IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KWARIKO, J.A, And FIKIRINI, J.A.)

CIVIL APPEAL NO. 31 OF 2020

STANBIC BANK (T) LTD.....APPELLANT

VERSUS

SOPHIA MAJAMBA..... RESPONDENT

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

(Aboud, J.)

dated the 20th day of December, 2009

in

Labour Revision No. 767 of 2018

.....

JUDGMENT OF THE COURT

15th February & 24th April, 2023.

FIKIRINI, J.A.:

The respondent, Sophia Majamba, displeased with her termination from employment with the appellant, Stanbic Bank (T) Ltd, on the ground of incapacity, lodged her complaint with the Commission for Mediation and Arbitration (the CMA). This was despite being paid terminal benefits and twelve months remuneration amounting to TZS. 71, 986,320.00 and later paid an extra twelve months salary, adding to TZS. 143, 972,640.00 as

compensation for termination. After hearing the parties, the CMA was satisfied that the termination was substantially and procedurally fair, awarded the respondent 15 days' salary amounting to TZS. 3,460,880.80.

Disgruntled with the decision, the respondent filed for revision before the High Court (Labour Division) at Dar es Salaam in Labour Revision No. 767 of 2018, which revised the CMA award. Displeased, the appellant, Stanbic Bank (T) Ltd approached the Court with eight grounds of appeal.

Background to the present appeal started with the respondent's employment with the appellant in 1995 as a secretary. She was promoted to various positions, including the Managing Director's secretary, providing professional and secretarial services. For the reasons which shall be discussed extensively in this judgment, her employment was terminated on 15th May 2015, as shown in exhibit A1.

Displeased, she referred her complaint to the CMA, complaining of unfair termination, and prayed for payment of two months' notice equivalent to TZS. 11,997,720. 00, fuel for twelve months at the rate of TZS. 180,000.00, medical treatment for twelve months at the rate of TZS. 150,000.00, gym facility TZS. 8900.00, leave TZS. 5,998,860.00 and May

2015's salary TZS. 2,999,430.00. The respondent also prayed for aggravated damages, three years remuneration TZS. 450,999,925.00. All these add up to TZS. 550,344,250.00 and a certificate of service.

Considering the termination was fair, the CMA ordered the respondent to be paid her May 2015 salary of TZS. 3, 460,880.80 which was not yet paid at the time of termination vide Award in CMA/DSM/KIN/R. 385/15/742. This did not go well with the respondent, who lodged a revision before the High Court in Labour Revision No. 767 of 2018. The High Court Judge's findings were that the termination was substantially and procedurally unfair since incapacity as a ground for termination was not proved. In the decision, the High Court Judge ordered for payment of two months' notice amounting to TZS. 11,997,720.00, thirty months' remuneration adding to TZS. 191, 963,520.00, and aggravated damages consisting of three years of remuneration and annual leave for the years she has been out of work to the award date.

Displeased with the decision, the appellant approached the Court with eight grounds, namely:-

1. *That the Honourable Judge erred in law and fact for failure to consider the culminated substantive context surrounding the respondent's termination rather than dwelling on the meaning of the single terminology "incapacity" used in the termination letter.*

2. *That the Honourable Judge erred in law and fact by holding that the respondent's termination was substantively unfair as they failed to consider the fact that the respondent's termination was by agreement.*

3. *In alternative to the above grounds, the Honourable Judge erred in law and fact for still holding that the respondent's termination was substantively unfair regardless of her findings that the Arbitrator was correct in holding that the respondent's termination was on intolerable behaviour.*

4. *That the Honourable Judge erred in law and fact for holding that the respondent's termination did not follow procedure contrary to the proof on record that the respondent's termination was by agreement following her intolerable and confrontational behaviour.*

5. *That the Honourable Judge erred in law and fact in awarding the respondent compensation of thirty months' salary equal to TZS. 191, 963, 520.00 without considering the fact that the respondent had already been paid 26 months' salary equal to TZS. 155, 973,600.00 after she agreed to be compensated for her termination.*

6. *That the Honourable Judge erred in law and fact in awarding the respondent compensation salary amounting to TZS. 191, 963,520.00 over and above the statutorily prescribed threshold without proof and justification of such entitlement.*

7. *That the Honourable Judge erred in law and fact for awarding the respondent three years remuneration as aggravated damages without proof of how and what damages the respondent suffered following the termination of employment apart from the fact that at the time of termination the appellant's industrious efforts to assist her had proved failure.*

8. *That the Honourable Judge erred in law and fact for failure to analyze the evidence properly before her hence occasioned injustice to the appellant.*

On the day the appeal came on for hearing, Mr. Anthony Mseke and Ms. Miriam Ismail Majamba, learned advocates appeared on behalf of the appellant and the respondent, respectively. Mr. Mseke adopted the written submission filed in terms of rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) on 15th April, 2020, and the list of authorities prior to addressing the Court. In his submission, he could submit on the first and third together and the fifth and sixth grounds of appeal covering termination on the ground of incapacity and reliefs awarded. Mr. Mseke, while admitting that the Judge and even the termination letter (exhibit A1), referred to termination on the ground of incapacity though not based on poor performance, but was of a different stance that the termination was on the ground of incompatibility. And that had the Judge considered the fact before her contextually, she would have concluded and leaned towards "incompatibility," whose attributes are covered under rule 22 of the Employment and Labour Relations (Code of Good Practice) Rules GN. 42 of

2007 (the Code of Good Practice Rules) and not "incapacity," covered under rule 15 of the Code of Good Practice Rules.

He further contended that the respondent, despite getting assistance from her employer as reflected on pages 97, 156, 157, 160, and 193 of the record of appeal, the fact she did not dispute, but all seemed in vain. Her constant complaint later led her to confront her fellow employees. All these were revealed at the CMA, and the Arbitrator concluded that the termination, aside from being mutual, was fair due to the respondent's behaviour (see pages 160, 195, and 198). The Judge had a different view as she concluded the termination was unfair since it was on the ground of "incapacity" even though she claimed not proved rather than "incompatibility" (see pages 426-427).

On the fifth and sixth grounds, whether the compensation and award made were proper, Mr. Mseke argued that following the procedure stipulated in the Rules was not required since the termination was mutual. Challenging the Judge's award of fifty six months' salaries as baseless for no reason was assigned on the one hand, on the other hand, the Judge should have considered that the respondent had already been paid twenty

four months' salary in addition to the twelve months' salary statutorily prescribed. The increase was thus unjustifiable and unwarranted, considering the respondent, in her prayers, asked for twelve months' salary only.

In his seventh and eighth grounds, Mr. Mseke faulted the High Court Judge for awarding the respondent three (3) years remuneration amounting to TZS. 215,958,960.00 as aggravated damages without proof of how and what damages the respondent suffered following the termination. He equated the Judge's position as turning herself into a doctor and a judge at the same time by concluding on what the respondent had suffered and what she deserved. Contesting the position taken by the Judge of awarding aggravated damages without justification, he invited us to direct our minds and borrow from our previous decision in **Anthony Ngoo and Davis Anthony Ngoo v. Kitinda Kimaro**, Civil Appeal No. 25 of 2014 (unreported).

He further, induced us to look into the case of **Cooper Motor Corporation Ltd v. Moshi/Arusha Occupational Health Services** [1990] T. L. R. 96, in which it was illustrated that the appellate Court could

interfere with the decision if the Judge failed to exercise its discretion judiciously, like in the present appeal by awarding to the respondent aggravated damages amounting to TZS. 215,958,960.00 without justification.

Mr. Mseke also criticized the High Court Judge for failure to properly analyze the evidence on record in his eighth ground of appeal, something which occasioned injustice to the appellant. He specifically pointed out that there was no evidence on record supporting the claim warranting grant of an aggravated damages award. Mr. Mseke went on contending that even when one looks at CMA Form 1, the respondent prayed for twelve months' salary as compensation for termination only, and the Arbitrator considering the termination was on mutual agreement, could not find any justification for the respondent's more claim particularly that of from 15th May, 2015 when she was terminated up to the date of the award 20th December, 2019. Buttressing his submission on the applicable principle when there is misdirection or non-direction on the evidence by the lower court, Mr. Mseke cited the case of **Peter v. Sunday Post Ltd** (1958) E. A. 424. He also referred us to the case of **Salum Mhando v. R** [1993] T. L. R. 170.

From his submissions, Mr. Mseke prayed for the High Court judgment to be set aside. Only the twenty four months salaries remain intact and not the excessive amount awarded, including the aggravated damages.

On her side, Ms. Majamba did not file written submissions but was allowed to make her oral submission in terms of rule 106 (11) of the Rules.

Responding to Mr. Mseke's submission, Ms. Majamba argued all grounds of appeal together. Her main argument was that from the beginning, the ground of termination was "incapacity," as indicated on page 183 of the record of appeal when DW1, a Human Resources personnel, testified, urging what was being referred or considered was termination on the ground of "incompatibility" due to the respondent's behaviour was an afterthought. She contended that this was because there was no proof of the respondent's behaviour before the CMA warranting termination. The fact that the respondent had behavioural issues was not known or placed before the management, or a complaint lodged, followed by a hearing conducted. The behavioural issue was thus magnified to support the termination carried out.

Expounding on what occurred to the respondent, Ms. Majamba argued that since 2004 up to when the respondent was terminated, there was no indication that her performance had changed or was below what was expected of her. Additionally, the respondent had a salary raise on 1st March, 2015 and was rewarded for good performance, out of which she was paid TZS. 22, 000,000.00. Shortly after that came termination on the ground of "incapacity." For someone who has been employed for twenty years, it was strange that she was terminated by a letter dated 15th May, 2015 without being subjected to any disciplinary action. When she challenged the termination, the appellant offered additional remuneration. According to Ms. Majamba, this was the appellant's act of cover up.

Insisting that the High Court Judge was correct in her decision, Ms. Majamba submitted that the respondent was terminated on the ground of "incapacity" and not "incompatibility," as Mr. Mseke wanted the Court to believe. She further contended that since the High Court decision was on "incapacity" and not "incompatibility," this Court cannot, therefore, venture into a new issue not considered by the High Court. According to her, the subject was brought up mainly to overturn the previous decision. Citing the case of **Remigius Muganga v. Barrick Bulyanhulu Gold Mine,** Civil

Appeal No. 47 of 2017 (unreported) to fortify her position, she urged us not to consider the newly raised point.

Contesting the assertion that the twelve months salary to keep the respondent from being destitute plus another twelve months salary and other awarded damages is what the appellant has been trumpeting as not deserving, while they were justified. Furthering this point, Ms. Majamba contended that all the reliefs sought are reflected in Form No. 1, found on page 10 of the record of appeal. The respondent specifically prayed for aggravated damages for three years and two months' salary as her notice. All these were requested considering the managerial level she was at. The High Court Judge, after analyzing all the information before her, rightly granted the prayers. The Judge on pages 438-439 of the record of appeal gave reasons for granting the prayers, and not as submitted by Mr. Mseke that no reasons were given. Moreover, the High Court Judge granted what was statutorily right to be granted to the respondent, even without her claiming.

Stressing on awarded damages, Ms. Majamba strongly argued that it all depended on the party's suffering. In the present case, the respondent

suffered since she was unfairly terminated without following the procedure, and there was nothing substantially complained about the respondent's performance. The termination was abrupt, and suddenly her salary stopped. Considering all these, the High Court found awarding the damages as prayed was appropriate. She invited us to be guided by the High Court (Labour Division) decision in **Tanzania Breweries Limited v. Gibson Nevava,** Revision Application No. 10 of 2021(unreported), in which the Judge held that there are rights that are statutory that an employee deserves once the termination is unfair. Another case cited was that of **Peter Maghali v. Super Meals Limited,** Civil Appeal No. 279 of 2019 (unreported), which stipulated that an employee must be heard by following the disciplinary procedure in place. That violation of the system can render a termination unfair.

Discussing procedural errors related to the termination of employment, Ms. Majamba submitted that there has to be a fair reason, and procedure must be followed when an employee is to be terminated, which was not the case. She cited the case of **Serenity on the Lake Ltd v. Dorcus Martin Nyanda,** Civil Appeal No. 33 of 2018 (unreported), to

further support her proposition on following legal procedure prior to the termination of an employee.

With the above submission, she implored us to find the appeal without merit and urged us to uphold the High Court decision.

Briefly rejoining, Mr. Mseke referred us to the case of **Ngoni Matengo Cooperative Marketing Union Limited v. Alimohamed Osman** (1959) E. A. 577, where the Court of Appeal of Eastern Africa underscored the importance of looking at the substance of the matter rather than the words. He also invited us to look at the ground of termination to be "incompatibility" rather than "incapacity" since under rule 22 (2) of the Rules, "incompatibility" is treated in a similar way to "incapacity" for poor work performance and that the Judge reasoned along those lines and even referred to a case only to abandon the thought later in her decision.

Responding to whether the issue of "incompatibility" was new, Mr. Mseke dismissed the assertion. He commended the Arbitrator's work, who extensively explained that what occurred was issues of "incompatibility" and not "incapacity." And under those circumstances, there was no need

for disciplinary action. Distinguishing the decision in **Peter Maghali** (supra), Mr. Mseke argued that twelve months' salary was awarded in the above case, though the procedure was flawed. He also invited us to read the case of **Felician Rutwaza v. World Vision Tanzania**, Civil Appeal No. 213 of 2019 (unreported). Contrasting that to the situation in the present appeal, he argued that the termination in the present appeal was mutually agreed upon between the appellant and the respondent. Thus no reason could be advanced after that. Therefore, the situation did not warrant an award of fifty six months' salary.

Mr. Mseke challenged the damages and awards granted. Starting with two months' notice, he argued that the respondent failed to prove she was in the managerial cadre before the Judge awarded it. On compensation, he argued that even though statutory, but ought to be proved. He further argued that the grant of compensation from the date of termination to the date of judgment was the Judge's creation trying to atone for the termination she considered unfair. At the same time, the respondent only sought twelve months' salary under section 40 (1) (c) of the ELRA, and the appellant complied by giving twenty six months'

remuneration. The Judge's increase of thirty months' salary was unnecessary; in this instance, it translated as punishing the appellant.

We have dispassionately considered the submissions by the learned advocates and authorities relied upon. We think the best way to approach the matter is to lay the legal foundation.

The law governing termination of employment contracts in Tanzania are the ELRA and the Code of Good Practice Rules. Rule 4 of the Code of Good Practice Rules is one of the most crucial provision on termination of contracts. The rule provides as follows:-

> *"An employer and employee shall agree to terminate the contract in accordance with the agreement."*

Another equally important provision is section 37 (1) of the ELRA, which prohibits an employer from terminating an employee unfairly and without following the termination procedures. As prescribed under rule 9 (4) of the Code of Good Practice Rules, fair reason and procedure must be observed. The considered justifiable grounds so far listed under the provision are misconduct, incapacity, incompatibility, and operational requirement. Each of these categories has its structure, and for the present

appeal, we shall endevour to examine both: (i) incapacity and (ii) incompatibility.

Incapacity is covered under rules 15 (1) of the Code of Good Practice Rules and is generally defined as:-

> *"(1) An employee's incapacity may be due to ill health, injury or poor work performance."*

The rule further states under rule 15 (2) of the Rule that:-

> *(2) Each reason needs to be dealt with on its own merits and a fair procedure applied in each case."*

Ordinarily, incapacity is gauged by unsatisfactory performance. This includes a situation where the employee fails to meet the approved standards, brings unexpected results, or becomes unfit or unable to perform as expected in providing the agreed service.

However, in determining the above, ensuring that the employee knows what is expected of her/him is imperative. Rule 16 (1) clearly illustrates how to manage work performance thus:-

> *"16 (1) It is important in determining the fairness of termination for poor work performance,* ***that the***

performance standard is not only reasonable but is also known to the employees." [Emphasis added]

Pursuant to rules 19 (1) – (14) of the Code of Good Practice Rules, under the injury or ill health categories, the employer is obliged to consider the cause of incapacity, whether work related or not, degree and permanence or temporary status of the incapacity, whether the employer can accommodate the situation and if there are somewhat remedy such as compensation or pension.

And while the incapacity alleged and available remedies are under consideration, under rule 21 (1) – (8), there have to exist channels of communication between the employer and the employee concerned. Under rule 21 (8) of the Code of Good Practice Rules, in particular, the outcome has to be communicated to the employee in writing.

On the contrary, incompatibility as a ground for termination is covered under rule 22. Incompatibility essentially can be described as unacceptability behaviour or personality on the part of the employee to her/his work, which has consequences on the co-employees or worker, those being served, or just any person who will be negatively impacted. Whereas it can constitute a good reason for termination, there is

nonetheless a procedure to be followed. The employer has to determine reasonably if incompatibility as an aspect warranting termination exists.

Even though incompatibility stands alone as a ground for termination, its component of poor work performance is also found under incapacity as a ground for termination of employment and enjoys the same treatment. Considering that proof of poor work performance is a question of fact to be determined on a balance of probabilities as envisioned under rule 17 (3) of the Code of Good Practice Rules, an employer is required to register or document all incompatible behaviour giving rise to disruption or complications at the workplace.

Furthermore, in terms of rule 18 (1) – (9) of the Code of Good Practice Rules, the procedure considered reasonable and just has been provided. Apart from recording disruptive or problematic behavioural incidents, the employer must take a step in warning the employee and, when needed, suggest counseling. Whilst this occurs, the employer is required to take through the employee on acceptable and unacceptable behaviour or conduct and the possible consequences, including termination from employment.

Notwithstanding that the employee has been warned or counseled, before terminating an employee on the ground of poor work performance, the employer is obliged to give the employee a fair opportunity to the following: (i) consider and, if need be, counter the allegation of incompatibility leveled against him/her, (ii) resolve, eradicate or eliminate the root cause of the incompatibility if possible and (iii) propose an alternative for termination.

After going through the provisions governing termination of employment and the grounds of appeal, which we find interrelated, it would be more convenient to cluster the grounds of appeal into four issues.

(i) what was the basis for the respondent's termination?

(ii) was the termination of the respondent substantively and procedurally fair?

(iii) whether failure to analyze evidence occasioned injustice to the appellant.

(iv) whether the compensation awarded by the High Court and three years' remuneration as aggravated damages was warranted.

On the first issue on what entails a termination on ground of incapacity, we find that it has to be on ill health, injury, or poor work performance. It is on record that the respondent's termination was mutual based on ground of incapacity, as exhibited by A1 and testimony of DW1, as reflected on page 98 of the record of appeal. Mr. Mseke disagreed with this position asserting that the respondent's termination was on the ground of incompatibility. He thus wished us to consider the context rather than simply the title on the termination letter carrying the caption "termination on ground of incapacity." He firmly held his position and referred us to the **Ngoni Matengo Marketing Union Limited** case (supra). Ms. Majamba, on the contrary, not only disagreed but contended that the issue was new and had not been decided upon by the High Court.

The record shows that the reason for the respondent's termination of employment is exhibited in A1. The complaint before the CMA and later the High Court is that the respondent was terminated on ground of incapacity. Therefore, the contention by Mr. Mseke that the respondent's termination was on ground of incompatibility is unsupported. We think the invitation to consider the substance rather than the title should have been raised at the CMA and the High Court, not at this stage, the issue being factual.

The case of **Ngoni Matengo Marketing Union Limited** (supra), referred to us, is distinguished. In that case, the applicant dissatisfied with the High Court decision filed an appeal before the Court of Appeal for Eastern Africa. The Court of Appeal of Eastern Africa dismissed the appeal for being incompetent, instead of striking it out. The applicant later appeared before a Single Justice in an application for extension of time. The application was dismissed, due to the fact that the prior application for leave to appeal out of time had been dismissed by the Court of Appeal of Eastern Africa for being incompetent. We find the scenario in the present appeal is entirely different from the one in the referred case. The respondent's complaint before the CMA was that she was terminated on ground of incapacity, and that is what indeed her termination letter indicated. The High Court, despite canvassing on the evidence suggesting incompatibility, concluded the termination was on ground of incapacity, which was nonetheless not proved.

Considering that the High Court did not decide on incompatibility, this Court cannot, therefore, decide on the point unless it has a legal implication. There is a long list of cases on this point from which we are guided, such as **Elia Moses Msaki v. Yesaya Ngateu Matee** [1990] T.

L. R. 90, **Mbeya Rukwa Autoparts Transport Ltd v. Jestina George Mwakyoma** [2003] T. L. R. 251, **Ludger Bernard Nyoni & Harrison Lyombe** (for and on behalf of 369 tenants) **v. The National Housing Corporation**, Civil Application No. 37 of 2007, and **Juma Manjano v. The DPP,** Criminal Appeal No. 211 of 2009 (both unreported). Thus, we subscribe to Ms. Majamba's position that termination on the ground of incompatibility is a new issue this Court is invited to resolve since the High Court did not determine it. Even though incompatibility is a species of incapacity on poor work performance, these two aspects are distinct. While incapacity is governed by rule 15 (1), incompatibility is governed by rule 22 of the Code of Good Practice Rules.

Moreover, the two aspects being different grounds for termination of employment must, therefore, be specifically pleaded and proved. In this case, it is incapacity that was claimed and not incompatibility.

And even assuming, for the sake of argument, that the respondent's termination was on ground of incompatibility, which we do not agree, still, the appellant was required to flag out the respondent's intolerable behaviour or complaint raised against her because such failure or inability

would warrant to be a substantively fair reason for termination. Although there were attempts to help the respondent, as evidenced in the testimonies of DW1 and DW2, which the respondent did not dispute, the efforts proved futile, and it seems no further attempts were made; in its place, termination was opted.

Under rule 18 of the Code of Good Practice Rules, the appellant was required to record all the incidents of incompatibility that gave rise to disruption or what were the actual problems. Hand in hand with that, the appellant was obliged to counsel and warn the respondent before termination. Whereas counselling was attempted, as evidenced by DW2, the record is silent if a warning was issued. Similarly, there was no proof that the respondent was informed and/or advised on unacceptable conduct at the appellant's company. And prior to termination, the appellant ought to have given the respondent a fair hearing by raising a charge and allowing her to reply to the allegations. Other measures which could be opted for were to try and eliminate the cause for disharmony and, worse, propose an alternative to termination.

Much as Mr. Mseke has claimed the termination was on ground of incompatibility, we are bound by what was written in a termination letter, which cannot be changed simply because the Court has been invited to consider substance over titles. We believe that generally, a Judge is duty bound to decide a case on the issues on record and that if there are other questions to be considered, they should be placed on record, and the parties be allowed to address the Court on those questions. Before the High Court, the issue was termination on ground of incapacity, and the Court made a finding on that issue and nothing else.

Incapacity as the ground of termination as exhibited in A1, governed by rule 15 (1) of the Code of Good Practice Rules, as rightly decided by the High Court Judge, it requires proof that there was poor performance and that the employee failed to meet the work standards at the workplace. In the present appeal, the appellant was unable to prove the alleged incapacity.

On the contrary, the evidence showed that the respondent showed high performance. Shortly before termination, she was rewarded for that in March 2015 and given a bonus of TZS. 22, 000,000.00. It was thus

astonishing that in a few months, from March to May, 2015, she became incapable to the extent of her employment being terminated on ground of incapacity.

We are confident that the appellant did not follow the procedure as stipulated under rule 8 (1) (c) of the Code of Good Practice Rules, which provide as follows:-

> *"8 (1) An employer can terminate the employment of an employee if he-*
>
> *(c) follows a fair procedure before terminating the contract,"*

The appellant, contended that the termination was agreed upon by parties hence mutual, the assertion refuted by the respondent, who claimed that she signed the termination letter without consent. Besides signing acknowledging her termination as exhibited in exhibit A1, she informed the appellant that she would appeal the decision as reflected on page 146 of the record of appeal. And indeed, she appealed the decision first with her employer, who agreed to pay her additional twelve months' salary. We are not convinced that the parties mutually agreed on termination. *One,* had that been the case, all the discussions which took

place would have been concluded with a sealed deal, which seems not to be the case, as three days after receiving the termination letter, the respondent appealed to the appellant. The appeal caused the appellant to consider compensation of twelve more months. The appellant's reaction does not suggest to us there was a mutual agreement. *Two*, there were no minutes or report on what the discussion was to support the contention that the parties mutually agreed on employment termination. Moreover, that did not exonerate the appellant from the obligation to act in a manner procedurally fair.

In our firm view, the reason for termination was unfair and unlawful as no valid reason was given or an allegation proved. This could, therefore, not warrant a fair procedure. Despite claims against the respondent, no fair hearing as provided under the law was conducted. The respondent was thus denied the opportunity to state her case. In the circumstances of this appeal, it cannot be said the termination was substantively and procedurally fair.

Regarding the third issue of failure to properly analyze the evidence, we are partly in agreement with Mr. Mseke. We are in agreement that had

the High Court Judge analyzed the evidence on record appropriately, the claim on aggravated damages would not have been granted as there was no evidence in that regard. We share and relying on principles stated in the case of **Peter** (supra) and **Salum Mhando** (supra), agree that there was a misdirection on the part of the High Court Judge.

On the other hand, we find the Judge had properly analyzed the evidence on the ground of termination. The High Court Judge's findings were, which we agree, that the respondent was terminated on the ground of incapacity and not incompatibility as Mr. Mseke would desire us to conclude. From the available evidence on record the respondent was terminated on the ground of incapacity, as evidenced in the termination letter – A1. The finding that the termination was on the ground of incompatibility though sound, but that was not what was on record.

Similarly, we say the Judge was correct in her findings that the termination besides not being mutual, was substantively and procedurally unfair.

On the contents of CMA Form 1, as reflected on page 13 of the record of appeal, the respondent has prayed for twelve months' salary plus

other claims including aggravated damages of three (3) years as compensation amounting to TZS. 450,999,925.00. It is therefore not correct for Mr. Mseke to allude that the respondent prayed only for twelve months' salary as compensation for termination. Moreover, since the termination was not mutual as portrayed, we think the reliefs prayed should have been considered in that light. Whereas the Arbitrator missed that point, the High Court Judge proceeded to award aggravated damages without justification.

Our last issue for determination is on the compensation awarded by the High Court and three years' remuneration as aggravated damages. We are without a doubt that there is a consequential remedy after we concluded that the termination was substantively and procedurally unfair. And that the respondent deserved compensation as provided under section 40 (1) (c) of ELRA. In the present case, however, the respondent was initially to be paid twelve months' salary equal to TZS. 71, 986, 320.00, two months' salary *ex-gratia* amounting to TZS. 11,997,720.00, salary in lieu of notice TZS, 5,998,860.00, severance pay of TZS. 59,988,600.00, medical pay TZS. 50,000.00 and leave allowance TZS. 5,998, 860.00. On the 18th May, 2015, a few days after the initial termination letter, she lodged her

complaint to the appellant. After consideration, the appellant increased twelve months more, equal to TZS. 71,986,320.00. In total, she was paid TZS. 228,006,680.00

The payment did not deter the respondent from lodging her complaint, with the CMA praying for two months' notice equivalent to TZS. 11,997,720.00, compensation of twelve months salary TZS. 71,986,320.00 plus fuel TZS. 2,160,000.00, medical TZS.1,800,000.00, gym TZS. 8900, leave TZS. 5,998,860.00 part of May, 2015's salary when still at work TZS. 2,999,430.00 and aggravated damages in three years of remuneration amounting to TZS. 450, 999,925.00 in total, adding up to TZS. 550,344,250.00 and on top of that, be given a good certificate of service. The CMA found the termination was fair and ordered the respondent to be paid only TZS. 3,460,880.00 her unpaid salary for the days she worked in May, 2015. The respondent challenged the findings.

This being the appellate Court, has the power to re-evaluate the evidence and make its findings. We admit, as did the High Court Judge, that the respondent's termination was substantively and procedurally unfair and that the respondent has a right to compensation and general

damages. However, we differ on whether there was sufficient evidence to consider the circumstances for aggravated damages and deserving of the awarded amount. We will explain this later in this judgment.

Compensation of not less than twelve months for remuneration is provided under section 40 (1) (c) of the ELRA. The provision provides as follows:-

> *"40 (1) (c) to pay compensation to the employee of not less than twelve months remuneration."*

Regardless of the stipulated not less than twelve months' compensation, the law does not prohibit compensation of more than twelve months. It is trite law that when awarding damages, the court must provide the reason to justify the award, considering that the essence of awarding damages is mostly to restore a party to the original position she was in before the occurrence of the incident complained of. In the case of **Veneranda Maro v. Arusha International Conference Centre,** Civil Appeal No. 322 of 2020 (unreported), the Court stressing the above held:-

> *"The discretion must be exercised judiciously, taking into account all the factors and circumstances in arriving at a justified decision."*

The Court must therefore consider all the factors presuming to be direct, natural, and probable consequences of the act complained. In the case of **Anthony Ngoo and Davis Anthony Ngoo** (supra), cited in the appellant's written submission, we emphasized the above when we said:

> *"The law is settled that general damages are awarded by the trial judge after consideration and deliberation on the evidence on record able to justify the award. The Judge has discretion in the award of general damages. However, the Judge must assign a reason, which was not done in the case."*

In the present appeal, the respondent sought relief of twelve months' remuneration before the CMA, indicating she had no reasonable cause to ask for more. Awarding more than what was requested or without any evidence on record or assigning a reason for doing so was in our view, unjustified. Moreover, in this appeal when the respondent approached the CMA, she had already been paid twenty six months of remuneration. The Judge should have therefore deducted the twenty six months already awarded. Therefore, instead of awarding TZS. 191, 963, 520.00 the Judge should have deducted TZS. 155,970,360.00. In our view, the respondent

has no further claim as remuneration besides the little amount left after deducting the twenty six months already paid.

The High Court Judge also awarded aggravated damages to the tune of TZS. 215,958,960.00 covering three years of remuneration. Amongst the reason given by the Judge is that the respondent suffered mental distress due to the termination and could not get another job opportunity of the same caliber. Whilst we agree on the definition of what should be considered when determining aggravated damages, we do not agree with the conclusion that was arrived at and the award made, as the reasons given were not proved. Nowhere in the record has it been proved that the respondent could not be employed due to the termination of the appellant's employment. The court, in exercising its discretionary powers, is still required to rely upon and apply the proper principle of law, lest the appellate court interferes with the assessment.

A wrong principle in the assessment of damages will undoubtedly attract disturbance by the appellate court in the quantum of damages awarded. In **Davies v. Powell** (1942) 1 All ER 657, approved by the Privy Council in **Nance v. British Columbia Electric Rail Co. Ltd** (1951) AC. 601, held:-

*"Whether the assessment of damages be by Judge or Jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case...**before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking into account some irrelevant factor or leaving out of account some relevant one); or short of this that the amount awarded is so inordinately low or so inordinately high that it must be wholly erroneous low or so inordinately high that it must be a wholly erroneous estimate of damage."*** [Emphasis added]

We align ourselves with the above decision because, throughout the record, there is no evidence justifying granting the aggravated damages. Aggravated damages, as pinpointed by the Judge, are essentially to compensate for additional distress or injury to the feelings arising from how the respondent was wronged. In the present case, the record did not support what the Judge stated on page 444 of the record of appeal to warrant awarding aggravated damages. The respondent's testimony on page 151 of the record was not along that line. Instead, she stated that

she deserved an award for damages because she was hard-working to the extent of being promoted, and with the termination, her name was thus defamed. We appreciate the Judge's consideration but should have been considerate in the amount awarded.

We agree that the respondent's termination was substantively and procedurally unfair, and therefore, the respondent deserves to be compensated and considered for general damages. It is noteworthy to say that a twelve-months' remuneration stipulated under section 40 (1) (c) of ELRA would have sufficed as aggravated damages, bearing in mind that she has already been compensated twenty six months over and above what is provided in law.

From the availed evidence the respondent has already been paid the following: terminal benefits plus twenty four months' remuneration equal to TZS. 143, 972, 640.00 as compensation for termination, two months salary *ex-gratia* amounting to TZS. 11,997,720/= one month's salary in lieu of notice TZS. 5,998,860/=, severance pay amounting to TZS. 59,988,600/=, medical facility TZS. 50,000/= and leave allowance TZS. 5,998,860/=, all adding up to TZS. 228,006,680/=. What remained unpaid

is TZS. 2,999,430/= which was her salary for the fifteen days she worked in May, 2015 prior to her termination.

All said and done we find the appeal has merit to the extent shown and is thus allowed. This being a labour matter we order no costs.

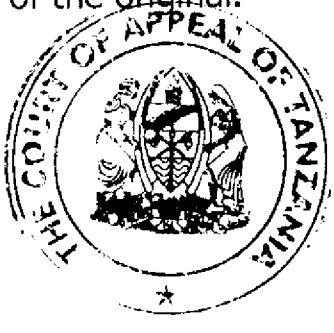
DATED at **DAR ES SALAAM** dated this 18th day of April, 2023.

R. K. MKUYE.
JUSTICE OF APPEAL

M. A. KWARIKO.
JUSTICE OF APPEAL

P. S. FIKIRINI.
JUSTICE OF APPEAL

The Judgment delivered this 24th day of April, 2023 in the presence of Mr. Shepo Magirari, learned counsel for the appellant and Ms. Miriam I. Majamba, learned counsel for the respondent, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL