IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., MAIGE, J.A., And MDEMU, J.A.)

CIVIL APPEAL NO. 136 OF 2022

ROBERT SHEMHILU ..... APPELLANT

VERSUS

TANZANIA ELECTRIC SUPPLY COMPANY LIMITED ..... RESPONDENT

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

(Rwizile, J.)

dated the 6th day of December, 2021

in

Consolidated Revisions No. 680 of 2019 & No. 232 of 2021

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JUDGMENT OF THE COURT

14th February & 21st May, 2024

MWAMBEGELE, J.A.:

By a long-term contract executed on or about the 30th day of September, 1994, the appellant, Robert Shemhilu, was employed by the respondent, Tanzania Electric Supply Company Limited (TANESCO), as an accountant grade I. He rose through several ranks until 25th May, 2011 when a three-year short term contract was executed which saw him rising to the position of Deputy Managing Director, Corporate Services (DMD-CS), quite an accolade to him. While in the service of the new post, on 3rd June,

2013 to be particular, he was terminated from employment following charges on several counts of gross negligence and gross inefficiency on which he was convicted. The charges were founded on the Employment and Labour Relations (Code of Good Practice) Rules, 2007 – GN No. 42 of 2007 and the TANESCO Code of Ethics and Conduct. Following his termination, he was paid one month's notice pay, repatriation expenses to Mlalo, Lushoto; his place of domicile and pension from the Parastatal Pensions Fund (PPF) upon being processed.

The termination irked the appellant. He thus filed a labour dispute before the Commission for Mediation and Arbitration (the CMA) claiming that the termination was unfair in substance and procedure. The dispute was christened Labour Dispute No. CMA/DSM/KIN/R.427/13/498 and was pegged on the following grounds; that the Disciplinary Committee had no jurisdiction to hear the dispute, he was denied an opportunity to prepare and present a proper defence and that the charges were discriminatory and selective and that the respondent had a predetermined decision to terminate him. He thus prayed for reinstatement and compensation on account of unfair termination. The CMA decided in his favour, finding termination to have been unfair in both substance and procedure. However, convinced that

reinstatement would not be ideal given the sour relationship between him and the respondent, the CMA was of the view that justice would prosper if he was paid salary for the remaining period of the contract. Consequently, the CMA awarded him terminal benefits of Tshs. 7,986,000/= (monthly salary) times twelve months (the remaining period of the contract) which made a total of Tshs. 95,832,000/= as compensation for the unexpired term of the contract.

Both parties were aggrieved by the arbitral award of the CMA. Thus, while the appellant lodged in the Labour Division of the High Court Revision No. 680 of 2019, the respondent lodged in the same court Revision No. 232 of 2021. The High Court consolidated them on 27th August, 2021 and heard them together. In its decision rendered on 6th December, 2021, the High Court (Rwizile, J.) held that termination of the appellant was substantively fair but procedurally unfair but, all the same, upheld the award of Tshs. 95,832,000/= by the CMA. Both Revisions were therefore dismissed with no order as to costs. Undeterred, the appellant has knocked the door of this Court seeking to challenge the decision of the High Court on only two grounds of appeal; namely, **first**, that the High Court erred in holding that there were valid reasons for terminating the appellant contrary to the

evidence on record; and, **secondly**, that the High Court erred in law for failure to fault the arbitrator's decision in awarding the reliefs sought.

At the hearing of the appeal, while the appellant was represented by Mr. Daniel Haule Ngudungi, learned counsel, Ms. Jessica Joseph Shengena, learned Principal State Attorney, Mr. Lameck Twinomukama Buntuntu, Senior State Attorney and Mr. Mkumbo Elias, also Senior State Attorney, joined forces to represent the respondent.

The learned counsel for the parties had earlier on filed written submissions by which they stood at the oral hearing and clarified on some areas.

Arguing in support of the first ground of appeal, Mr. Ngudungi submitted that before the disciplinary hearing, the appellant had requested for documents which would assist him in his defence. The learned counsel referred us to pages 552 though to 557 of the record of appeal where the appellant requested to be supplied with relevant documents but the respondent did not heed to the request. He added that the appellant was supplied with only the charge sheet but not the report of the Controller and Auditor General (CAG) which was the basis of all the charges. That

amounted to an unfair trial, he argued. The learned counsel invited us to take inspiration from the decision of the High Court in **Tanzania Telecommunication Company Limited v. Nkayira Moshi**, Revision No. 29 of 2015 (unreported) in which it was held that investigation report which formed the basis of the allegations should be availed to an employee so that he would prepare his defence.

The appellant also complained that the select Disciplinary Committee was not his disciplinary authority and thus it had no jurisdiction to hear the dispute. The appellant argued further that what his disciplinary authority did was to appoint a select Disciplinary Committee to deal with the matter and after completion of the hearing, it made a recommendation to it. Instead of hearing the matter, the Board which was his disciplinary authority, just called him for mitigation. On that course of action taken, the appellant submits that he was not accorded a fair hearing. After all, he argued, the CAG Report which was the basis of the charges, identified one Felchesmi J. Mramba to be the substantive post holder, but it was the appellant who carried the cross on account of another person. On the right to a fair hearing, the appellant urged us to follow the position we took in **Bank of Tanzania v. Said A. Marinda & Others**, Civil Reference No. 6, 7 and 8 of 2006 (unreported) in

which we held that failure to give an opportunity to the applicant to be heard amounted to breach of a fundamental principle of natural justice. On the same principle, the appellant's counsel also cited **V.I.P. Engineering and Marketing Ltd and 2 Others v. Citibank Tanzania Ltd** (Consolidated Civil Reference 6 of 2006) [2007] TZCA 165 (26 September 2007) TanzLII in which we quoted the following excerpt from **Abbas Sherally & Another v. Abdul Sultan Haji Mohamed Fazalboy**, Civil application No. 33 of 2002 (unreported):

> *"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."*

Counsel also referred us to **Earl v. Slatter & Wheeler (Aerlyne) Ltd** [1973] 1 WLR 51 for the proposition that, where natural justice is violated, it is no justification that the decision was in fact correct and **A.G. v. Ryan** [1980] A. C 718 in which it was held that a decision which offends against

the principles of natural justice is outside the jurisdiction of the decision making authority. He therefore implored us to allow the appeal on this ground.

As regards the second ground of appeal, the appellant submitted that the High Court wrongly upheld the findings of the arbitrator who wrongly applied the provisions of section 40 (1) of the Employment and Labour Relations Act, Cap. 366 of the Revised Edition, 2019 (the ELRA). The appellant's counsel argued that the High Court judge failed to fault the CMA award which acted in excess of its powers by awarding compensation as a substitute of reinstatement as prayed by the appellant in Form No. 1. In terms of section 40 of the ELRA, the appellant's counsel argued, once the court finds that termination was substantially and procedurally unfair, the court has two options to make. In the case at hand, he contended, the CMA awarded compensation in lieu of reinstatement instead of reinstating the appellant and award any compensation in addition to his entitlement under the agreement for reinstatement. The High Court thus erred in affirming the award which was against the spirit of section 40 (2) the ELRA, he argued.

Given the above arguments, the appellant's counsel urged us to allow the appeal and award the appellant what he is entitled under the law.

Resisting the appeal, Ms. Shengena submitted that the appellant was supplied with all the relevant documents he asked for as reflected in the letter of 18th April, 2013 which appears at pp. 1307 and 1308 of the record of appeal. However, Ms. Shengena admitted that the appellant was not supplied with the whole of the CAG Report but only the relevant parts which concerns charges against the appellant. The CAG Report, she went on, had other details which concerned charges against other employees which were not relevant to the appellant.

With regard to the second limb of ground one to the effect that the appellant's investigation was not heard by the requisite committee, Ms. Shengena submitted that the select committee was appointed to hear the disciplinary case of the appellant by virtue of the provisions of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 – GN No. 42 of 2007. The learned Principal State Attorney did not, however, mention the relevant rule. As regards the cases of **Bank of Tanzania v. Said A. Marinda & Others**, **Earl v. Slatter & Wheeler (Aerlyne) Ltd**

(supra) and **A.G. v. Ryan** (supra), cited by the appellant's counsel, the learned Principal State Attorney submitted that they were distinguishable but did not go further to tell us how. She implored us to dismiss this ground of appeal.

Arguing in opposition to the second ground of appeal, Ms. Shengena submitted that despite the fact that the CMA found that the termination was unfair in substance and procedure, the arbitrator sought assistance from Professor SR Jaarrsveld, et al in their treatise, **Principles and Practice of Labour Law**, Vol. 1 para 211 which is found at pp. 1434 and 1435 of the record of appeal, which explains circumstances when a reinstatement may be ordered. Convinced by the above treatise as well as with the decision in **Good Samaritan v. Joseph Robert Savari Munthu**, Revision No. 165 of 2011 (at p. 1434 of the record of appeal), the CMA found that reinstatement would not be in the interest of justice. The only available remedy was thus statutory compensation and not to be paid salaries for the remaining contract, she argued.

Giving Ms. Shengena a hand, Mr. Buntuntu cited to us a book titled **Principles and Practice of Labour Law** at p. 46 where the learned author

explains the circumstances warranting an order for reinstatement. According to the book, the appellant being a senior officer holding a key position in the respondent, was not entitled to reinstatement, he argued. He added that compensation was in terms of section 40 (1 (c) of the ELRA. The learned Senior State Attorney thus implored us to dismiss the appeal.

In a short rejoinder, Mr. Ngudungi submitted that the short term contract did not alter any terms in the original contract but built on them. The learned counsel argued that the appellant did not pray for reinstatement to the position of Deputy Managing Director which might be a senior and key position, but to the position of a financial officer under the first agreement which is neither senior nor key position. The book cited by Mr. Buntuntu, he argued, is therefore not applicable to the present case. He thus reiterated his prayer to allow the appeal and order reinstatement so that the appellant could get his terminal benefits.

We start the determination of this matter by echoing that appeals to this Court on labour matters, in terms of section 57 of the Labour Institutions Act, Cap. 300 of the Laws of Tanzania, are on points of law only. In the determination of the appeal at hand, we shall be guided accordingly. In the

instant appeal, having deliberated on the matter at length, we think the discontentment of the appellant is essentially on the relief awarded. What the appellant seeks is reinstatement and "compensation for unfair termination to the extent allowed by the law".

Be it as it may, the complaint in the first ground of appeal is on the propriety of the charges against the appellant. The High Court reversed the decision of the CMA which held that termination was unfair in substance. The appellant complains that the High Court erred in holding that there were valid reasons for terminating the appellant contrary to the evidence on record. The High Court reasoned at pp. 2049 - 2050 why it thought there were valid reasons for termination. Having examined the record of appeal and considered the appellant's arguments, we find substance in the appellant's argument. The whole thing stemmed from the CAG report which triggered the charges against the appellant. Explaining why he differed with the finding of the CMA, the High Court judge observed at pp. 2049 - 2050 of the judgment:

> *"... the respondent was a senior officer of the applicant. He had served for at least 15 years before being promoted to the rank of deputy managing*

director of corporate services. He was definitely experienced in the fieid. In the tender board among other duties was to guide fellow members as an expert to arrive at a decision which is beneficial to the employer. There is also evidence that the tender board did not pass a proper decision that benefited his employer. Still, as senior officer, he did not properly supervise his subordinates or process for their discipline. In all, there is no dispute based on the report that the applicant suffered loss of billions of monies. This, I can hold with certainty that the applicant had valid reasons to prosecute the respondent. I therefore do not accept the commission's finding that the respondent charged without reason".

We are unable to agree with the High Court judge in holding as he did. As reasoned by the CMA at pp. 1429 - 1430 of the record of appeal, the appellant was not responsible for initiating the tender. If anything, the CAG Report at p. 110 showed that the one responsible for that assignment was one Felchesmi Mramba and who was the secretary to the Tender Board. The record of appeal shows that the charges preferred against the appellant, on which he was found guilty, convicted and, as a result, terminated, stemmed

from the decisions of the Tender Board. The appellant was just a member to that Board. We do not agree with the High Court that singling the appellant out (who was just a member) merely because he ought to have advised the Board accordingly, justified the steps taken against him. Instead, we agree with the CMA that the appellant was discriminated by shouldering the mistakes made by the Tender Board. That, as the CMA found and held, and to our mind rightly so, offended the spirit of rule 12 (5) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 – GN No. 42 of 2007 which provides:

> *"(5) The employer shall apply the sanction of termination consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who commit same misconduct".*

There was no evidence brought to the fore by the respondent that a mere member of the Tender Board, could be singled out for the mistakes of the Board as happened to the appellant. We agree that the appellant, an expert in the field with an experience of fifteen years, ought to have guided the Tender Board to reach decisions which would not dump his employer into barbed wires as happened. He did not do so and a substantial loss of money

was occasioned to the respondent. However, unlike the High Court, we are of the view that the respondent had no valid reasons to charge the appellant for decisions of the Tender Board. The first ground of appeal therefore succeeds.

We now turn to consider the second ground of appeal. What the CMA awarded, as already stated above, having found that the termination of employment was substantively and procedurally unfair, was compensation of Tshs. 95,832,000/= which comprised salaries for the unexpired term of the contract. As already alluded to above, the CMA reached that conclusion having sought guidance from Professor SR Jaarrsveld, et al in their treatise, **Principles and Practice of Labour Law** (supra) and **Good Samaritan v. Joseph Robert Savari Munthu** (supra) and concluded that reinstatement would not be in the interest of justice. The appellant thought reinstatement was apposite, hence the revision to the High Court. The High Court sustained the award. Undaunted, the appellant still thinks the High Court should have held that the appellant was entitled to reinstatement. He prays for an order of reinstatement into the position he held in the first agreement. This takes us to the examination of the two contracts of employment of the appellant.

The first contract was one on permanent and pensionable terms and was terminable by either party giving "one month's notice in writing or one month's pay in lieu of notice". The second was a fixed term contract, contained in the letter to the appellant dated 25th May, 2011, of three years and "renewable subject to satisfactory job performance after its expiry". The second contract also made explicit that it did not alter the terms and conditions of the first contract but built on them. It provided:

> *"This letter does not alter any terms and conditions of employment you had previously with the company but builds on them."*

Our interpretation of the above clause is that the two contracts did not co-exist. We refer to them as the first contract or the second contract just for convenience purposes. The signing of the second contract with improved terms and conditions built on the conditions of the first contract. Technically, given the nature of the appellant's job which was not part time, he could not have been under two contracts of employment at one and the same time. He was therefore under one contract (the first contract) which was improved in terms and conditions by the second contract. This is deciphered from the passage from the second contract quoted above to the effect that the terms

and conditions of the first contract were not intended to be altered but to be built upon. That is to say, as was held by the High Court in **Othman R. Ntarru v. Baraza Kuu la Waislamu Tanzania (BAKWATA),** Labour Revision No. 323 of 2013 (unreported) to which we subscribe, when an employee is on permanent and pensionable terms, a new appointment on a fixed term does not automatically terminate the permanent and pensionable contract unless the employer's manual, code or policy provides otherwise.

In the case under appeal, there is no such employer's manual, code or policy in the record of appeal that provides otherwise. As already stated earlier, the long term contract could be terminated at the instance of any party giving a one month's notice or paying one month's salary in lieu of notice. That was not done in the case at hand.

To recap, the second contract of employment letter supplemented the first contract by building on it. It did not revoke it. No such evidence was brought by the parties. In the premises, they could not have intended to co-exist, otherwise the parties would have explicitly provided so.

For clarity, as an extension to the above discussion, there are instances when the employee is on permanent and pensionable terms and a new

appointment on fixed terms of employment terminates the permanent and pensionable contract as was the case in **Leah D. Kagine v. The Registered Trustees of Bugando Medical Centre** (Civil Appeal No. 327 of 2021) [2023] TZCA 17959 (14 December, 2023) TanzLII. In that case, the appellant was employed as a Personnel Officer by the respondent under a long term contract of employment on permanent and pensionable terms. While that contract was still subsisting, she executed a fixed term contract of employment with the respondent which catapulted her to the post of Director of Administration and Human Resources. It was a 36-month contract of employment. There, unlike here, the second fixed term contract did not say it improved upon the first contract. We held that upon execution of the fixed-term contract, the initial contract for unspecified period was automatically terminated.

Having stated as above, we now turn to consider whether the High Court erred in upholding the award by the CMA. As already stated above, the CMA awarded the appellant compensation of Tshs. 95,832,000/= which comprised salaries for the unexpired term of the contract. The High Court upheld the award. The appellant argues that a reinstatement was appropriate in the circumstances. We must confess that this issue has

exercised our mind greatly. Having considered the record of appeal and authorities on the point, and upon research and consultations as well as injection of common sense to the matter, we find ourselves unable to go along with the appellant's argument. We shall demonstrate. The appellant was terminated from employment on account of being convicted on disciplinary charges. As we have already found and held above, the former contract with permanent terms continued when he signed the fixed term contract, conviction on the charges and its consequent dismissal affected the terms of the previous employment on permanent and pensionable terms. The case would be different if the fixed term contract expired without renewal, that is when, in our considered view, it would be appropriate to reinstate him in his former position of a finance officer. Given that argument, we find sense in the argument by Mr. Ngudungi to the effect that the CMA as well as the High Court should have applied the provisions of section 40 of the ELRA. By ordering that the appellant be paid salaries for the remaining period of the contract, the High Court meant that the appellant was on a fixed term contract of employment while in fact he was not. As already said, the terms of the fixed term contract of employment built on the first contract. It is our view that the provisions of section 40 of the ELRA applied in a

situation like in the instant case where the first and second contracts of employment merged into one.

What then should the High Court have done? Section 40 of the ELRA provides:

> *"40.-(1) Where 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 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.*
>
> *(3) N/A."*

In the instant appeal, having found that the termination of the appellant was unfair substantively and procedurally, the CMA had three options in terms of section 40 (1); to reinstate, to reengage or to pay compensation to the appellant of not less than twelve months' remuneration. Given that the CMA had the view, and the High Court agreed, that in view of the sour relationship that the appellant had with the respondent after the termination of employment, reinstatement and re-engagement would not have been apposite, the remaining option was the one under paragraph (c) to section 40 (1) of the ELRA; to pay compensation to the employee of not less than twelve months' remuneration. For the avoidance of doubt, we are aware that the provisions do not apply to fixed term contracts of employment. However, in the case under appeal, given that the first contract of employment was still into operation, but with improved conditions effected by the fixed term contract of employment, the provisions of section 40 of the ELRA were still applicable. This being the case, the High Court should have held that the CMA erred in awarding the appellant the remaining salaries in the fixed term contract. In its stead, it should have invoked the provisions of section 40 of the ELRA.

Sequel to the above, we find and hold, just like the CMA, that the appellant's termination was substantively and procedurally unfair. As the first contract of employment was still subsisting but under improved terms and conditions, the High Court should not have upheld the relief of salaries of the remaining part of the contract amenable to fixed term contracts of employment. Section 40 of the ELRA should have been brought into play instead. Given the relationship between the appellant and the respondent after the conviction of the disciplinary charges and the attendant termination of employment, reinstatement of the appellant could not have been in the interest of justice. In the circumstances, we set aside the award of Tshs. 95,832,000/= as compensation for the unexpired term of the second contract of the CMA which was upheld by the High Court. Instead, we replace it with one under section 40 (1) (c) of the ELRA. As reinstatement of the appellant is not, in the interest of justice, viable, we think compensation to him of eighteen months' remuneration will meet the justice of this case.

This appeal succeeds to the extent stated. It being a matter falling within the realm of labour disputes, which, ordinarily, in terms of rule 51 (1)

of the Labour Court Rules, 2007 – GN No. 106 of 2007, do not attract costs, fees and interest, we refrain from making any order as to costs.

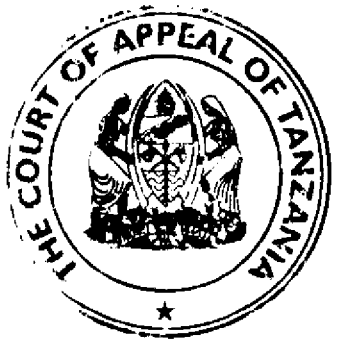
DATED at **DAR ES SALAAM** this 18th day of May, 2024.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered this 21st day of May, 2024 in the presence of Mr. Daniel Ngudungi, learned counsel for the Appellant and Mr. Steven Urassa, Principal Officer and Ms. Magdalena Mwakabungu, learned State Attorney for the Respondent is hereby certified as a true copy of the original.



J. J. KAMALA
DEPUTY REGISTRAR
COURT OF APPEAL