IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE ARUSHA DISTRICT REGISTRY
AT ARUSHA

REVISION APPLICATION NO. 74 OF 2019

(Original CMA/ARS/ARB/206/2015)

NGORONGORO CONSERVATION AREA AUTHORITY... APPLICANT

Versus

VERONICA JOHN UFUNGUO ..... RESPONDENT

JUDGMENT

Hearing Concluded.....10/08/2020
Judgment delivered... 02/11/2020

GWAE, J

Miss Veronica John Ufunguo, the respondent herein above was an employee of the applicant, Ngorongoro Conservation Area Authority (NCAA) since 25th August 1995 vide a letter dated 21st September 1995 as a CADET and she was then promoted as Tourism Services Manager effectively from 21st January 2010.

However on the 14th day of November 2014, the respondent duly received a suspension letter dated 4th November 2014 from the respondent relieving her from duties in order to pave a way for investigation on the applicant's allegations on uttering exhausted documents, use of documents intended to mislead the

Principal, Conspiracy, embezzlement and misappropriation of Authority fund, receiving money which was unlawfully obtained and fraudulent practice during procurement. Hence labour relations between the parties started becoming sour and eventually leading to these proceedings.

On the 2nd February 2015, the respondent was duly issued with a notice of institution of disciplinary proceedings accompanied with a charge containing a number of sixteen (16) counts. She responded to the charge by filing her written defence as per the notice. However the applicant subsequently amended the charge comprising thirty seven (37) counts and eventually the disciplinary hearing committee conducted the hearing sessions from 13th July 2015 up to 8th August 2015. The verdict of the disciplinary hearing against the respondent was issued by the applicant on the 26th August 2015 and received by the respondent on the 16th September 2015.

The respondent's services were terminated after she was found guilty of the disciplinary offences by the applicant's disciplinary committee through the letter dated 26th August 2015 issued by the applicant's chairperson of the Board of Directors informing the respondent that she was terminated from service effectively from 31st September 2015.

Following the termination of the respondent's employment, the applicant paid the respondent her terminal benefits such as severance pay, golden

handshake and repatriation costs making a total of Tshs. 239, 005, 931/= which were however used to refund the amount of money (Tshs. 250, 902,240/=equal to US$ 116, 320) which the respondent was said to have admitted being liable before the Disciplinary Committee.

Dissatisfied with the termination of her employment, the respondent made a referral of his dispute to the Commission for Mediation and Arbitration for Arusha at Arusha ('CMA') on the 15th October 2015. According to her referral form no.1 in which she seriously complained that she was unfairly terminated as reasons for the termination were unfounded and that her defence was not considered by the Disciplinary Hearing Committee. She thus claimed to be paid the following reliefs; payment of Tshs 532,421,208/= arising from collective bargaining agreement and NCAA Staff Regulation, Tshs. 79,336,177.33 being unpaid allowances, Tshs, 843, 273,200/=being compensation for the remaining 12 years and 4 months of her service with the NCAA and Tshs. 843,273,200/=. All claims making a grand total of Tshs. **2, 298,303,785.33.**

Evidently from the record, the parties' dispute was partly mediated before Massawe, Mediator. The claims which were successfully mediated were; unpaid annual leave for three years, hardship allowance, House allowance, subsistence allowance and repatriation costs, all making a total of Tshs. **85, 083, 247. 33** however that amount was equally used to set off the respondent's indebtedness

to the NCAA in the tune of Tshs. **89,883,291**/=The CMA finally arbitrated the parties' dispute with exclusion of the respondent's claims fruitfully mediated on the 15th December 2015.

Ultimately, the CMA (**Hon. Lomayan Stephano-a**rbitrator) procured its award on the 15th day of August 2019 reinstating the respondent without loss of her remuneration from the date of termination after it had been satisfied that the respondent's termination was both substantively and procedurally unfair.

Seemingly, the applicant, NCAA felt aggrieved with the arbitration award. She thus filed this application for revision under Rule 28 (1) (a), (b), (c), (d) and (e) of the Labour Court Rules, 2007 (Rules) and section 91 (1) (a) and 91 (2) (b) and (c) and section 94 (1) (b) (i) of the Employment and Labour Relations Act, No. 6 of 2004 (ELRA). The applicant's application is supported by an affidavit of **Dr. Freddy Safiel Manongi**. Grounds for the sought revision of the CMA's award are as follows;

1. That, the CMA erred in law in entertaining the referral by the respondent who is a public service employee/servant while it had no jurisdiction to entertain the same
2. That, the Arbitrator erred in law in entertaining the dispute on issues and prayers arising from Collective Bargaining Agreement / Voluntary Agreement

3. That, the Arbitrator erred in law in in his evaluation of evidence and testimonies of the parties and arrived a wrong conclusion that the termination was both substantively and procedurally unfair
4. That, the Arbitrator erred in law in finding that the termination was substantively unfair while there were ample documentary evidence and testimonies of the applicant's witnesses coupled with the respondent's own admission proving the charge against her.
5. That, trial arbitrator erred in law and fact in finding that the hearing was procedurally unfair while there is ample evidence on record proving that the hearing was procedurally fair
6. That, trial arbitrator erred in law in finding that the hearing was unprocedurally unfair for want of investigation report while the complainant was availed with all necessary requisite documents extracted from the report which were relevant to the disciplinary charges
7. That, trial arbitrator erred in law in ordering the respondent's benefits to be paid with new salary while the same started when the respondent had been terminated and without there any proof increasing the respondent salary to Tshs **6, 100,000/=**

Served with a copy of the applicant's application, the respondent duly filed her counter affidavit opposing this application on the grounds that there was no investigation that was carried out into the allegations leveled against her which were exclusively based on the Special Audit Report. She further contested the applicant's grounds for revision herein above by stating that the CMA's award is lawful, sound and substantively fair.

It was by consensus of the parties' advocates namely; M**r. Othiambo Kobas** and **Mr. Method K. Kimomogoro** for the applicant and respondent respectively followed by the leave of the court that, this application be argued by way of written submission. Nevertheless the respondent's advocate did not meet the schedule as ordered by the court since he fell sick as a result advocate **Emmanuel Sood** took over the filing of the ordered written submission after he had sought and obtained condonation of doing so.

Considering the lengthy submission of the parties' submissions, I have found not apposite to have them reproduced in a nut shell before I start determining the applicant's application for revision. I have thus opted to consider the parties' rival written submissions while determining each ground save where the applicant's advocate deemed fit to combine them where I shall also do the same. Now, suffice to hearted thank the parties' advocates for their fruitful submissions which will greatly assist the court in the composition of this

judgment. I have also taken cognizance that the applicant's advocate has abandoned **ground 1** and **ground 3** of the application herein above.

In the **2nd ground (**ground 1) which is to the effect that, **"the Arbitrator erred in law in entertaining the dispute on issues and prayers arising from Collective Bargaining Agreement/Voluntary Agreement".**

Supporting the 2nd ground, the applicant's advocate argued that the CMA's arbitrator had no jurisdiction to entertain claims relating to Collective Bargaining Agreement since the same are pursuant to parties' Collective Agreement requiring any application and interpretation and implementations which are to be dealt with by the CMA only at the stage of mediation and that in case mediation fails the same can be referred to Labour Court pursuant to section 74 of the ELRA.

On the other hand Mr. Sood referred this court to section 14 of the ELRA stating that the CMA had jurisdiction to arbitrate the dispute between the parties adding that, according to the hearing form (R11-exhibit 11) informing the respondent of her right of referring the matter to the Commission if aggrieved by the decision of the Disciplinary Hearing Committee.

In determining this issue, I am now bound to look at the clear words of section 74 of the ELRA which read;

"74 unless parties to the agreement agree otherwise

(a) A dispute concerning the application, interpretation or implementation of a collective agreement shall be referred to the Commission for mediation; and

(b) If the mediation fails, any party may refer the dispute to the Labour Court for decision

According to the unambiguous words of the provision of the ELRA quoted above, it is clear that the labour dispute concerning collective agreement at the place of work between employers and employees are referred to the CMA only for the purpose of mediation and in the event mediation fails a party thereof may refer it to the labour court.

The power to mediate and arbitrate or determine matter provided under section 14 of the ELRA does not extend to the power to arbitrate the issues of application, interpretation and or implementation of parties' Collective Agreement since it is the labour court which is statutorily and plainly conferred with those powers and not the Commission. I am also of the view that parties in a proceeding do not confer jurisdiction of a court or quasi-judicial body except when expressly stated by a statute. Hence a notification by a Disciplinary Hearing Body that an aggrieved party by its decision may refer a dispute to CMA cannot bestow a jurisdiction to the Commission which the law prohibits.

However when I profoundly look at the typed proceedings at page 4 and the impugned CMA award, I am quite unable to hold that, the issues relating to Collective Bargaining Agreement though claimed by the respondent in her

referral form, were contentious and vividly entertained by the CMA when the dispute was arbitrated. I boldly hold so simply because of the framed issues appearing thereof where no issue relating to collective bargaining agreement was framed and determined. Hence this ground was absolutely misplaced since it is not in conformity with the CMA record and its award.

As to the **4th ground** (ground 2), **"that, the Arbitrator erred in law in finding that the termination was substantively unfair while there were ample documentary evidence and testimonies of the applicant's witnesses coupled with the respondent's own admission proving the charge against her"**.

It was the holding of the CMA's arbitrator in this regard that since the NCAA did not submit the Special Audit Report and since the respondent was not a final or approving officer of the alleged payments as the same were approved by **Mr. Kyambile**, the Director of Finance and **Mr. Bernard Murunya** who was the Conservator. He went on holding that the termination of employment should not base on a mere suspicion.

The applicant's advocate argued that the applicant had been able to prove that, the termination of the respondent's employment was due to fair reason pursuant to section 39 (1) (a) of the ELRA since the respondent was found guilty of 23 counts out of 37 counts for which she was arraigned. He added that the

evidence tendered during disciplinary hearing and arbitration proved that the respondent was guilty of the offences for instance, the approval or signing by the respondent of fictitious foreign trips as a Head of Department.

On the other hand, it was the argument of the respondent's counsel that, since the Special Audit Report allegedly conducted and prepared by one Flora Kahambuka Masami who appeared before the Disciplinary Committee delegated the power by Appointment and Disciplinary Committee (ADC) as **DW1** was not produced, therefore the applicant should therefore be considered as having failed to prove existence of such fact pursuant to section 110 of Tanzania Evidence Act, Cap 6 R. E, 2002. He embraced his submission in the case of **Barelia Karangirangi v. Asteria Nyalwambwa,** Civil Appeal No. 237 of 2017 (unreported) Court of Appeal (Mbarouk-JA rtd) held;

> "That, the one who must alleges must prove. The rule finds its backing from section 110 and 111 of the Law of Evidence...."

The counsel further cemented his argument by citing Rule 13 (1) of the Code of Good Practice, GN. 42 of 2007 which requires investigation report and an interpretation of Rule 13 (1) of the Code by this court (**Nyerere, J-rtd**) in the case of **Tanzania International Terminal Services (TICTS) v. Fulgence Steven Kalikumtima and** others, Labour Revision No. 471 of 21) (unreported) where it was held;

> "The applicant suspended the applicants in order to conduct investigation; however there is no scintilla of evidence to substantiate that applicant conducted actual investigation, therefore indicates that the applicant charged the respondents and finally terminated their employment before conducting investigation as required in law. Thus I am of the considered view that the arbitrator did consider that there was no investigation which was conducted, this is in the absence of such proof, investigation report, which rendered the whole process illegal".

First and foremost, I must admit that in order to hold that there was fair and valid reason for a termination of employment there must be cogent proof to that effect on the part of an employer. I also subscribe the decision of this court at DSM in **Mohamed Mwenda v. Ultimate Security LTD**, Revision No, 440 of 2013 (unreported) relied by the learned arbitrator where it was correctly held that;

> "Valid reason must relate to the employee's conduct, capacity or compatibility or based on the operational requirements of the employer".

In our instant application, in order to justly and fairly determine if the applicant proved existence of valid reason for termination of the respondent's employment, I must carefully look at both oral evidence adduced before the CMA and documentary evidence.

Examining the testimonies of the applicant's witnesses particularly of DW1, Flora Kahabuka Masami, DW2, Lilian Magoma, DW10, Raphael Henry, Nickson Nyange and others, it is clear that "a kamati ya uchunguzi" (audit committee-Special Audit Committee) was formed and the intended audit was carried out as vividly exhibited by testimonies of the applicant's witnesses for instance one Raphael Henry who appeared before CMA as DW10 who testified that in the year 2013, there was an audit committee under the lead of Flora (DW1) which interviewed her;

(DW10-"Maelezo hayo nilionyeshwa katika kamati ya uchunguzi").

The respondent also plainly admitted that there was an audit report when she was testifying before the Commission except her contention that she was not supplied with the Audit Report ("S: Flora alifanyaje? S: alifanya special audit report S: je taarifa hiyo ya uchunguzi ulipewa? J: Hapana").

In that regard, he respondent's testimony and that of other witnesses established that there was Special Audit Report prepared by DW1 though on the other hand it is clear that the respondent was not availed with the same. Hence, to my firm view, there was compliance with the Rule 13 (1) of the Code. I am joining hands with my fellow learned sister **Nyerere, J** that investigation is vitally important in certain cases like the present one when she was dealing with similar predicament in the case of **Tanzania International Terminal Services**

(TICTS) v. Fulgence Steven Kalikumtima and others, Labour Revision No. 471 of 21) (unreported) where she stated inter alia;

> "The applicant suspended the applicants in order to conduct investigation; however there is no scintilla of evidence to substantiate that applicant conducted actual investigation, therefore indicates that the applicant charged the respondents and finally terminated their employment before conducting investigation as required in law. Thus I am of the considered view that the arbitrator did consider that there was no investigation which was conducted, this is in the absence of such proof, investigation report, which rendered the whole process illegal".

But in our instant dispute it is amply proved that the respondent and other employees (Mbwambo, Daniel and others) were suspended in order to pave way for the intended investigation and there is also ample evidence adduced during arbitration that there was audit conducted by a team chosen by the Minister. The mere fact that the copy of the same or an extract was not availed to the respondent is only a matter of procedural aspect and **not** substantive fairness. It follows therefore the decision in the case of **TICTS's case** (supra), to my firm view, is distinguishable from the present dispute.

Going by the records of CMA, I am satisfied that the respondent in one way or other must have committed disciplinary offences in other words, she must have contravened provisions of Financial Regulations for instance of taking ones' allowance or periderm without authorization of the persons named in the

payment vouchers, or uttering false documents as there were names named as payees but those staff were not aware of those payments fictitiously made in their favor double payments. For the sake of clarity let at least things speak by themselves by reproducing herein under parts of evidence adduced during arbitration;

DW9

"S: Nani alilipwa katika paylist?

J: Mimi na mwenangu, Veneranda na Magoma

S: Wewe ulistahili kulipwa Tshs ngapi?

J: USD 5010

S: Nani alichukua fedha hizo?

J: Mlalamikaji, Veneranda

DW5

J: Wewe ulistahili kulipwa malipo kiasi gani (Peter)?

J: USD 600

S: Ulilipwa fesha hizo?

J: Hapana

S: Aliyeidhinisha malipo ni nani?

J: Mlalamikaji kama mkuu wa idara yeye ndiye aliyesaini

Looking at the testimonies of the above witnesses and other applicant's witnesses it is evidently clear that the respondent was the one who used to receive money whose payment vouchers bore the names of other employees without authorization by the payees and by even not handing over the same to the requests respondent notwithstanding that the amount of money taken by her

was perhaps or likely **not** for her personal benefits but her acts are not in conformity with the law nor can they be excused due to the alleged fact that the same money was for supporting the Ruling Political Party.

As this court is court of law and not of mercy or sympathy, equally, the Commission. The acts of the respondent and her superior officers for instance the former Conservator (**Mr. Murunya**) and Director of Finance **(Kyambile),** to my decided opinion, are not free from disciplinary misconducts and or criminal liability including those who inserted names of some of the applicant's staff as payees for various payments without their requests as well as those who received the money without authorization of the payees. Had the alleged acts not unlawful, the same would have been pardoned by the proper authority and not the CMA or this court. As pointed by the applicant's advocate that, had the arbitrator properly examined the evidence before him he would have found that there was reason for termination. Having analyzed as herein, the 4th ground (2nd ground) is found meritorious.

In the **5th ground (**ground 3**), that, trial arbitrator erred in law and fact in finding that the hearing was procedurally unfair while there is ample evidence on record proving that the hearing was procedurally fair".**

This ground comprised of five aspects, namely; investigation and special audit report, complexity of language used in the disciplinary hearing, amendment

of charges, the presence of the advocate Odhiambo Kobas in the disciplinary hearing subsequently in the Commission and whether the respondent was given the right to be heard.

According to the applicant's counsel, the termination was fair and that fair procedures were adhered to pursuant to section 37 (1) (c) of the ELRA by conducting a requisite investigation as required under Rule 13 (1) of the Code as the audit was carried out and that the charges (counts) were self-explanatory and he referred to the audit report. Thus, according to him, failure by the applicant to tender the report did not occasion injustice to the respondent and taking into account that the employer is given discretion to dispense with the requirement under rule 13 (11) of the Code. Cementing his submission, Mr. Kobas urged this court to make a reference to the case of **Hamis Jonathan Mayage vs. Board of External Trade,** Revision No. 8 of 2008 (unreported) where **Mandia J** as he then found the employer to have complied with rule 13 (1) and (2) of the Code due to the fact that, the charges were preceded by an audit. The learned counsel cited a decision of this court at Arusha (**Mzuna, J)** in **Ngorongoro Conservation Authority v. Elinipenda Mbwambo**, Labour Revision No. 188 of 2017 (unreported) where it was held and I quote;

> "Having gone through the records, I am satisfied that the investigation was rightly carried out before the disciplinary hearing through the evidence of PW1 who testified that the investigation was

carried out by Special Audit Team which among other things, also interviewed at the staff whose names were indicated in the payment vouchers which had quarries.....the mere fact that there was failure to tender special audit report during disciplinary hearing or failure to attach the same to the charge sheet was not fatal as long as the charge was served to the respondent before hearing containing all necessary documents and explanations...."

Mr. Sood reiterated that failure to tender the audit report was fatal as the respondent did not consent to the alleged dispensation with the tendering of audit report.

In the respect of the 1st limb of the procedural law (investigation/audit report), as alluded earlier that there is ample evidence that there was an audit that was carried out by the special audit team under the lead of DW1 and as argued by both advocates for the parties that the audit report was not tendered before both the Disciplinary Hearing Committee and Commission. The charges against the respondent were preceded by the audit report of 2013 as depicted in the suspension letter dated 4th November 2013. Following that, the applicant is now seriously contending to have rightly exercised his discretion to dispense with tendering the audit report and that the report was confidential one.

However I am of the considered opinion that, the applicant would retain the audit report instead of exposing it wholly as the same was not only confidential one but also it was relating to different staff on different matters

(nature of report) yet an extract of the same would be availed to the respondent only pertaining to the allegations leveled against her so that she could be in a better position to know the accusations against her and ultimately to adequately defend herself unless the respondent's **consent was sought and obtained** as per Rule 13 (11) of the Code referred by both counsel. I thus hold the different view from that of my learned brother in the case of **Hamis** and **Mbwambo** quoted above due to nature of the charge (fraud and forgery) and a number of counts (37).

The applicant is found stating that he supplied the respondent all the necessary documents however when I looked at the exhibit E2, (Applicant's letter dated 25th May 2015 addressed to the respondent) which is to the effect that the respondent would be supplied with necessary documents and clarification of some counts to enable her to accurately and adequately provide her defence. I am of thinking that the extract of the audit report was vitally important as explained herein considering that her consent was not sought and obtained by her employer before commencement of hearing as opposed to the case of **Mbwambo's case** (supra) where the employee consented to it (See page 19 of the typed judgment)

In the **2nd a**spect of the 5th ground on language used during disciplinary hearing, it is lucidly clear that the language used was English in which the respondent might be fluent or very fluent I am saying so since English is not our

language (it is always the third language after Swahili language (2nd language) for those who are used in their vernacular language. Though the language used in the counts is more of the legal practitioners nevertheless the respondent understood it for two reasons, that, she duly signed the hearing form (D11) on each page indicating that she was able to know the contents of what had been recorded therein that is she clearly indicated dissatisfaction of the ordered reimbursement of USD 116,320 by the Disciplinary Committee ("Sijakubaliana na outcome ya hearing inayonihitaji kulipa fedha ambayo sijatumia wala kuifaidi kwa namna yoyote ile") and secondly, Ms. Veronica is a form six leaver at Dakawa Secondary School. This aspect of the 4th ground is baseless and the same is dismissed for the reason herein above.

As to the aspect of the amended disciplinary charge, the CMA's held that the decision of disciplinary hearing body was unfair on the amended charge since there is no labour law or rules that permits an amendment of the disciplinary charge after an employee has given her written defence.

Reacting to the holding of the CMA in this aspect the learned counsel for the applicant argued that there is no law prohibiting an amendment of charge at any time. He cited provision of Order vi of the Civil Procedure Code Cap 33 R.E, 2002. He added that the charge was amended following the applicant's request to make the charger simpler and understandable.

Reacting to the above submission by Mr. Kobas, the respondent's counsel argued that the applicant's argument is nothing but a daylight lie by stating that the amended charge was associated with ill motive or intention. Although there is no law prohibiting an employer or an employee to amend his pleadings yet the applicant's act of amending the charge substantially that is from 16 counts to 37 counts is inordinate after the respondent filing of his defence merely because the respondent requested to be supplied with necessary document is not proper in law as far as fair hearing is concern

In ordinary sense amending a disciplinary charge containing a total of 16 counts to 37 counts as far as labour standards is concern without clear reason of doing so constitutes injustice more so after filing of defence in writing. The assertion by the applicant that the amended charge was intended to make the charge against the responder simpler and understandable, therefore in conformity with Rule 13 (2) of the Code, is not maintainable in the circumstances of this case unless clear reasons were known by the respondent and on record. Request to be supplied with necessary documents was not meant to amend charge substantially from the former charge.

As far as to the **4th limb** of the 5th ground on the presence of advocate Kobas who appeared in the Disciplinary Hearing as an invitee and before CMA and thus court as an advocate for the applicant. Generally, it is not very just and fair to play both a role of a complainant and that of a judge of his own cause.

Impartiality is always necessary in the dispensation of justice despite the fact that there is no law which prohibits an advocate to appear before a disciplinary hearing committee and then before CMA or labour court but in essence, for a party who saw that advocate before disciplinary hearing body as an invitee would feel infringed or prejudiced to see the same advocate in the subsequent legal proceedings before a competent body. If the applicant opted to have an advocate as an invitee as observed and submitted for clarification of certain matters, it my decided opinion, the same opportunity would be accorded to the respondent and be reflected in the proceedings for the same purpose unless she expressly declined to exercise such right of engaging an advocate as an invitee to assist her so that a scale of fair hearing would be not only done but also to be seen done.

In the last aspect of the **5th ground** (ground 4), from the outset, I am of the considered view that the applicant's Appointment and Disciplinary Committee (ADC) formally withdrew from conducting the matter at hand vide his letter (D14) due to conflict of interests and the ADC delegated its powers to the Human Resources and operation Committee of the Board (HROC). According to the hearing form (D11) it was the board which terminated the respondent's services effectively from 31st A September 2015 as per the Board of Directors' letters. Thus the arbitrator misdirected himself by holding that the Board of

Directors terminated the respondent's employment on 16th September 2015 when she received the termination letter.

Furthermore, the arbitrator treated HROC as probe team by relying in the case of I. **S Msangi v. Jumuiya ya Wafanyakazi and Workers Developments Corporation** (1992) TLR 259, that is wrong since the probe team in our instant dispute was the Special Audit Team whose members did not participate in the disciplinary proceedings. Hence delegation made by ADC was pursuant to section 11 of the Ngorongoro. Conservation Area, Act Cap 284 R.E, 2002.

I have noted other anomaly that is the respondent did not respond to the 1st and 2nd count during hearing as plainly depicted in the hearing of the respondent defence in the exhibit D12 (see page 2 to 9 of the said exhibit). This is a serious irregularity.

Last ground but not least, ground 5 "**that, trial arbitrator erred in law in ordering the respondent's benefits to be paid with new salary while the same started when the respondent had been terminated and without there any proof increasing the respondent salary to Tshs 6, 100,000/=".**

According to the record, the Treasury Registrar's letter dated 1st September 2015 issued officially announcing salary increase to the applicant's employees with effect from 1st September 2015, I think it could not cover the

respondent who was initially suspended or relieved from duties pending investigation since November 2014 and terminated effectively from 31st September 2015.

It is labour disputes' practice that whenever an employee is entitled to a compensation as per section 40 (1) or section 40 (3) of the ELRA, the basis of computation is his or her salary which he was earning immediately before his or her termination and not a salary earned by his or her fellow employees of the same rank at the time of delivery of the CMA award.

In our case salary increment vide the letter directed to the Authority by the Treasury Registrar, does not cover the respondent despite the fact that the respondent received the termination letter on 16th September 2016 since her termination was with effect from 31st August 2015 vide Board's letter dated 26th August 2015. I have to ask myself, what if, the respondent received the letter of termination on earlier date that is before 31/09/2015, would it forfeit her whole August salary or partly thereof? The answer, to my firm view, is negative? That being the court's finding the respondent's entitlements ought to be calculatable on the basis of her salary payable to her immediately before the effective date of termination that is Tshs.**3, 833, 000**/=(See V 13 & V15).

In the final analysis, therefore, the respondent's termination is found to have been for fair and valid reason however after I have carefully considered the accumulative non-compliance of termination procedures on the part of the

applicant, to wit; the substantial amendment of charge after the respondent had already filed her defence, failure to inform the respondent her right to have an advocate as invitee as was the case in the applicant's side for clarifications on legal issues, failure to give the respondent right to defend herself in respect of the 1st and 2nd count during hearing of the dispute before the Disciplinary Hearing Committee and the applicant's failure to have sought and obtained a consent from the respondent in order to exercise its discretion provided for under Rule 13 (11) of the Code to dispense with availing the respondent with a copy of the Special Audit Report or an extract thereof.

I have also found that, since the reasons for the alleged misappropriation of the authority is unclear as depicted from the hearing form (D12) and since the terminal benefits payable to the respondent was unjustifiably deducted. I say so for obvious reason that the respondent never admitted to be liable for refund of the loss by asserting that the money was not for her own use as evidenced by exhibit D12 ("Sijakubaliana na outcome ya hearing inayonihitaji kulipa fedha ambayo sijatumia wala kuifaidi kwa namna yoyote ile"). Hence it is absurd to have the terminal benefits deducted.

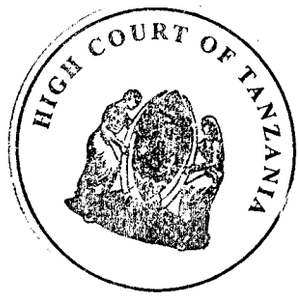
Consequently, the applicant's application is partly granted and the CMA's award is revised and set aside to the above extent. The respondent is found to have been terminated for valid reason but her termination was procedurally unfair, thus remedy fit to grant in her favour is compensation pursuant to section

40 (1) (c) of the ELRA. She is therefore entitled to a compensation of **twenty (20)** months' salaries. Basis for computation is salary earned by the respondent immediately before termination that is Tshs. **3, 833,000/=**x 20=, Tshs. **76, 000,000**/= her terminal benefits and certificate of service. No order as to costs of this application is made.

It is so ordered.

M. R. GWAE
JUDGE
02/11/2020

Court: Right of appeal to the Court of Appeal of Tanzania is open and fully explained for any aggrieved party.



M. R. GWAE
JUDGE
02/11/2020