IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LABOUR DIVISION]
AT ARUSHA

LABOUR REVISION NO. 40 OF 2022
(Originating from the Commission for Mediation and Arbitration of Arusha, Labour Dispute No. CMA/ARS/ARB/360/21/144/21)

SUNFLAG TANZANIA LIMITED ..... APPLICANT

Versus

JULIUS CHARLES MLOKOZI ..... RESPONDENT

JUDGMENT

12th December 2022 & 24th February 2023

Masara, J

The Applicant herein is challenging the Award of the Commission for Mediation and Arbitration for Arusha (the CMA) given in Labour Dispute No. CMA/ARS/ARB/360/21/144/21. In that decision, the CMA concluded that the Respondent's termination of employment by the Applicant was both substantively and procedurally unfair. The Applicant was ordered to pay the Respondent a total of TZS 38,709,700/=, which included a 24 months renumeration, severance pay and general damages. This decision prompted the Applicant to come to this Court in the quest to have the same varied. The Application is supported by affidavit of Emmanuel Mgoma, the Human Resources Manager of the Applicant. The Respondent contests the same through his counter affidavit.

According to the Applicant's affidavit, the CMA was not justified when it awarded the Respondent general damages to the tune of TZS 10,000,000/= as there was no ample evidence to justify the same, Further, that the CMA erred in calculating the amount of severance pay basing on the gross wage instead of basic wage as provided by law. Lastly, that the award of 24 month's renumeration was excessive and was without justification.

To appreciate the basis of the Application, it is apt to revisit background facts of the dispute as can be gleaned from the record and affidavits. The Applicant is a garments manufacturing company. The Respondent was employed by the Applicant on 03/04/2019 as a System Administrator. The Respondent was the foreseer of a system known as ORACLE. The system was installed for security purposes; that is, to control and keep in check the entire process of production, storage and sale of the final products. The system was meant to combat crimes such as theft. On 27/03/2021, the Applicant noted that the ORACLE system was tampered with. It was suspected that the Respondent was involved in tampering with the system as he was the trustee of the same.

According to the records, the system collapse caused the Applicant a huge loss, including loss of valid and important data of the company. On

27/08/2021, the Applicant wrote a letter to the Respondent requiring him to show cause why measures should not be taken against him for the loss of important data of the company, since he was the one accountable for the system. On the same day, the Respondent responded disassociated himself from the fault occasioned in the ORACLE system. Further, the Respondent demanded evidence from the Applicant which proved that he was responsible for the fault in the system. The Respondent's response was considered to be an insubordination to the management. Consequently, the Respondent was summarily terminated from employment through a letter dated 30/08/2021.

Following the termination, the Respondent referred the dispute to the CMA on 14/09/2021. In the referral form (CMA F1), the Respondent claimed terminal benefits, including 24 months, severance pay for two years and general damages due to psychological torture perpetuated by the unfair termination. As earlier indicated, after hearing the dispute, the CMA found out that the Respondent's termination was both substantively and procedurally unfair. It ordered the Applicant to pay the Respondent 24 months remuneration to the tune of TZS 28,123,800/=, severance pay to the tune of TZS 585,900/= and general damages which was quantified

to the tune of TZS 10,000,000/=. The Applicant is basically challenging the quantum of compensation awarded to the Respondent.

At the hearing of the application, the Applicant was represented by Mr Innocent Mwanga, learned advocate, while the Respondent was represented by Mr Herode Bilyamtwe, a Personal Representative. By consensus, it was resolved that the Application be heard through filing of written submissions.

Submitting in support of the complaint in paragraph 4(i) of the affidavit in support of the application, Mr Mwanga faulted the Arbitrator for misapprehending facts of the case and deciding the same basing on his own fabricated facts. He intimated that the Arbitrator narrated new facts which did not feature in the evidence. He insisted that it was wrong for the Arbitrator use his own fabricated facts against the Applicant.

Submitting on the complaints in paragraph 4(ii), (iii) and (vii) of the affidavit in support of the application, Mr Mwanga contended that the Arbitrator erred in awarding the Applicant general damages without due regard to the circumstances of the case. He added that, it was unfair to award the Respondent general damages to the tune of TZS 10,000,000/= in addition to terminal benefits and compensation given to him. He relied on decisions of **Stanbic Bank Tanzania limited vs Abercombie &**

Kent (T) Limited, Civil Appeal No. 21 of 2001, **Albert Mlilo vs Sudi Mwakalikamo, Civil Appeal No. 1 of 2015**, **Razia Jafferali & Ahmed Mohamedal Sewji & 5 Others, Civil Appeal No. 63 of 2005** (all unreported) relating to the circumstances that may lead to the award of general damages. Mr Mwanga faulted the CMA Award, stating that there was no evidence to support awarding of general damages to the Respondent. Although he admits that awarding general damages is in the discretion of the Court, he insisted that such discretion must be exercised judiciously. That, if general damages are awarded basing on wrong principles, this Court has discretion to interfere with such an award. To support his contention, he referred this Court to the reported case of **Tanzania Saruji Corporation vs African Marble Company Limited [2004] TLR 155**. The learned advocate fortified that since general damages are compensatory in nature, the Arbitrator ought to have taken into account that the Respondent, apart from being compensated 24 month's renumeration, he was also paid his normal terminal benefits vide exhibit D4. He asserted that facts in the cases relied upon by the Arbitrator are dissimilar to the circumstances in the case under consideration. It was his further submission that each case has to be decided based on its own facts and circumstances, referring Rule 2(1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules G.N No. 67 of 2007.

Amplifying the complaint in paragraph 4(vi) of the Applicant's affidavit, which challenges the CMA decision for awarding compensation of 24 months renumeration, Mr Mwanga contended that the discretion of the Arbitrator to award compensation exceeding 12 months renumeration is exercisable with reasons and upon consideration of the facts of the case. He accounted that it was wrong for the Arbitrator to award 24 months renumeration to the Respondent without assigning reasons for departing from the 12 months compensation provided by law. He made reference to Rule 32(5) of G.N No. 67 of 2007. Mr Mwanga maintained that the Arbitrator, having found that the termination was both substantively and procedurally unfair, ought to have ordered reinstatement or re-engagement, as per Rule 32(1-4) of G.N No. 67 of 2007. The learned advocate insisted that the Arbitrator did not comply with Rule 32(1), (2) and (5) which provides tests to be applied in assessing the quantum of compensation in respect of section 40(1)(c) of the Employment and Labour Relations Act (ELRA). He urged the Court to set aside the award of 24 months remuneration and replace it with 12 months renumeration as compensation for unfair termination.

Regarding paragraph 4(v) of the Applicant's affidavit, Mr Mwanga faulted the Arbitrator for awarding severance pay based on gross wage instead

of basic wage, as per the law. He relied on section 42(1) of the ELRA stating that severance pay is equal to 7 days basic wage for each completed year of continuous service with that employer up to a maximum of ten years. In his view, severance pay ought to be TZS 376,923/= and not TZS 585,900/=. He concluded by urging the Court to allow this Application.

Opposing the Application on behalf of the Respondent, Mr Bilyamtwe initiated his submission by challenging competence of the Application. In the first place, he stated that the case referred in the Applicant's affidavit; namely, CMA/ARS/ARB/57/2021, was alien and that the Respondent was not a party to that dispute. Second, the that the Application was brought under Rule 46(2) of the Labour Court Rules, G.N No. 106 of 2007, contrary to the requirements of Rule 24(2)(3) (a) to (c) of the same Rules. Third, he faulted the notice of intention to seek revision of the Award on the ground that it is was modified by an unauthorised person as per the 3rd schedule to the Regulations. Mr Bilyamtwe also faulted the affidavit in support of the Application, stating that it contravened Rule 24(3)(a) to (c) of the Labour Court Rules for lack of legal issues. On the same breath, he alleged that the affidavit of the Applicant, at paragraph 1, makes reference to Dispute No. CMA/ARS/ARB/57/2021 while the Respondent

was not party to that dispute. He prayed for dismissal of the Application with costs.

Submitting on the merits of the Application, Mr Bilyamtwe asserted that the Award by the Arbitrator was proper as it confined to Rule 32(5)(a), (b), (e) and (f) of the G.N No. 67 of 2007. In his view, pages 10 to 17 of the CMA Award provide reasons justifying each amount awarded. He lauded the Arbitrator, stating that he gave reasons for awarding as general damages TZS 10,000,000/=. He insinuated that it is special damages which need to be specifically pleaded and strictly proved, unlike general damages which the law presumes to be direct, natural or probable consequences of the act complained of. He maintained that facts of the cases relied upon by the Applicant's counsel are distinguishable with the facts prevailing in this Application.

According to Mr Bilyamtwe, principles of awarding general damages in labour matters differ from those relating to awarding the same in normal suits. He added that the Arbitrator, while awarding general damages, based applied principles suitable to the nature of the dispute. To support his contention that arbitrators have jurisdiction to award general damages, he referred to the decision in **Abubakar Haji Yakub vs Air Tanzania Co. Ltd, 2011-2015, CMA Case Management Guide,**

Volume 3. He insisted that it was proper for the CMA to award general damages taking into account the Applicant's action of terminating the Respondent without adherence to fair procedure.

Regarding the award of 24 month's renumeration, it was Mr Bilyamtwe's submission that the case of **Veneranda Maro and Another vs Arusha International Conference Centre, Civil Appeal No. 322 of 2020** (unreported) has facts which are similar to the case under determination, since it was based on unfair termination of employment both substantively and procedurally. that the reasons for awarding more than the minimum compensation reflects probable loss of employment to the employee who was terminated unfairly. It was his further submission that the Arbitrator considered factors, including reference to the above cited case while awarding 24 month's renumeration as reflected at page 11 of the Award.

Submitting on the calculation of the Respondent's severance pay, the Mr Bilyamtwe stated that, in the Respondent's opening statement filed at the CMA on 20/10/2020, he stated that his basic salary at the time of termination was TZS 1,171,800/=. Further, at the time of paying the Respondent's terminal benefits, the same were based on the basic salary which was TZS 1,171,800/=. He prayed for dismissal of the Application and the upholding of the CMA Award.

In the rejoinder submission, Mr Mwanga reiterated his submission in chief, adding that on 01/08/2022 the Respondent withdrew his preliminary objections relating to the points he raised; therefore, he had no room to raise the same in the reply submission. Regarding dispute No. CMA/ARS/ARB/57/2021 reflected in the affidavit, he averred that it was slip of the pen. He contended that such anomaly cannot render the entire affidavit defective as, under the current law, the offending paragraph in the affidavit could be expunged leaving the other parts intact. On the other error, where the Applicant wrote **ARB** instead of **ARS** while referring to the dispute before the CMA, he equally contended that it was a typing error. Regarding failure to file a notice of intention to seek revision, it was the Applicant counsel's position that such failure is not fatal, referring the case of **Tanzania Revenue Authority vs Mulambuzi Byabusha, Revision No. 312 of 2021** (unreported).

Having considered the affidavits of the parties, the submissions for and against the Application and having revisited the CMA records, it is my view that the issue for determination is whether the Award of the CMA was proper. I will determine the Application based on the complaints raised in the affidavits and argued by both parties' representatives in their submissions

Before delving into determining the merits of the Application, it is apt to address the preliminary matters raised by the Respondent's representative. Mr Bilyamtwe raised five points of objection challenging the competence of the Application. However, it must be noted that on 16/06/2022 when the Respondent filed his counter affidavit, he also raised two preliminary points of objection to challenge the competence of the Application. The record further manifests that on 01/08/2022, when the matter was scheduled for mention, the Respondent's representative prayed to withdraw the said preliminary objections. Mr Mwanga did not object to the prayer following which the Court marked the preliminary objections as withdrawn. I, thus, agree with Mr Mwanga's rejoinder submission that, having prayed to withdraw the preliminary objections and the Court having marked the preliminary objections as withdrawn, the Respondent's Personal Representative was not in order when he purported to resurrect the same matters in his reply submissions.

It is this Court's position that since the preliminary objections were marked withdrawn, the Respondent was precluded from challenging the competence of the Application as he purported to do in the submission. A party to a dispute is supposed to abide to his previous conduct and utterances, lest the Court and the other parties are taken for granted.

Having resolved that the preliminary objections challenging competence of the Application had been raised and later marked withdrawn, any attempt to challenge the same at a later stage must fail. By saying so, I find the objections raised devoid of merits. I proceed to dismiss the same accordingly.

Another anomaly pointed out by the Respondent's representative is in respect of the dispute number referred under paragraph 1 of the affidavit in support of the Application. In the affidavit, the Applicant made reference to dispute number CMA/ARS/ARB/57/2021 while the proper dispute number was CMA/ARS/ARS/360/21/144/21. In his rejoinder submission, Mr Mwanga conceded to the anomaly. He however considered it to be a clerical error. In the alternative, he prayed that, if the Court finds the anomaly fatal, the Court could expunge the offending paragraph from the affidavit.

My determination of this point is brief. Once the affidavit is read as a whole, it is apparent that the case referred to is CMA/ARS/ARS/360/21/144/21, which is the matter subject of this revision. Facts in all paragraphs of the affidavit in support of the Application reflect facts of the dispute above referred. Similarly, the same dispute number is referred on the cover page, implying that the revision

originates from that dispute. This does not render the affidavit defective as Mr Bilyamtwe suggests. It is a typing error which can be rectified since it has not prejudiced the Respondent nor affected the facts deponed in the affidavit. Moreover, the CMA records relating to the same dispute was made available to me. I do not see how an apparent typographic error in the affidavit would dissuade me from determining the merits of the matter substantively addressed to this Court. Ordering otherwise would be circumventing the cause of justice on a technicality, which is not within the spirit embraced by the introduction of the Overriding Objective Principle. Therefore, I do not find merit in the Respondent's complaint in this regard.

I now turn to determine the merits of the application. In his submission regarding the 1st complaint as deponed under paragraph 4(1) of the affidavit, Mr Mwanga contended that the Arbitrator did not decide the case based on the facts and evidence adduced. He added that the Arbitrator concocted his own facts which were not supported by the record. My scrutiny of the trial records proves otherwise. From the record availed to this Court, the Arbitrator dully considered the evidence adduced before him. At page 2 of the Award, issues raised were referred and dully determined. At page 3 thereof, the Applicant's evidence was analysed in

correlation to the raised issues. Similarly, at page 4 and part of page 5, the Respondent's evidence was analysed in response to the raised issues. The award shows, at page 5 and part of page 6, that the Arbitrator was determining fairness of the reason for terminating the Respondent's employment. The analysis led to the conclusion that the Respondent was terminated for unfair reason.

Further, at pages 6, 7, 8, 9 and 10, the Arbitrator determined the issue whether the Respondent was terminated in compliance with fair procedure. He came to the conclusion that the Respondent's termination was in violation of the procedural law as he was not afforded the right to be heard. At pages 10, 11, 12 and 13, the Arbitrator determined the amount of compensation to be awarded to the Respondent. At the same page 13, the Arbitrator determined the amount of severance pay to be paid to the Respondent. Lastly, at pages 13 to page 17, the Arbitrator extensively determined and justified the awarding of general damages.

From the above, I find that, contrary to Mr Mwanga's arguments, the dispute was thoroughly determined based on the facts and evidence adduced. The contention that the Arbitrator narrated his own facts gets no credence from the record. I could not decipher where the Arbitrator insinuated that the Applicant crushed down her own system and took it

as reason of termination against the Respondent. I thus find the complaint unmaintainable and dismiss it forthwith.

I turn to the next complaint relating to the award of general damages to the tune of TZS 10,000,000/=. According to Mr Mwanga, such damages were not justifiable as there was no evidence to support the same. On his part, Mr Bilyamtwe maintained that general damages awarded were appropriate and are backed up by evidence and the authorities relied upon by the Arbitrator.

What amounts to general damages finds its relevance in the authoritative decision of the Court of Appeal in the case of **Tanzania Saruji Corporation vs African Marble Company** (supra). The Court stated as follows:

> *"General damages are such as the law will presume to be the direct, natural or probable consequence of the act, complained of, the defendant's wrong doing must, therefore, have been cause, if not a sole or a particularly significant cause of damage."*

As opposed to specific damages which must be specifically pleaded and strictly proved, general damages are such as the law will presume to be direct, natural or probable consequences of the act complained of. It is trite law that in awarding general damages, the quantification of such damages remains in the discretion of the court. The Court of Appeal in

the case of **Peter Joseph Kibilika and Another vs Patrick Alloyce Mlingi, Civil Appeal No. 37 of 2009** (unreported) held as follows:

> *It is the function of the Court to determine and quantify the damages to be awarded to the injured party. As Lord Dunedin stated in the case of* ***Admiralty Commissioners v SS Susqehanna [1950] 1 ALL ER392. If the damage be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question.*** "(Emphasis added)

General damages are only awardable upon evidence that the party seeking to be awarded such damages suffered directly as the consequence of the act complained of. In his evidence at the CMA, the Respondent complained that his termination of employment was unexpected, it made him go through an economically difficult period of life due to unemployment. He complained also that the termination exposed him to changing behaviour, abnormal mood, decreased appetite and loss of sleep. He sought to tender medical proof to that effect but it faced a successful objection from the Applicant's counsel.

Having due regard to the above factors, there is no gainsaying that there was no proof of the alleged changing behaviour, abnormal mood, decreased appetite and loss of sleep as portrayed by the Respondent. Once proved, the award of general damages could be justified. That said,

however, I do not consider the award to have been necessary given the fact prevailing at the time of the Award.

Arguably, it is noted from the record that the Respondent had worked for the Appellant for two years and five months prior to his termination. The termination of his employment admittedly led to loss of income, which cannot be compensated by monetary sum to restore the Respondent in his original position. But it is on record that the Respondent was paid his terminal benefits vide exhibit D4. In addition to that, the Respondent was awarded compensation over and above the minimum compensation of 12 months. Thus, the Respondent, albeit being unfairly terminated, was adequately compensated. The Arbitrator's award of TZS 10,000,000/= as general damages does not find justification.

I have taken note that in awarding general damages, the Arbitrator placed reliance in various decisions. However, I agree with Mr Mwanga that each case has to be decided basing on its facts and the evidence on record. Facts of this case, in my considered view, do not dictate awarding general damages due to the reasons I have advanced above.

Various decisions of this Court had similar observation. For example, in **Feza Primary School vs Wahida Kibarabara, Lab. Div. DSM,**

Revision No. 117 of 2013, this Court relied on the decision in **P.M. Jonathan vs Athuman Khalfan, [1980] TLR190,** where it was stated:

> *"The position as it therefore emerges to me is that general damages* ***are compensatory in character. They are intended to take care of the plaintiff's loss of reputation, as well as to act as a solarium for mental pain and suffering.*** *"... Therefore, having all the above in mind and the facts which are proved by the available evidence and considering the nature of this case that* ***the respondent was subjected to mental torture and shame by the headmaster who discriminated and harassed her as alleged by the respondent,*** *I find that the respondent is entitled to the payment of general damages to compensate or take care of the loss and pain she suffered because of the applicant's act."* (Emphasis added)

Similarly, in the case of **Tanzania Breweries Limited vs Nancy Morenje, Lab. Div. Revision No. 182/2015**, the Court held:

> *"I would have decided otherwise* ***if the respondent had proved by evidence to have suffered personal injury like mental torture or anguish then she would have been entitled to general damages*** *if claimed in CMA Form No.1 as required in law. Therefore, the Arbitrator award of general damages was unjustifiable."* (Emphasis added)

In this case, although the Respondent purported to prove some harms arising from the termination of his employment, he did not prove loss of reputation, mental or other type of injury sufficient to justify the award of

general damages. Furthermore, the Respondent did not prove that he underwent changing behaviour, abnormal mood, decreased appetite and loss of sleep, since the document intended to be relied upon did not pave its way in the records of the CMA. Besides, there is uncontroverted evidence that the Respondent was paid his terminal benefits and in addition to that he was paid 24 month's renumeration as compensation. The compensation as reflected in **Veneranda Maro** (supra), acts as a penal element against the employer for failure to get the procedure right as well as a solace to an employee. Damages and or compensation acts as solace to the employee and does not aim at enriching the employee or act as a punishment to the employer. Thus, I find the award of general damages by the arbitrator to the tune of TZS 10,000,000/= manifestly fault. It is hereby set aside. Consequently, the complaints in paragraph 4(ii), (iii) and (viii) is hereby resolved in favour of the Applicant.

The next complaint is in respect of paragraph 4(vi) of the affidavit, which challenges the CMA Award for awarding compensation over and above the minimum 12 months renumeration as stipulated under section 40(1)(c) of the ELRA. I have revisited the record of the CMA and is inclined to agree with the learned Arbitrator's decision. At page 12 of the Award,

while justifying payment of 24 months renumeration, the Arbitrator made the following observations:

> *"No any destruction and the loss therefrom alleged by Mr Mgoma has been proved in any how before this Commission to have existed in the cause of complainant so (sic) to make the Commission inflict lesser penalty on the respondent. Thus,* ***in consoling the complainant for being unfairly terminated and, in punishing the respondent for transgression of law****, this Commission can neither dismiss the claim of compensation as prayed for by Mr. Mgoma nor can it disturb such an amount sought by complainant but instead, it will grant it in the quantum which he has sought. Denying it will mean encouraging the respondent to deliberately continue breaching the law with impunity. Consequently, the respondent shall in accordance with section 40(1)(c) of the Act pay the complainant twenty-four months renumeration equal to Tshs 28,123,800/= as compensation for terminating his employment unfairly."* (Emphasis added)

From the quoted excerpt, reasons for awarding compensation over and above the minimum 12 months were expounded. They are two folds. First, to **console** the Respondent for being terminated unfairly and, second, to **punish** the Applicant for terminating the Respondent without observing the right to be heard or, in other words, without conforming to the law. The Arbitrator relied on the decision of the Court of Appeal **in Veneranda Maro & Another** (supra), which I also subscribe to in my determination

of this issue. In that case, the Court endorsed the South African decision in the case of **Viuoen vs Nketoana Local Municipality [2003] 24 ID 437** which held:

> *"...compensation is not an award of damages in the contractual or delictual sense. It includes* ***a penal element against the employer for failing to get the procedure right, as well as an element of solace to the employee, in the sense that the employee has lost the right to be given a procedurally fair dismissal which is entrenched in the LRA.*** "(Emphasis added)

The Court of Appeal stated further that:

> *"We fully subscribe to said decisions considering that the ELRA prescribes the award of compensation pegged to the employee's monthly salary depending on the nature of termination that is, procedural or substantive."*

From the above authoritative decision, penal element was approved as one of the factors to award compensation. Applying the above principles in the case at hand, the Respondent was terminated without any proof of commission of the alleged misconduct. Hence his termination was based on unfair reason. Furthermore, he was terminated summarily without being afforded the right to be heard as enshrined in our Constitution. The Arbitrator complied with the provisions of Rule 32 of G.N No. 67 of 2007, which prescribes the final orders after finding termination unfair. Bearing in mind that the Respondent had worked with the Applicant for more than

two years without any record of misconduct, and taking into account that his termination exposed him to loss of income, also having in mind that the Applicant terminated him arbitrarily without adhering to legal procedures, I have no hesitation to applaud and agree with the Arbitrator that the acts of the Applicant deserved a penal sanction; that is, by imposing compensation over and above the minimum provided by the law. Triggered by the above reasons, I find no reason to alter the award of 24 months renumeration by the Arbitrator. The said award was justified.

The last complaint hinges on the amount of severance pay awarded to the Respondent. According to Mr Mwanga, the amount was excessive since he ought to have been awarded TZS 376,923/=. Section 42(1) of the ELRA prescribing the awarding of severance pay provides:

> *"For the purposes of this section, "severance pay" means an amount at least equal to 7 days' basic wage for each completed year of continuous service with that employer up to a maximum of ten years."*

As the record stands, it is undisputed that at the time he was terminated, the Respondent was paid his terminal benefits, including Notice and leave. According to exhibit D4 dated 02/09/2021, he was paid based on the basic

salary which was TZS 1,171,800/=. The same amount was approved by the accountant and personnel officer as reflected in exhibit D4. In the award, while calculating the amount of severance pay, the Arbitrator used the same amount of basic salary of TZS 1,171,800/=. Ipso facto, at the time of his termination, the Respondent's salary was not TZS 700,000/= suggested by Mr Mwanga. That appear to be the basic salary at the time of he was employed. The award of TZS 585,900/= as severance pay ordered by the Arbitrator was therefore in order as it was calculated based on the basic salary of the Respondent at the time of his termination. This complaint is, thus, devoid of merits.

Before concluding, I wish to comment on the observation made by Mr Mwanga relating to whether the Arbitrator was wrong in awarding compensation to the Respondent as opposed to other remedies provided by law. Mr Mwanga blamed the Arbitrator for failure to order reinstatement, having found the termination unfair both substantively and procedurally. Ordinarily, once the termination is found unfair both substantively and procedurally, the appropriate order is reinstatement. This can be discerned from the Court of Appeal decision in **Magnus K. Laurian vs Tanzania Breweries Limited, Civil Appeal No. 25 of 2018** (unreported), where it was stated:

"Generally, where the termination is adjudged unfair on procedural grounds only, an arbitrator or the High Court, Labour Division will award compensation under section 40 (1) (c) of the ELRA as opposed reinstatement or re-engagement under section 40 (1) (a) and (b) respectively of the ELRA. ***But if the termination is held to be both substantively and procedurally unfair, it will be fitting to order reinstatement without loss of remuneration unless there are justifiable grounds for not doing so in terms of Rule 32 (2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007, G.N. 67 of 2007*** *("the Guidelines Rules")".* (Emphasis supplied)

In the case at hand, despite the CMA correctly finding the termination of the Respondent unfair both substantively and procedurally, it did not order reinstatement as per the decision above. However, fortified by the provision of Rule 32(2)(b) of G.N No. 67 of 2007, I find that the circumstances of this case were not favourable for an order of reinstatement. Admittedly, the Arbitrator was supposed to point that out. In my view, since the Respondent was terminated summarily by the Applicant on the ground of gross insubordination, continued employment relationship between the two would be almost intolerable. Therefore, I endorse the course taken by the CMA Arbitrator ordering compensation in lieu of reinstatement. In any case, the order of reinstatement, if issued by

this Court at this stage, which this Court is mandated by law, would inevitably be more costly to the Applicant than the outstanding award.

Fortified by the above analysis and observations, this Application partly succeeds. The general damages of TZS 10,000,000/= awarded to the Respondent are hereby set aside. The rest of the CMA Award remains unaltered and is hereby confirmed. Considering this to be a labour dispute, I order each party to bear their own costs.

Y.B. Masara

JUDGE

24th February 2023