to this Court from the High Court, Labour Division shall be on point of law only and not otherwise. To support her point reliance was placed on the provision of section 57 of the Labour Institution Act, Cap 300 R.E 2019 (henceforth "LIA"). She then went ahead to criticize that ground number one did not address a point of law. However, she forcefully argued that, the learned Judge on revision was

right to uphold the decision of the Deputy Registrar who invoked section 40(3) of the Act considering the fact that the position of Head of Marketing and Communications Department was occupied at the time the trial court pronounced the judgment and therefore, reinstatement was impracticable as the employment relationship between the duo was broken down irreparably due to the ongoing court case. She further contended that in terms of Rule 28 (e) of the Rules, Nyerere, J. revised the decision of the Deputy Registrar and not that of Mashaka, J. (as she then was) and came to the conclusions that the Deputy Registrar was right in ordering payment of compensation in lieu of reinstatement in line with section 40(3) of the Act.

Ms. Mkanzabi, submitted very briefly, in response to the second and sixth grounds that the learned Judge on revision rightly found that there was no need to interfere with the decision of the Deputy Registrar because the respondent exercised his right of discretion to pay the appellant compensation in lieu of reinstatement since the position in question was no longer vacant and apart from that, there was hostility between the appellant and the respondent. She further argued that there was no order

for stay of execution and the respondent had no intention to proceed with an appeal which was already withdrawn.

In response to the third ground Ms. Mkanzabi categorically stated that this was the only ground which raises a pure point of law in line with the requirement of section 57 of the LIA. She contended that, the impugned decision ordered the appellant to be reinstated to her former position without loss of income and that, the law which provides for the remedy of reinstatement is section 40 of the Act which also gives the employer an option to exercise the discretion to reinstate or compensate the employee in terms of section 40(3) of the Act. She contended further that since the Act is silent when it comes to demotion, the Registrar invoked the provision of Rule 55(1) and (2) of the Rules which empowers the Court in the exercise and performance of its powers and functions, or in any incidental matter, to adopt any procedure that the Court deems appropriate to achieve the objects of the Act and, or the good ends of justice in particular where rules do not provide. Ms. Mkanzabi, arguably, submitted that the Registrar rightly invoked section 40(3) of the Act in ordering execution because it was impracticable to reinstate the appellant

to her former position and it was on that basis the learned Judge on revision upheld the decision of the Registrar.

We wish to pause here and answer the question on whether remedies for unfair demotion is a procedure and therefore within the scope of Rule 55 (1) and (2) of the Rules which deals with procedures specifically not provided for. On our part, we are of the considered opinion that the respondent's argument that the Labour Court can invoke the provision of Rule 55 (1) and (2) of the Rules in the circumstances surrounding this matter is totally misconceived and out of place. Unfortunately, with due respect, we think that, the counsel for the respondent cannot be heard to take a rider to such a convenient escape route. Whereas remedies are found in the Act, the Rules which are made under section 55 (2) of LIA provides for the practice and procedure of the Labour Court which is a creature of the LIA. Therefore, the spirit of section 55(2) of the Rules is to fill gaps where Rules are silent on which procedure should the Labour Court adopt in the proper dispensation of justice and in no way this rule refers to remedies not provided for in the Act including remedies for unfair demotion.

Arguing in reply to the fourth ground Ms. Mkanzabi valiantly submitted that this ground was baseless on account that the same was not raised before the learned Judge on revision and further, she argued that section 40(3) of the Act gives the respondent an option to exercise the discretion to reinstate or compensate the appellant and that the learned Judge on revision took into consideration those deductions. She argued that during execution process the respondent will pay the appellant all wages due from the date of unfair demotion to the date of final payment as ordered by the trial court.

Responding to the fifth ground, Ms. Mkanzabi was fairly brief, she contended that, the learned Judge on revision did not revise the decision of the fellow trial Judge but rather revised the execution decision of the Deputy Registrar. Reliance was placed on Rule 28 (1) and (2) of the Rules. It is on that account the respondent implored us to dismiss the appeal for lack of merit.

What stands for our determination in the light of what has been submitted by both parties above, is whether the appeal is meritorious or not. Upon going through the proceedings of the trial court and written submissions as well as hearing oral submissions from the appellant and the

learned counsel for the respondent, we are convinced that the central issue for the determination of the matter lies on the order for compensation of the appellant in lieu of reinstatement. Nonetheless, we think the need does not arise to go through all the grounds of appeal that have been listed by the appellant. We shall therefore, restrict ourselves to just one ground which we believe, will conclude the matter before us.

Our starting point will involve a reflection of the law that provides for appeals to this Court from the High Court, Labour Division. For the sake of clarity, we wish to reproduce the provision of section 57 of the LIA which provides thus;

*"Any party to the proceedings in the Labour Court may appeal against the decision of that court to the Court of Appeal of Tanzania **on a point of law only.**"* [Emphasis added]

Admittedly, there is only one ground which is worthy consideration and determination by this Court and that is none other than ground three which is the only ground that raises a point of law as Ms. Mkanzabi rightly put it. The rest of the grounds do not raise any point of law worthy consideration and ultimately determination by this Court in terms of section 57 of LIA.

The gravamen of this appeal lies in the manner upon which the impugned judgment upheld the decision of the Deputy Registrar who came to the conclusions that the respondent could exercise discretion to reinstate or compensate the appellant in terms of section 40 (3) of the Act. Since section 40 of the Act is central to the fair determination of this appeal, we therefore, think, it is appropriate here to digress briefly the provision of section 40 of the Act which reads;

*"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 the unfair termination; or*

*b) To re-engage the employee on any terms that the arbitrator or Court may decide; or*

*c) To pay compensation to the employee of not less than twelve month's remuneration.*

*(2) N/A*

*(3) Where an order of reinstatement or re-engagement is made by an arbitrator or court and the employer decides not to reinstate or re-engage the employee, the employer shall pay compensation of twelve months wages in addition to wages due and other*

***benefits from the date of unfair termination to the date of final payment.*** [Emphasis added]

Speaking of the above provision, it is, perhaps, pertinent to observe that, the provision is conspicuously clear and loudly speaks for itself in that, it is applicable only in a situation whereby the employee is unfairly terminated and not otherwise. The question that remains to be answered is whether the case before us does present a similar outlook so as to justify the impugned judgment that upheld the decision of the Deputy Registrar who applied the provision of section 40 of the Act.

In an attempt to answer the above question, we wish to let record of appeal, at pages 326, 327 and 328 speak for itself;

*"I must say that the employer discretionary power to invoke section 40(3) of the ELRA is tailored on the following grounds provided under Rule 32(2) of the Labour Institutions (Mediation and Arbitration Guidelines) GN No. 67 of 2007 which provides that Arbitrator or Court shall not order reinstatement or re-engagement where;*

*a) The employee does not wish to be reinstated or re-engagement;*



- b) *The circumstances surrounding the termination are such that a continued employment relationship would be intolerable;*
- c) *It is not reasonably practical for the employer to reinstate or re-engage the employee; or*
- d) ***The termination is unfair because the employer did not follow a fair procedure.***

*Despite the facts that the stipulated circumstances elaborated above **deals with the circumstances of unfair termination of employment and not unfair demotion**, but it cutters (sic) in all circumstances where there is an order of reinstatement or engagement because such discretionary power is vested to the employers who know whether it is practicable or not to reinstate or engage or whether the circumstances surrounding the termination/demotion made employment intolerable.*

*In the instant case before the Deputy Registrar there was a prayer by the respondent counsel that the respondent is ready to invoke section 40(3) ELRA because the relationship between applicant and respondent has broken down and further to that applicant position was already taken by another person. In my view the Deputy Registrar*

*was correct to accept respondent prayer because the law mandate employer to exercise discretionary power under Section 40(3) of the ELRA. The Deputy Registrar went further elaborating that respondent discretion aimed to achieve the objects of the Act to ensure good end of justice because it is not in any way distorting the order of reinstatement made by Hon. Mashaka J.*

*Despite the facts that applicant counsel opposed the grounds raised by respondent counsel to invoke Section 40(3) of the ELRA on reasons that the relationship between the parties is not impairs (sic) and the position is still vacant it is absurd that the applicant counsel did not provide evidence to prove his allegation before the Deputy Registrar.*

*My observation in this case is that the Deputy Registrar Lyimo in any way did not alter, calculate or even exchange the rationale of the Judgment of Hon. Mashaka J. when she ordered the applicant to be reinstated to her former position without loss of remuneration as submitted by Mr. Noel Nchimbi learned counsel for the applicant because the power to invoke Section 40(3) of the ELRA is inherent to the employer to choose to comply with an order of reinstatement or compensate the employee 12*

*months' salary in addition to wages due and other benefits from the date of unfair demotion to the date of final payment.*

*Therefore, this court finds no reason to fault the Deputy Registrar's decision allowing respondent employer to invoke Section 40(3) of the ELRA instead of reinstatement."*

A cursory perusal of the above excerpts from the impugned judgment, it clearly reveals that, the Deputy Registrar invoked the provision of section 40(3) of the Act which gives the employer discretion to decide whether to reinstate or compensate the employee upon declaring that the termination was unfair. This was inconsistent with the decision of the trial court which ordered reinstatement of the appellant to the position of Head of Marketing and Communications Department without loss of salary and benefits thereof from the date of unfair demotion to the date of final payment.

We, on our part, think there is no parity of reasoning in the circumstances of the present case between unfair termination and unfair demotion and therefore it was inappropriate to invoke the provision of

section 40(3) of the Act. We, however, wish to state that every case must be decided according to its peculiar circumstances.

In the upshot, we allow the appeal. We reverse the impugned High Court's decision. We find that the learned Judge erred in upholding the Deputy Registrar's invocation of section 40(3) of the Act. Consequently, the execution should be confined to the order for reinstatement of the appellant to her former position as given in Labour Dispute No. 9 of 2013. This matter being a labour dispute not attracting awards of costs, we order each party to bear its own costs.

**DATED** at **DAR ES SALAAM** this 13<sup>th</sup> day of October, 2021.


A. G. MWARIJA  
**JUSTICE OF APPEAL**

M. C. LEVIRA  
**JUSTICE OF APPEAL**

P. F. KIHWELO  
**JUSTICE OF APPEAL**

The Judgment delivered this 20<sup>th</sup> day of October, 2021 in the presence of the appellant in person and Ms. Oliva Mkanzabi, counsel for the respondent is hereby certified as a true copy of the original.



  
S. J. KAINDA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**