IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

APPLICATION FOR REVISION NO.4 OF 2022

(C/f Employment Dispute No. CMA/ ARS/ ARS/19/19 at the Commission for Mediation and Arbitration at Arusha)

SG NORTHERN ADVENTURE LTD .....APPLICANT

Vs

MAGRETH MALINGA..... RESPONDENT

JUDGMENT

Date of last Order:9-8-2022

Date of Ruling: 20-9-2022

B.K.PHILLIP,J

Aggrieved by the decision of the Commission for Mediation and Arbitration (" the CMA") ,the applicant herein filed this application under sections 91 (1) (a), (2) (b) (c) and 94 (1) (b) (i) of the Employment and Labour Relations Act, 2004, (the " ELRA"), Rules 24(1), (2) (a) (b) (c) (d) (e) (f), (3) (a) (b) (c) (d) , 28 (1) (b) (c) (d) and (e),55 (1) (2) of the Labour Court Rules, G.N. No. 106 of 2007 and praying for the following Orders;

(i) That this Honorouble Court be pleased to call for and examine the records of the award delivered on 22nd of November ,2021 by Honourable Egbert Sekabila, Arbitrator for the purpose of satisfying itself as to the correctness, legality or propriety of the proceedings and orders made therein, revise and set aside the Award.

(ii) Any other reliefs that this Honourable Court deems fit and just to grant.

The application is supported by an affidavit sworn by Mr. Mbazi Steven Mrita, the applicant's principal officer.The learned advocate Qamara Aloyce Peter, the respondent's Advocate filed a counter affidavit in opposition to the application. The learned advocate Shilinde Ngalula appeared for the applicant.

The legal issues /grounds for determination by the Court stated in this application pursuant to Rule 24(3) (c) of GN.No.106 of 2007 are as follows;

i) Whether or not the Arbitrator who resigned his post and his letter of resignation accepted by the employer has powers to hear and determine Labour dispute pending before the Commission.

ii) Whether or not the letter of appointment is a contract of employment.

iii) Whether or not the Arbitrator gave a correct interpretation of Rule 4 (2) of the Employment and Labour Relations (Code of Good Practice), GN. No 42 of 2007, (hereinafter to referred to as "GN No. 42 of 2007") which provides for the qualification of the chairman to chair the hearing Committee.

iv) Whether the Arbitrator has powers to interfere with the findings of the decision of the hearing Committee which heard the evidence of the parties on the first instance.

v) *Whether or not it is an error of law for the failure of the Arbitrator to summarize , analyze and Consider the evidence of D1 and D2 on Cross examination.(sic)*

vi) *Whether or not the award was vitiated for being issued by the Arbitrator beyond the limitation of time without the Arbitrator assigning reason for the delay.*

Before going into the arguments raised by the learned advocates, let me give a brief background to this matter, albeit briefly. In 2013 the respondent was employed by the respondent as the Company's operations manager. In 2018, the applicant charged her of insubordination and causing loss to her employer.It was alleged that the respondent closed the house of the applicant's Managing Director , Ms.Miriam Mrita whose husband had passed on and she was under custody. Consequently, caused inconvenience to her family, damages to the house and loss to a tune of Tshs 213,119,180.54. The respondent appeared before the Disciplinary Committee where the matter was heard and finally she was found guilty of the offence charged. Her employment was terminated on the 21st of May 2018.Following the termination of her employment she lodged her complaints for unfair termination at the CMA.

At the CMA , both parties brought two witness each. Upon hearing the parties, the Arbitrator made the following findings; that the respondent was employed by the applicant under a written contract of employment, (exhibit D1) on the 1st of January 2013.The Disciplinary Committee was not properly constituted on the ground that the chairman was a retired employee from private institutions whereas pursuant to the provisions of

Rule 4 (2) of GN .No 42 of 2007 a chairman of the Disciplinary Committee has to be senior manager from a different office within the Company . Advocates Ms. Mercy Mwakatundu and Shilinde Mgalula who were members of the Disciplinary Committee were not appropriate persons to be members of the Committee because were not employed anywhere but private practitioners of law. The reason for termination was not fair because it had no connection with the respondent's official duties/ responsibilities. The Respondent's remuneration was Tshs 2,977,173/= per month. At the end of the day the Arbitrator awarded respondent a sum of Tshs 71, 425,152 /= being compensation for unfair termination. The Arbitrator cited the provision of Rule 12(1) of GN. No 42 of 2007 and section 40(1) (c) of the ELRA to buttress his findings.

Now, back to the application in hand, the application was disposed of by way of written submission. With regard to the 1st issue Mr. Ngalula submitted that the Arbitrator Hon. Mourice Egbert Sekila erred in law to determine the matter and grant the award while knowing that he had no powers to determine the application after tendering his resignation letter for his post as an Arbitrator on 24th August 2021 and the same being accepted by his employer. He argued that pursuant to the provisions of section 14 of the Labour Institution Act, 2004, from the date of his resignation Hon. Sekabila had no jurisdiction to determine the dispute between the parties and the award he made is illegal. He made made the award in breach of professional ethics. Currently he is working as the Chairman of the District Land and Housing Tribunal for Kasulu District, in Kigoma Region,contended , Mr. Ngalula.

Furthermore, Mr.Ngalula requested this Court to invoke its powers vested in section 95 of the Civil Procedure Code ("CPC") and order the Commission for Mediation and Arbitration to present in Court the resignation letter tendered by the Hon Sekabila and the acceptance letter from his employer since the same are confidential letters so that this Court can make an informed decision on the complaints raised herein.

In response, Mr. Qamara refuted Mr. Ngalula's assertion that the Hon Sekila made the award while he had tendered a resignation letter from his post as an Arbitrator. He contended that so long as Hon. Sekabila conducted the proceedings and made his decision while working and using CMA office in Arusha, the award was properly made and valid. Moreover, he pointed out that Hon Sekila's employer is not CMA Arusha . His employment records can obtained from his employer, the Prime Minister's office (Labour , Youth, Employment and Persons with Disability) not the CMA .Further , Mr. Qamara argued that the concern raised by Mr. Ngalula on Hon Sekabila's employment cannot constitute an issue of illegality and the applicant is supposed to prove what he alleges.

In rejoinder Mr. Ngalula reiterated his submission in chief. I have considered the arguments made by the learned advocates and am in agreement with Mr. Qamara that the task of proving that Hon. Sekabila made the award while he had resigned from his employment lies into the applicant. The law of evidence provides that he who alleges has to prove his/her allegations. This is in line with the provision of section 110 (1) of the Evidence Act which provides as follows;

"Whoever desires any Court to give judgment as to any right or liability dependent on the existence of facts which he asserts must prove that those facts exits"

In addition to the above, it is noteworthy that Mr. Ngalula's request to this Court is untenable.This Court cannot shoulder the responsibility of securing the allegedly resignation letter since doing so will be tantamount to taking sides in the case which is contrary to the law. This Court is not supposed to take sides in a case or be biased in anyway. Thus, the 1st ground has no merit as there is no prove that Hon . Sekabila made the award while he had already resigned from his employment. The same hereby dismissed.

With regard to the 2nd ground Mr. Ngalula's arguments were to effect that the letter of appointment (exhibit D1) , (hereinafter to be referred to as "the letter") tendered by the respondent before the CMA was forged on the following reasons; that the stamp on that letter (exhibit D1) indicates that it was issued by SG Northern Adventure Ltd and Resort not SG Adventure Ltd, the applicant herein, and there is no any evidence tendered before the CMA to prove that SG Adventure Ltd and Resort and SG Adventure Ltd are one and the same entity. The respondent alleged that Exhibit D1 was signed by assistant Managing Director , Mr. Mbazi Steven Mrita (PW2) but his name is not indicated in the letter instead what is indicated therein is the title only, which reads as Managing Director whereas PW2 testified before the CMA that he was employed by the applicant in 2014. The title of the author of the letter (DW2) is indicated therein as Human Resource Manager whereas in his testimony DW2 said that he was employed as the Finance and Administration Manager. DW1

who also alleged to have signed the letter is indicated in the letter as Operational Manager contrary to his testimony in which he testified that he was employed as Director of Operation. The General Manager by the name of Rashida Masika who is alleged to have signed the letter among others was not called to testify before the CMA.

Mr. Ngalula argued strongly that Exhibit D1 should not be relied upon since it is contradictory to the evidence adduced by the respondent and unreliable. He was of a view that on the balance of probabilities it does not establish and support the respondent's allegation the she was employed under a written contract of employment.

In rebuttal Mr. Qamara argued that the issue on whether or not the respondent had a written employment agreement was framed by the CMA in compliance with the provisions of section 15 (1) (a) – (h),(5) and (6) of the ELRA. He contended that if the applicant is challenging exhibit D1 then , according to section 15(6) of the ELRA, he was required to produce before the CMA a written contract or documentary evidence pertaining to the respondent's employment as the burden of disapproving what is said by the respondent (employer) shifts to him as an employer. He insisted that the respondent proved that exhibit D1 is a genuine document which went through police investigation processes when she was taken to police by her employer.

In rejoinder Mr. Ngalula reiterated his submission in chief. First of all, I wish to point out that the submission made by Mr. Ngalula in support of this ground mainly attacked the authenticity of Exhibit D1.However, as

it can be discerned from this ground , the same is couched in a way that it required the learned advocate to address the Court the status of the letter of appointment *vis-vis* the contract of employment. Be as it is, I will determine this issue in accordance with the arguments raised by Mr. Ngalula. Upon perusing the Court's records, I noted that the evidence adduced reveal that there is no any dispute that the respondent was employed by the applicant in 2013 because PW2's testimony is to that effect. However,as argued by Mr. Ngalula , in his testimony PW2 told the CMA that he was employed in 2014 and that is one of the points relied upon by Mr. Ngalula to question the authenticity of Exhibit D1 on the reason that PW2 cannot be a signatory of exhibit D1 while in 2013 he was not yet employed by the applicant. However, what has to be noted here is that PW2 did not produce any document to prove his assertion that he was employed by the applicant in 2014.No any reason was adduced by PW2 on why he did not produce before the CMA his contract of employment to substantiate his assertion that he was employed by the applicant in 2014. Under the circumstances, I am inclined to agree with the respondent's assertion and contents of exhibit D1 which indicates that it was signed by PW2.

With regard to other discrepancies and contradictions alleged by Mr. Ngalula in respect of Exhibit D1, I have noted that the same were cleared by the response to the questions posed to the respondent during cross examination. For instance, the concern on the stamp and the Company's name that appears in Exhibit D1 that is, SG Adventure Ltd and Resort, the respondent explained before the CMA that it is the applicant's Human

Resources Officer who is better placed to know about the difference in the names. I am convinced that is the correct position. Similarly, the concern on the titles of DW1 and DW2 as indicated in exhibit D1 is something which is within the mandate of the applicant's management. After all, titles of employees and the Company's structure can be changed any time. Exhibit D1 was prepared in 2013. Thus, by the time it was tendered in evidence more three five years had lapsed. In short the discrepancies and contradictions alleged by Mr. Mgalula are so trivial to affect the validity and evidential value of Exhibit D1 .

In addition to the above, it is noteworthy that , as correctly submitted by Mr. Qamara, the law requires the employer, to keep the employment records of his employees. So long as the applicant was questioning the authenticity of Exhibit D1, then he was required to produce before the CMA another contract of employment for the respondent since under our Labour laws the respondent cannot be employed under oral contract from 2013 to 2018, as alleged by PW2 in his testimony. I am saying this because there is no dispute that the respondent was a permanent employee. In my considered opinion, the Arbitrator's findings that the respondent was employed under a contract of employment (exhibit D1) is correct. Thus ,I hereby dismiss the 2nd ground of revision for lack of merit.

Submitting for the 3rd ground , Mr. Ngalula argued that the Hon Arbitrator's findings that PW1 was not an appropriate person to be appointed as the chairman of the Disciplinary Committee and that Advocates Ms Mwakatundu and himself were also not appropriate persons to be appointed as members of the Disciplinary Committee. Relying on rule 13

of GN. No.42 of 2007 and the Guidelines for Disciplinary , Incapacity and Incompatibility Policy and Procedure found at pages 66-78 of GN. No. 42 of 2007, (Henceforth " the Guidelines"),Mr. Ngalula argued that what matters most is that the chairman of the Disciplinary Committee should be impartial and if possible should not have been involved in the issue giving rise to the hearing and any senior manager from a different office may serve as a chairman. The right to appoint a chairperson of the Disciplinary Committee is vested into the employer. The employer has powers to appoint a person working in his company or in other organizations/Companies. He went on submitting that the chairman of the Disciplinary Committee in the matter in hand, Mr. Peter Mnkai (PW1) was senior Human Resource Manager from Bi Mary Enterprises, thus he was an appropriate person to chair the Disciplinary Committee. Moreover, he argued that Advocates Ms. Mwakatundu and himself were appropriate persons to be appointed as members of the Disciplinary Committee. He insisted that under our Labour laws the employer is allowed to appoint members of the Disciplinary Committee from among his employees or any persons provided that the appointed members demonstrate impartiality in the conduct of the Disciplinary hearing.

In addition to the above , Mr. Ngalula argued that the Arbitrator erred to make a finding that the respondent was not accorded opportunity to appeal against the decision of the disciplinary committee whereas the right of appeal was expressed to the respondent but she refused to sign the disciplinary form .

On the other hand, Mr. Qamara supported the Arbitrator's findings that the Disciplinary Committee was not properly constituted .He argued that rule 4(2) of the Guidelines does not give the employer powers to appoint a chairman who is not his employee. He was of the view that a senior manager from a different office within the Company is the appropriate person to be a chairman of the Disciplinary Committee because he/she is aware of the circumstances of the work place. He contended that in the case in hand the chairman, (PW1) upon being cross examined confessed that he knew nothing about the house that was alleged to have been closed by the respondent and admitted that he was being paid to chair the Disciplinary Committee. This put at stake his ability of being impartial, argued Mr Qamara. Commenting on whether Ms. Mwakatundu and Mr. Ngalula were appropriate persons to be appointed as members of the Disciplinary Committee, Mr. Qamara submitted that they were equally not appropriate persons to serve as members of the Disciplinary Committee because they were not employees but were hired and Ms. Mercy Mwakatundu was employed as a Human Resources Officer of the applicant after termination of the respondent's employment whereas Mr. Ngalula has been hired to handle this case up to date. In short, Mr. Qamara was of a strong view that the whole process of the Disciplinary hearing was tainted with irregularities and the Disciplinary Committee was not properly constituted, its members were appointed in contravention of the law and the interests of the respondent were prejudiced. He maintained that this ground has no merit.

With regard to the respondent's right of appeal , Mr. Qamara submitted that respondent was denied her right to appeal because the record shows that the Disciplinary hearing was conducted on 18th May 2018, and the termination letter was issued on 19th May 2018. He submitted that it appears the termination letter was prepared prior to the decision to terminate the respondent was pronounced and before the process for appeal was complied with. He contended that there is no proof that the right of appeal was explained to the respondent. The hearing form was not issued to the respondent and there is no evidence that she refused to sign same. Mr. Qamara further contended that some of the arguments raised by Mr. Ngalula are not supported by what transpired at the hearing of the respondent's complaints at the CMA but are based on what he knows as he participated in the Disciplinary hearing as a member.

In rejoinder, Mr. Ngalula reiterated his submission in chief and added that the chairman and the members of the Disciplinary Committee were paid transport allowances only to enable them to cover travel costs and other subsistence costs. Ms. Mercy Mwakatundu was appointed as new Human Resource Manager of the applicant upon the resignation of Mr. Christian Bushoke and was recruited after successful interview. Moreover, Mr. Ngalula submitted that the respondent did not object to the participation of chairman as well as any member in the disciplinary hearing. He contended that there was no conflict of interests for him as a Company's advocate to represent the applicant at the CMA and the respondent did not raise any objection against his appearance for the applicant at the CMA. The respondent had a right to object against his appearance if at all

she had any sound reason to do so, but he she did not raise any objection to that effect, argued Mr. Ngalula.

The main controversy in this ground is on the interpretation of the provisions of Rule 4(2) of the Guidelines, in particular on whether or not the employer can appoint any person who is not employed by the Company to be a chairman or member of the Disciplinary Committee. For ease of reference let me reproduce the provision of Rule 4(2) of the Guideline hereunder.

Rule 4(2) of GN. No. 42/2007: " *The chairman of the hearing should be impartial and should not have been involved in issue giving rise to hearing.* ***In appropriate circumstances, a senior manager from a different office*** *may serve as a chairperson"*

(Emphasis is added)

Reading the above quoted provision of the law between the lines, I am of a settled opinion that it is mandatory that the chairman of a Disciplinary Committee should be an employee of the company. However, Guidelines provides that in appropriate circumstances senior manager from a different office within the company can serve as the chairman, that is , if circumstances allow to do so. My take here is that the employer has the mandate to weight the matter and situation, and then appoint the chairman accordingly. Likewise, the law does not restrict the employer on the choice of the members of the Disciplinary Committee. I agree with Mr. Mgalula that the what is important is that the chairman and members of the Disciplinary Committee should be impartial. In the case of **Lucy**

Mandara Vs Tanzania Cigarate Company Limited, Revision No.185 of 2020, this Court (Aboud J,) was confronted with a similar issue to the one in hand and had this to say;

".....Thus, to answer whether the chairman can be outsourced, is my view the law envisaged the situation where the employer does not have the required senior manager, for instance when it is a small company with no enough senior managers to handle the matter or for any other reasons. Then the employer can find someone from outside that particular office who possess the qualities to chair the committee."

In the case in hand the Court's record reveal that the chairman (PW1) was a retired officer who worked as a Human Resource Manager in A-Z Ltd and Bi Enterprises. So, he was knowledgeable of the rights of employees and issues pertaining to disciplinary matters.

With regard Ms. Mercy Mwakatundu and Mr. Ngalula I am of the opinion that they were an appropriate persons to be appointed as a member of the Disciplinary Committee as they are knowledgeable of the laws pertaining to labour matters.

Mr. Qamara's concern that PW1, Ms. Mwakatundu and Mr. Ngalula were hired and got paid, that alone does not necessarily mean that they were not impartial. As alluded herein above the law allows an employer to outsource the chairman of the Disciplinary Committee. Similarly the fact that Ms. Mwakatundu was later on employed as the Appellant's Human Resources Officer does not necessary means that she was not impartial. In fact Mr. Qamara has not pointed out any sound reason to prove that the chairman, (PW1), Mr. Mgalula and Ms. Mwakatundu were not impartial during the conduct of the Disciplinary hearing.He just made general

allegation and blank statement that the respondent's interests were prejudiced. This is a Court of law. Its decision has to be based on evidence.

With regard to the respondent's right of appeal, I do not agree with Mr. Qamara's contention that the respondent was denied her right to Appeal.In her testimony the respondent testified that she refused to sign the hearing form. Thus, it is obvious that she was not interested in taking further steps. Moreover, Mr. Qamara's contention that the termination letter was prepared prior to the decision of the disciplinary Committee was issued is baseless since no any evidence was adduced to that effect.. From the foregoing the 3rd ground has merits.

With regard to the 4th ground, Mr. Mgalula submitted that the reason for termination of the respondent was fair since the employer proved the charge leveled against the respondent who admitted to have closed the Managing Director's house without her permission and pleaded for leniency. The respondent interfered with the Managing Director's family matters which is clear insubordination amounting to gross misconduct which can lead to termination of employment. Mr. Mgalula maintained that the Arbitrator had no power to step into the shoes of the Disciplinary Committee by purporting to re-hear the matter and overturn the decision of the Disciplinary Committee.

In rebuttal, Mr. Qamara submitted that the respondent was accused of causing damages to properties belonging to her boss, the Managing Director, something not related to her employment. The Managing Director's property is not part her job's description. He was in agreement

with the Arbitrator that according to Rule 12 (1) (a) of GN. No. 42 of 2007, any employer Arbitrator or Judge in making a determination on a complaint on unfair termination has to consider whether or not the employee contravened a rule or standard regulating conduct relating to employment.

In addition to the above , Mr Qamara submitted that the respondent cannot be held liable for any loss occurred after closure of the Managing Director's house if any, because as per the respondent's testimony , after closing the house the keys were taken by Mr. Omary Mfangavo and were later on handed over to Mr. Mbazi (PW2) for safe custody.He also contended that the one who made the valuation of the alleged loss was not called before the Disciplinary Committee to testify on the same. Thus, the respondent had no opportunity to cross examine him/her.

Having analyzed the submission made by the learned Advocates, I am inclined to agree with the findings of the Arbitrator that the reason for termination was unfair as I will explain soon hereunder.

As correctly stated by the Arbitrator in his judgment, what is supposed to be considered when adjudicating a complaint on unfair termination is provided in the provisions of Rule 12(1) of GN.No.42 of 2007. The same provides as follows;

" Any employer, arbitrator or judge who is required to decide as to termination for misconduct is unfair shall consider;

a) Whether or not the employee contravened a rule or standard regulating conduct relating to employment"

The above quoted provision of the law requires a judge or arbitrator when making his determination to confine himself within the rules or standard set by the employer in regulating the conduct of the employee in relation to things pertaining to his duties or responsibilities . The pertinent question here is; whether or not the issues pertaining to the death of the husband of the applicant's Managing Director and closure of her house are related to the rule or standard in regulating the conduct relating to the respondent's duties? My answer to the above question is a big " NO". As correctly observed by the Arbitrator the issues concerning the closure of the Managing Director's house and the allegedly loss thereof are not related to the respondent's duties.

I have also noted that the applicant's Company is a family Company because it is Managed by family members. The current acting Managing Director is the Managing Director's brother and there is no dispute that the respondent is the sister in law of the applicant's Managing Director whose house was closed by the respondent. In other words the respondent is a relative of the Applicant's Managing Director and thus, her family member. In my considered opinion, it appears that there is a mixing up of official matters with family issues. It is imperative that even when a Company is a family Company a line of demarcation between personal/family issues/affairs and matters pertaining to the Company's business must be observed.

From the foregoing it is the finding of this Court that the 4th ground of revision has no merits and is hereby dismissed.

With regard to the 5th ground, Mr. Ngalula's arguments are similar to the ones he raised in the 2nd ground in which he was challenging the authenticity of Exhibit D1, the letter of appointment. He reiterated his arguments that the Arbitrator erred to rely on exhibit D1.Moreover he argued that the respondent's allegation that her salary was Tshs 2,100,000 paid in two parts is not credible and not safe to be relied upon because even the total amount indicated in exhibit D2 collectively (the respondent's salary slip) do not make the total of Tshs 2,100,000/=, the allegedly salary indicated in exhibit D1.He argued that PW1 testified that the respondent's salary was Tshs 1,882,381 and produced the respondent's salary slip (exhibit P2). His testimony was not contradicted during cross examination. Moreover, Mr. Mgalula argued that this Court has powers to re-evaluate the evidence in this case and implored it to do so.To cement his arguments he cited the case of **Peter Vs Sunday Post Ltd (1958) E.A 424** and **Salum Mhando Vs Republic (1993) TLR 170.**

In rebuttal, Mr.Quamara maintained that exhibit D1 and D2 proved that the respondent's salary was Tsh 2,100,000/= .DW2 (the Applicant's Finance and Administrative Manager) testified to the effect that the respondent's salary was paid in two parts due to the system of payment that was installed in the applicant's Company. It was not possible to effect a single payment to a tune of Tshs 2,100,000/= .He added that the applicant being the employer had the responsibility to prove the payment of the respondent's salary pursuant to section 15(5) and (6) of the ELRA.

I have perused the exhibits tendered by both parties, including the salary slips (exhibits D2 collectively and P2) which are the subject of discussion

in this ground. What I have observed is that the difference between the salary slip tendered by PW2 is that PW2 tendered only one salary slip whereas DW2 tendered two salary slips for each month and the explanation behind this is that the respondent's salary was paid in two parts due to the system for payment of salaries that was installed in the Company. Exhibits D2 collectively contains three sets of salary slips for the months of May 2018, September 2016, August 2016 and July 2016 whereas PW2 tendered only one pay-in slip for the month of July 2017.Interestingly , Exhibit P2 indicates the respondent's salary as Tshs 1,882,381/= and in each set of salary slips tendered by DW2,the first slip indicates respondent's salary as Tshs 1,882,381/= and the second one indicates a sum of 1,094,762/=. The explanation made to justify the existence of two salary slips for same employee leaves a lot to be desired. No convincing explanations were given on why the applicant installed a payment system which cannot allow employees' salaries to be paid in a single transaction as it is the normal practice. I am afraid, this can lead to various interpretations. I am not supposed to involve myself in speculations, but suffice to say that Exhibits D2 and P2 are not worthy to be relied upon bearing in mind the concern raised by Mr. Ngalula that the total amount in the two salary slips exceeds the sum of Tshs 2,100,000/= indicated in the respondent's letter of appointment (Exhibit D1). On the other hand, the figure indicated in Exhibit P2 does not tally with the one indicate in Exhibit D1(letter of appointment).Thus , in the final analysis it is the finding of this Court that the Arbitrator erred to rely on Exhibit D2 in determination of the respondent's salary. It is the finding of this Court

under the circumstances, Exhibit D1 is the correct document to be relied upon in the determination of the respondent's salary. Thus, this ground of appeal has merit.

With regard to the 6th ground of appeal, Mr. Ngalula submitted that the Arbitrator delivered the award beyond the statutory 30 days within which she was supposed to delivery it without assigning any reason as required under section 88 (9) of the ELRA. He pointed out that the award was supposed to be delivered on the 16th of November 2021 but was delivered on 22nd November 2022.

In addition to the above, Mr. Ngalula raised new issues which were not pleaded to wit; that exhibits were not properly indorsed, not dated and not stamped. To cement his argument he cited the case of **A.A.R Insurance (T) Ltd Vs Beatus Kisusi, Civil Appeal No.67 of 2015** and **National Bank of Commerce Ltd Vs Sabas Kessy , Revision Application No.277 of 2020** (both unreported),but he did not annex the copies of the judgment in the aforementioned cases, thus I had no opportunity to read them.

Moreover, Mr. Ngalula contended that the testimonies of the witnesses were not recorded in a narrative way and in the language of the Court as required under the provisions of Order XVII Rule 5 of the Civil Procedure Code and the Arbitrator did not sign at the end of the testimony of each witness. Another new concern that was raised by Mr. Ngalula is that the award was not pronounced before the parties. It was just left at the

reception to be collected by the parties. That amounted to procedural irregularity which vitiated the proceedings, contended Mr. Ngalula.

In rebuttal, Mr. Qamara conceded that the award was delivered beyond the 30 days stipulated in section 88 (11) of the ELRA. However, he was quick to point out that the applicant has not advanced any reason showing how he was prejudiced by the delay in delivery of the award. Citing the case of **2000 Industries Ltd Vs Halima Giteta and 8 others, Labour Revision No. 9 of 2009** (unreported), he contended that the delay in delivering the award is not fatal, thus the applicant's complaints have no merit.

In addition Mr. Qamara point out that Mr. Ngalula raised new grounds of revision which were not pleaded. Nevertheless, he responded to the same as follows; That the exhibits were properly admitted as required by the law.The exhibits were properly indorsed, dated and signed.The mode of delivery of the award is clearly stipulated in the Labour Laws. Relying on the provisions of Rule 27 (2) of the Labour Institutions(Mediation and Arbitration Guidelines) Rules, he contended that under the Labour Laws there is no requirement for the award to be read out before the parties. He urged this Court to dismiss this application for lack of merit.

In rejoinder, Mr. Ngalula reiterated his submission in chief and added that this Court has powers to revisit the whole of the proceedings and award made the Arbitrator so as to ascertain its appropriateness. It can revise the decision of the CMA basing on grounds raised *suo motto*. He beseeched this Court to grant this application.

First of all I am inclined to agree with Mr. Qamara that since the applicant has not shown that he has been prejudiced by the delay in delivery of the award, the alleged delay in delivery of the award is not fatal and this is in line with the principle of overriding objective which requires this Court to concentrate on substantive justice.

It is also true that Mr. Ngalula raised new grounds which were not pleaded. This is not correct since it contravenes the provisions of Rule 24(3) (c) of GN.No.106 of 2007 . It is a trite law that submissions have to be based on what is pleaded.

Without prejudice to my observation herein above and for the interests of justice as well as exhausting the arguments raised by Mr. Ngalula, since Mr. Qamara responded to the new grounds raised by Mr. Ngalula let me make my brief observation on the same. As correctly submitted by Mr. Qamara the labour laws do not provide for the requirement for the award to be read out before the parties. In the case of **Serengeti Breweries Limited Vs Joseph Boniface , Civil Appeal No. 150 of 2015** , (unreported) the Court of Appeal of Tanzania observed the aforesaid lacuna in the labour laws had this to say;

"..However, there is no rule in Labour Institutions (Labour and Arbitration Guidelines) Rules G.N.No. 67 of 2007 which prescribes the duty and the manner in which the Arbitrator or the CMA , shall serve the award on the parties. This is the inadequancy in the employment laws. We are of the considered view that , this uncertainity, is not conducive for the timely delivery adjudication of labour dispute. As such , we hereby direct that , the respective labour legislation be amended to require the Arbitrator to notify the parties , on the date of delivery of the ward and the Arbitrator be required to

serve the award to the disputing parties so as to enable them to pursue their rights in case they are aggrieved."

To my understanding no amendment of the Labour Laws have been done to accommodate the observations of the Court of Appeal stated herein above.

With the regard to the manner of taking evidence in labour cases the Civil Procedure Code is not applicable. The applicable law is the Labour Institutions (Labour and Arbitration Guidelines) Rules G.N.No. 67 of 2007 The faults alleged by Mr. Ngalalu on the manner the evidence was recorded and marking of exhibits are misconceived because he relied on the law not applicable in Labour matters. Thus the same has no merits.

From the foregoing, it is the finding this Court that the respondent's termination was not fair and basing on the findings of this Court in ground No. 5, I hereby vary the amount of compensation to be paid to the respondent pursuant to section 40(1) (c) of the ELRA from Tshs 71,452,152/= to Tshs 25,200,000/= being twelve months salary.

In the upshot, the application succeeds to the extent narrated herein above. This being a labour case, each party will bear his own costs.

Dated this 26th September 2022

B.K.PHILLIP

JUDGE