IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

LABOUR REVISION NO. 92 OF 2021

(Arising from CMA/ARS/ARS/47/19 before the Commission for Mediation and Arbitration at Arusha)

BILILA LODGE INVESTMENT LIMITED

t/a FOUR SEASONS SAFARI LODGE .....APPLICANT

VERSUS

OKULI KINABO KIMARO ..... RESPONDENT

JUDGMENT

29th November & 20th December, 2023

KAMUZORA, J.

This revision application was brought under sections 91(l)(a), 91(2)(a)(b)(c), 94(1)(b)(i) of the Employment and Labour Relations Act No. 6 of 2004 Cap 366 R.E 2019 (ELRA) and Rules 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d), 24(11)(c)(d) (e)and 28(1)(c)(d) (e), of the Labour Court Rules GN No. 106 of 2007. The applicant is praying for this court to be pleased to call for records of the Commission for Mediation and Arbitration at Arusha and revise the proceedings and award issued by the CMA on 20th August, 2021.

Briefly, the Respondent sued the Applicant before the Commission for Mediation and Arbitration (CMA) for unfair termination of his employment contract. The CMA agree that the applicant herein unfairly terminated the Respondent hence, awarded a total of 20,440,430.77/- to the respondent in which TZS 8,275,260 was awarded as compensation for twenty (20) months' salary, TZS 2,165,170.77 as terminal benefits and TZS 10,000,000/= as general damages. Dissatisfied by the CMA award, the Applicant preferred this Revision No. 92 of 2021 seeking to have the CMA decision overturned. The grounds for revision are as below: -

a. *The legality and correctness of the commission's finding that the Applicant did not take comprehensive measures and or offer the respondent with any alternative job before deciding on termination.*
b. *The legality and propriety of the commission's finding that the decision made by the Applicant to terminate the respondent from her employment was not supported by a valid medical opinion from a registered medical practitioner*
c. *The legality and propriety of the commission's finding that the Respondent was not admitted at NSK Hospital in Arusha for a medical checkup despite an admission made by DW1, Elda Kimaro during hearing and Respondent's opening statement*
d. *The legality and propriety of the commission's finding that the two medical reports from Head-to-Toe clinic dated 13th and 19th November 2018 (Exhibit P4 collectively) which prove that the Respondent's injury might have been caused by a motor traffic*

crash that had happened on 2015 could be an oversight on the part of the physician who prepared the same

e. *The legality and propriety of the commission's finding that the Applicant did not follow available procedure when terminating the Respondent from her employment*

f. *The legality, propriety and validity of the commission's award to order the Applicant to pay the Respondent the monetary reliefs of Tzs 8,275,260 allegedly being compensation for Twenty Fourt (24) months' salary, Tzs 2,165,170.77 allegedly being terminal benefits and Tzs 10,000,000/- allegedly being general damages.*

g. *The legality, propriety and validity of the commission's finding to order the Applicant to pay the Respondent 24 months' salary without any justifiable reason.*

h. *The legality, propriety and validity of the commission's award to order the Applicant to pay the Respondent Tzs 10,000,000/= allegedly being general damages without any proof of the damages suffered from the Respondent and it is not among the reliefs provided for in the law in cases of unfair termination*

i. *The legality, propriety and validity of the commission in holding the Applicant liable for the unfair termination of the Respondent.*

When the matter was called for hearing, the learned counsel Mr. Dennis Moria, learned counsel appeared for applicant and the Respondent was represented by learned counsel Mr. Ombeni Kimaro. Counsel for the parties opted to argue the application by way of written submissions and they both complied to the submissions schedule.

Submitting in support of application, the counsel for the applicant started arguing ground **(h)** that the award of TZS 10,000,000 as general damages is unfounded as such relief is not provided for under the law. That, section 40 of **the Employment and Labour Relation Act Cap 366 R.E 2019,** provides reliefs for unfair termination which are; reinstatement to employment, re-engagement on terms to be decided by the Arbitrator and compensation of not less than twelve-month remuneration. That, the Arbitrator awarded general damages to the Respondent contrary to the law and without proof that the Respondent suffered damages. For him, the award of TZS 10,000,000/= by the CMA was in contravention of the laws. He referred the case of **Attorney General Vs. Gregory Kivuyo and 4 Others (Labour Revision 41 of 2021)** and insisted that the CMA stumbled into error by awarding general damages to a claim of unfair termination.

Submitting on grounds **(a), (b)** and **(d),** the counsel for the applicant argued that, the law requires that before an employer can terminate an employee on grounds of illness or injury, there must be opinion of a qualified medical practitioner opining that the employee is not fit to return to work and the employer is satisfied that there is no alternative job for the respective employee. That, **Rule 19 (1) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N 42 of 2007**

provides for factors that the employer should take into consideration before terminating an employee on account of illness or injury. He contended that the applicant endeavored to prove how she took into account the said factors, before terminating the respondent's employment. Referring the testimony by **PW1** he explained that the respondent's injury resulted from a motor traffic accident which the respondent suffered in 2015 and not a work-related illness. That, to prove this, **PW1** produced two medical reports from Head 2 Toe Orthopedic and Physiotherapy Clinic **(Exhibits P-4 collectively)** which were submitted by the Respondent to the Applicant **(DW3)** while on her sick leave to inform the Applicant on the clinical examination and investigation that she undergone. That, the Respondent at the CMA testified that her injury was caused by an accident which she suffered on 06th October, 2015 while at work. According to the Respondent, she was hit by a sharp metal which came from the top of the building following the construction which was carried on at the Applicant's Lodge.

The counsel for the applicant further submitted that from the testimony of **PW1** and **Exhibit P-4 collectively,** the Respondent's injury is not a work-related injury because the said states clearly that the Respondent had been involved in a motor traffic accident that happened sometime in 2015 and she had never notified the Applicant on the same.

That, unlike the Applicant, nothing was produced by the Respondent to support her contention that she was hit by a sharp metal at workplace as she alleged. The applicant's counsel insisted on the principle, '*he who alleges must prove*' to support his assertion that the respondent's claim was based on empty words without proof that she sustained injury while at work. To support his argument the counsel for the appellant referred the decision in the case of **Mohamed S. Ghona Vs. Mahamoud Mwemus Chotikungu, Land Case No 42 of 2015, HC of Tanzania (Land Division) at Dar es Salaam** (unreported).

The counsel for the applicant further submitted that during cross-examination, the Respondent strangely denied **Exhibit P4 collectively** on the reason that the same are false and denied her own opening statement filed on 26th March 2019 which mentions that she was involved in an accident back in 2015. That, the applicant wondered as to why the Respondent admitted **Exhibit P-7** and denied **Exhibit P-4 collectively** while they were both prepared by the same Clinic and **Exhibit P-4 collectively** was attached in the respondent's list of additional documents as item number 11 meaning, she intended to use them as evidence. He maintained that the respondent's opening statement and **Exhibit P-4 collectively** contains facts which disproves the Respondent's allegation that the injury suffered was work-related injury.

He added that **DW3** confessed to have attended the Respondent and prepared the said **Exhibit P-4 collectively** which the Respondent is now denying. The counsel for the applicant was of the view that the respondent's testimony is questionable and this Honourable Court should disregard it in its entirety because the one to deny the said **Exhibit P-4 collectively** was supposed to be **DW3** who prepared them and not the Respondent. That, the fact that **DW3** did not deny it, the Respondent is estopped from denying the same. He referred decision of the High Court of Tanzania (Land Division) at Dar es Salaam in Land Case No 426 of 2016, **Zahoro Salum Zahoro Vs. Salma Issa Mtambo (being administratrix of the estate of the late Katende Simba) & 4 others** (unreported).

The counsel for the applicant maintained that the testimony of **PW1** and **Exhibits P-4 collectively** prove that the Respondent's injury is not a work-related injury but her involvement in a motor traffic accident that occurred in 2015 that left her with the back injury resulting to her long-term back problems leading to her termination. That, there is no proof that the Respondent notified the Applicant about the said accident as required by the Applicant's internal policy as the Applicant became aware after being served with **Exhibit P-4 collectively** from the Respondent.

On grounds **(e)** and **(i)** the counsel for the applicant submitted that

according to **PW1,** the Respondent's sick leave was approved from 18th July, 2018 to 23rd November, 2018 for a total of 126 days meaning that the Respondent fully exhausted her medical leave days under the law. That, on 23rd November, 2018 the Applicant notified the Respondent by way of a letter **(Exhibit P-5)** to attend a consultation meeting on 03rd December, 2018 at Arusha or 10th December, 2018 at Dar es Salaam so as to discuss on the way forward of her employment following her permanent medical condition. That, **PW1** further testified that, on 03rd December 2018 she met with the Respondent at the Applicant's offices at Arusha and the Respondent went with two representatives and they all participated in the discussion and the Respondent did not dispute this fact during cross- examination. That, **PW1** further testified that, they had a long consultation meeting with the Respondent regarding her employment status on the fact that she had already exhausted her medical leave days and she was still not fit to return to work according to the medical reports which the Respondent had submitted to the Applicant. That, the Applicant suggested to the Respondent to take up the position of a front desk/reservation officer but the Respondent declined on the reason that she did not possess any computer skills. That, according to **PW1,** the consultation did not end there as the Respondent asked for more time so that she could get time to think about other alternative work

she could do but surprisingly, a day later, on the 04th December, 2018 the Applicant received another medical report **(Exhibit P-7)** from the same first clinic the Respondent had attended, notifying the Applicant that she was then able to return back to work. That, according to **PW1,** following that report, which was contradictory to the previous medical reports and given only a day after she had met with the Respondent, the Applicant arranged for the Respondent to undergo another medical checkup to ascertain the Respondent's health and medical situation. That, from **PW1** testimony, on 13th December 2018 the Respondent went to NSK Hospital in Arusha for another medical checkup and after several tests, bed rests and physiotherapy, the hospital through its report **(Exhibit P-9)** confirmed that the Respondent was still sick and she would always have lower back pain, difficulty standing for a long time, difficulty bending her back, and difficulty carrying heavy objects. That, in **Exhibit P-9,** it was further recommended that the Respondent's injury would get worse with time as it is a degenerative process and therefore, she was not able to resume her duties as before. That, during hearing at the CMA, **DW3** who introduced himself as the physiotherapist who attended the Respondent at the time when she visited their Clinic testified that, **Exhibit P-9** is not a medical report as per the required standards but when probed during cross-examination on the required standards **DW3** admitted that he did

not have proof of the same and he said it was just his opinion.

The counsel for the applicant further submitted that the testimony of the Respondent is inconsistent with the testimony of **DW1** (her biological mother) who testified that the Respondent had undergone medical treatment at NSK Hospital following her back problem. That, at paragraph 7 of the Respondent's opening statement it states that the Respondent underwent medical treatment at NSK Hospital after her first consultation meeting with the Applicant. The counsel was of the view that **Exhibit P-9** proves that the Respondent's degree of incapacity was to the extent that the she could not resume her duties as before. That, **Exhibit P-9** is the last medical report that was used by the Applicant to reach into conclusion that the Respondent was not fit to return back to work and therefore termination was the last resort after consulting and offering her an alternative position but she denied the offer. He insisted that **Exhibit P-7,** which the Respondent is so much relying on, should have been ignored by the Commission for the following reasons;

i. It is not the last medical report as the last medical report is **Exhibit P-9,** which is a medical report from NSK Hospital.
ii. **Exhibit P-7** was made purposely to conceal the fact that the Respondent was not fit to return back to work and not otherwise and it was prepared immediately after the Respondent met with

PW1 on 03rd December 2021.

iii. **Exhibit P-7** is totally different from other medical reports submitted by the Respondent from the same medical center. It does not show when the Respondent reported for her medical checkup like the other medical reports. Worse enough, it states that the Respondent was seen in their outpatient clinic complaining of lower back pain while a day before she was with **PW1** and confirmed that she was fit and ready to resume her duties as before.

The counsel for the applicant maintained that the Applicant took all steps and procedures as outlined in **Rule 19 of the Employment and Labour Relations (Code of Good Practice) Rules, G.N 42 of 2007,** and had valid reason to terminate the Respondent.

In tackling the remaining grounds (f) and (g) the counsel for the applicant submitted that the Commission erred for failure to indicate the basis of the award of 24 months' salary to the Respondent. That, under **section 40 of the Employment and Labour Relation Act Cap 366 R.E 2019** which relate to compensation for unfair termination, 12 months' salary is the minimum award set by the said provision but the Commission awarded more than the compensation provided for by the law unjustifiably. That, in considering that there was valid reason for termination and procedures were followed by the Applicant, the

Commission should not have awarded the said reliefs. In concluding, the counsel maintained that the Applicant proved that the termination was fair substantively, and procedurally hence, pray that this revision application be allowed in its entirely.

In reply, the counsel for the respondent submitted jointly for **grounds (h), (F) and (g)** to the application which are confined in the complaints that the commission failed to state the basis of awarding general damages and the basis of awarding 24 months contrary to section 40 of the Employment and labour Relation Act Cap, 366 R.E 2019. The counsel for the respondent argued that the relevant provision of the law governing dispute like the one at hand is rule 19 of the Employment and labour Relation (Code of Good Practice) Rule, 2009. That, the law relevant for termination of employment based on ill health is Section 37 (1), (2), (a), (c), (4) and 99 (1) (a) of the Employment and Labour Relations Act on one hand, and Rule 19 and 21 of the Code (Employment and labour Relation (Code of Good Practice) Rule, 2009) on the other hand. That, there is also section 39 of the Employment and Labour Relation Act, on the burden of proof that, where there is allegation of unfair termination, the burden of proof that the termination was fair, lies on the employer.

The respondent counsel insisted that, the Applicant failed to prove the allegation that the respondent did not suffer any damage and that the

general damages was awarded contrary to the law. He argued that under Rule 32 (1) and (5) of the Labour Institution (Mediation and Arbitration Guidelines) GN NO. 67 of 2009, it is the discretion of the commission to award reliefs in the arbitration and the test should be determined in the circumstances of each case. He was of the view that reliefs provided under section 40 of the Employment and labour relation Act Cap 366 R.E 2019 are not the only reliefs awarded when it comes to unfair termination. The court or CMA have the discretion to assess the circumstances of each case and award relevant reliefs and the law allows even compensation where there is unfair termination.

He was of the view that reliefs provided under section 40 of the Employment and Labour Relation Act Cap 366 R.E 2019 are not reliefs provided to the individuals who are terminated due to ill grounds. That, the respondent herein was terminated by the applicant after she suffered injuries in the cause of her work/employment and did not get any assistance from her employer. That, the evidence in the record reveal that she was working under dangerous work environment and she was not provided with any protection. That, PW1 admitted that the injury was caused by sloppy floor and the Respondent herein fall down and injured her spinal code discs and broke her leg. She was not given transport from Serengeti where she used to work to Arusha where she came after the

accident as she was assisted by a cargo driver in a cargo vehicle from Serengeti to Arusha. That, the Applicant did not even report the accident to OSHA because for they worried that they will be made liable for discriminating the Respondent. To him, the above circumstances justify the general damages awarded and that, the allegation that the general damages are not allowed under the law is misconception of the law to the part of the applicant's counsel. He was of the view that the case of **Attorney General Vs. Gregory Kivuyo and 4 Others,** Labour Revision No. 41 of 2021 cited by the applicant counsel is not supporting his case. that, although the said case was not dealing with termination on the ill health ground, the principle established in that case especially at page 8 is that the arbitrator has the discretion to award appropriate reliefs based on the circumstances of each case. That, the arbitrator in the case at hand was legally entitled to award General damages as **Section 32 (5) of the Labour Institution (Mediation and arbitration Guidelines) GN NO. 67 of 2009** allow the arbitrator to award appropriate relief. He maintained that the case cited is partially distinguished to the extent that the termination referred in the said case was not based on Rule 19 of the Employment and labour Relation (Code of Good Practice) Rule of 2009 as it was normal termination on other grounds apart from ill health. He prayed that **ground H** of the application be dismissed for want of merit

and this court be pleased to find that the arbitrator was legally correct in awarding general damages because of the discrimination done to the respondent by the applicant.

On **grounds (a), (b) and (d)** of the application, the counsel for the respondent submitted that by 2015 the respondent herein was already employed by the Applicant and there is no evidence in the record which shows that she took sick leave because of the alleged accident from when she was first employed back in 2014 to 2015. That, the record reveal that the only accident reported was that which occurred on 6th October, 2015 which PW1 acknowledged being aware of hence, the argument that the injuries sustained by the respondent was not work related is an afterthought. That, despite having serious policy on accident as well as insurance as PW1 said, still they decided not to accommodate the respondent with all those benefits and the respondent used her own money to pay for the hospital bills. The counsel for the respondent was of the view that since the respondent was denied medical benefit she was entitled to damage for discrimination. That, PW2 admitted to have no memory of the amount of money paid to the respondent when she was medically treated and did not renew the respondent's insurance. That, PW2 also admitted that medical bills for the respondent were not paid as he did not recall being instructed to pay the medical bill. That, PW2

testified that they have a doctor at Serengeti where the respondent used to work but the doctor did not comment on the respondent's ability to work. To him, the conduct of the applicant throughout the period when the respondent was sick shows that they intend to terminate her and they even created a facade that she was not injured at her work place in order to avoid liability. That, the fact that she was not paid any medical benefit and her insurance was not renewed is a proof of discrimination and the arbitrator assessed the conduct hence, was right awarding general damages.

The counsel for the respondent further submitted that evidence from PW1 clearly indicates that she was aware of the Respondent's accident at work place. that, she admitted to have seen the Investigation report regarding the accident which occurred on 6th October, 2015 which involved the respondent herein. That, she also admitted the respondent was injured while she was at her work place and that the accident was caused by sloppy floor. That, this is contrary to what the applicant's counsel is trying to convince the Court that the Respondent was not injured at her work place and that the injuries was caused by the motor traffic accident.

That, **Exhibit DI collectively** which was tendered and not objected reveal that the Respondent was suffering from back pain and leg injury

and the X-Ray report shows that the respondent had fracture on the left leg. To him, this is enough proof of injuries sustained by the respondent thus, wondering why the applicant's counsel wanted the respondent to prove injury beyond reasonable doubt. He was of the view that, the case of **MOHAMED S. GHONA VS MAHAMOUD MWEMUS CHOTIKUNGU, Land Case No. 42 of 2015, HC of Tanzania (Land Division) at Dar es Salaam** cited in the applicant submission is distinguishable. That, the principle in that case is not applicable to the case at hand because the evidence shows that the respondent sustained her injuries while at work.

The respondent's counsel also submitted that the reference made by the applicant counsel regarding Exhibit P-4 collectively is of no assistance to the applicant because PW1 testified at page 17 of the proceedings that she does not have any document or report showing that the respondent suffered the motor vehicle accident back in 2015. That, the only report she had and was aware of is the report showing that the respondent suffered accident at work place on 6th October, 2015 thus, the allegation that the injury was caused by road accident is an afterthought and unsubstantiated.

On the claim that there was departure from the pleadings, the counsel for the respondent submitted that the allegation of departure is based on the opening statement which they believe is not part of

pleadings. That, opening statement is a submission in support of the claim and defense and it does not fall withing the meaning of pleadings. That, before the Commission for Mediation and Arbitration CMA form No 1 is the only pleading filed by the respondent herein and in the said form, there is no content regarding the accident alleged by the applicant's counsel. Referring the definition of pleadings at page 1191 of the Black's Law Dictionary 8th Edition, he maintained that opening statement is not part of pleadings hence, the allegation regarding departure from pleadings is unfounded. The counsel for the respondent was of the view that the case of **Zahoro Salum Zahoro Vs. Salma Issa Mtambo,** Land Case No. 426 of 2016 is distinguishable and was cited out of context as there is no departure for the pleadings in the case at hand. That, Opening statement is just a submission like final submission which does not qualify to be termed as pleadings, he thus prayed that grounds (a), (b), and (d) to the application be dismissed for want of merit.

Responding to **grounds (e) and (i)** of the application, the counsel for the respondent submitted that the evidence in the record reveals that the respondent was went on sick leave after she was injured in her work place and the applicant terminated her without complying with Rule 19 of the Employment and labour Relation (Code of Good Practice) Rule of 2009 which provides for the necessary steps to be taken in order to terminate

an employee based on ill health. That subject to the provision of section 39 of the Employment and labour Relation Act the applicant herein was bound to prove that she followed the requirement provided under Rule 19 of the Employment and labour Relation (Code of Good Practice) Rule of 2009 which provide for substantive aspects of termination on account of ill health and procedures for termination of sick employees. That, the requirement under Rule 19 was observed because the applicant did not believe that the respondent was terminated due to ill health. That, the rule requires an employer who wishes to terminate an employee to be guided by an opinion of a registered medical practitioner as defined under section 3 of the Medical, Dental and Allied Health Professional Act, No. 11 of 2017 (the Medical Professional Act). That, the applicant's counsel submitted that the opinion of the medical practitioner that the applicant relied upon to terminate the respondent is a report from **NSK HOSPITAL (EXHIBIT P-9).** That, the said medical report does not contain the seal of the Doctor or hospital it was produced from, not signed or dated. That, the applicant even failed to call the doctor who prepaid it to testify before the commission and the said exhibit was tendered by PW1 who is neither a medical doctor nor a person with medical knowledge or competence and it contained medical jargon which PW1 could not explain. The counsel for the respondent argued that it is possible that the said exhibit was

designed/fabricated by applicant and the same is contrary to the provision of Section 3 of the Medical, Dental and Allied Health Professional Act, No. 11 of 2017 (the Medical Professional Act). He referred the case of **Samwel Japhet Kahaya Vs. The Republic,** Criminal Appeal No. 40 of 2017 at page 12 -13 by the Court of appeal on the principle regarding expert opinion. He maintained the alleged medical report from PW1 (exhibit P-9) does not inspire confidence not only to the parties in the case but also the public at large for it contain no signature, date, the seal of the author and the name of the hospital which issued it. That, the doctor who issued a medical report did not testify in court. That, the law is very clear that failure to call material witnesses entitles the court to draw adverse inference where such witnesses are within reach but are not called without sufficient reason being shown. He maintained exhibit P-9 was issued by NSK hospital allegedly by Dr Yasser. No proof was given from NSK Hospital proving that the said Dr Yasser was their employee and he no longer work with them. It was expected for any other Doctor from NSK Hospital to testify in place of Doctor Yasser. That, at page 30 of the proceedings, the counsel for the Applicant told the commission that Doctor Yasir refused to appear before the commission. He was of the view that the said medical report creates doubts hence, the commission was justified not give weight to exhibit P-9. To support the argument on failure

to call witness, he referred the case of **Omary Hussein @ Ludanga & Another Vs. the Republic,** Criminal Appeal No. 547 of 2017 at page 15 the CAT and maintained that failure to call the doctor who is alleged to have examined the respondent and failure to have any other doctor from NSK hospital is a proof that exhibit P-9 was fabricated as the respondent denied to have been examined at NSK Hospital.

The counsel for the respondent further submitted that DW2 was a doctor who treated the respondent on her back injury. That, the said doctor informed the commission that by 4th December, 2018 the respondent had recovered could resume work in her prior position. That, the Human resources manager could not disagree with the medical report of a qualified doctor who treated the respondent since when she was unable to walk until when she could walk and finally attend most of the proceedings. That, the applicant was served with exhibit P7 meaning that was no medical reason to terminate the respondent. To him, the applicant had prior planned to terminate the respondent as the evidence by PW1 at page 20 of the proceedings reveal that before the meeting held on 11th January, 2019, she had already prepared termination letter meaning that the decision to terminate the respondent was already made and the meeting held by the Applicant was not intended to comply with the requirement of Rule 19 Supra. That, PW1 also testified at page 20 of the

proceedings that they had internal Doctor who suggested treatment to the respondent's injuries but they did not request for his further examination or further report. That, the internal doctor opined that the respondent's injuries would take 3-7 months to be healed but they terminated the respondent even before the time opined by internal doctor. He insisted that two doctors treated the respondent and opined about her recovery and that was enough medical opinion. He referred to the case of **Bulyanhulu Gold Mines Limited Vs. Paschary Andrew Stanny,** Civil Appeal No. 281 of 2021 at page 21-33 which he considered the best case to deal with termination based on ill health. He urged this Court to be guided by the said case in finding that the termination by applicant was not fair. He also invited this court to be guided by the case of **Vodacom Tanzania Vs. Zawadi Bahenge & 6 Others**, Revision No. 12 of 2012, page 4-7 and the case of **Kassim Mtulya Vs. Ison Bpo Tanzania Limited, Revision No. 38 of 2020,** page 5-7. In concluding, the respondent's counsel prayed for this court to dismiss the application for revision and prayed this court to be guided by the above cited authorities and decide in favour of the respondent.

My assessment to the records and submission by counsel for parties is that, there is no dispute that the respondent was employed by the applicant in a position of a Server at Four Season Safari Lorge located at

Serengeti and the respondent's employment contract was with effect from 18th July 2014. Four Season Safari Lorge is a trade name for Bilila Lodge Investiment Limited (the applicant herein). It is also not disputed that the respondent employment contract was terminated on ground of ill health as per the letter dated 11th January, 2019. What is disputed is whether, there was good reason for termination and whether procedures for termination was followed.

While the applicant claims that the respondent was sick and could not resume work hence, good reason for terminating her employment, the respondent claimed that she was recommended as fit to resume work hence, her termination was not on fair reason. Similarly, while the applicant claims to have followed all procedures for termination, the respondent claims that the procedures were not followed for the applicant did not comply to the requirement of law before issuing termination letter.

There is no doubt that the respondent was confirmed to be sick as she experienced back pain. Parties' arguments are on whether the respondent suffered injury which was work related or not. While the appellant claim that the respondent suffered car accident, the respondent claim that she suffered injury while at work as she was hit by an object causing her to sleepy into the floor and sustain leg and back injury. The respondent presented reports for 2015 and other reports showing that

she attended physiotherapy clinic in 2018. In her evidence, she claimed that she was experiencing back pain due to the injury she sustained in 2015. It is unfortunate that neither of the report tendered by her gave a clear description if the cause of pain due to accident she claimed to have suffered. Thus, concluding that the pain she was experiencing in 2018 was due to injury sustained in 2015 is unsubstantiated.

However, that does not take away the duty of the appellant to prove that her termination was fair for she could not resume work. The law under Section 37 (1), (2), (a) (i) and (4) of the Employment and Labour Relation Act provides for what will amount to fair termination. The said section reads: -

"37 (1) it shall be unlawful for an employer to terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid; -

(b) NA

(c)That the employment was terminated in accordance with a fair procedure.

(3) NA

(4) In deciding whether a termination by an employer is fair, an employer, Arbitrator or Labour Court shall take into account any code of good practice published under Section 99."

The Code of Good Practice mentioned above provides for what amount to fair reasons and fair procedures for termination under Rule 19 and 21. The same will be demonstrated in my subsequent discussion.

The evidence reveals that she was sick and was attending physiotherapy clinic from August, 2018 as per medical reports submitted before the CMA. The report dated 4th December, 2018 shows that she was fit to resume her job for she had recovered. This report is the basis of dispute as the applicant is challenging the respondent capacity to resume work on account that the report was fabricated after the HR had a meeting with the respondent a day before on 3rd December 2018 suggesting her termination. It is unfortunate that the respondent denied to have met the HR on that date and no records were submitted to substantiate that fact.

The appellant presented an alternative report intending to prove that the respondent was not fit to resume work. It is unfortunate that such report lacks credentials of being considered as official report for the same reasons listed by the respondent's counsel. The report despite having name of the purported Doctor, it bears no name of the issuing hospital, signature, date and official seal. Thus, the said report could not be relied upon as document certifying the respondent's health status. In that regard, it is my view that the applicant when terminating the employee under the ground of ill health or injury was bound to comply to the

requirement under Rule 19 and 21 of GN No. 42 of 2007. Under Rule 19 (1) the applicant was bound to take into account factors listed under paragraphs (a) to (e) which includes; looking at the cause of the incapacity, degree of incapacity, temporary or permanent nature of the incapacity, the ability to accommodate the incapacity and the existence of any compensation or pension.

From the evidence in record, nothing proves that the applicant took any of the above measures to ensure that he is well satisfied on the cause of what he called incapacity of the respondent or the degree of incapacity. Under subrule (3) of Rule 19 the employer was bound to be guided by an opinion of a registered medical practitioner in determining the cause and degree of incapacity. However, the report relied upon by the applicant has no evidential value to justify the allegation that the respondent was certified as incapable of resuming work. Thus, the degree of incapacity and whether permanent or temporary was not proved by any evidence.

Under subrule (4) and (5) of Rule the employer was bound to investigate the extent of incapacity, if temporary or will be for long time and look for possible ways to accommodate the employee in alternatives listed under subparagraph 5 which are; temporary replacement, light duty, alternative work, early retirement, pension or any other acceptable alternative. However, the applicant was unable to prove that she was

ready accommodate to the respondent's incapacity, if any. The applicant's witness who is the HR claimed that during consultation meeting, the respondent was offered an alternative position but refrained on account that she had no computer skills. But nothing was submitted before the CMA to prove that the respondent the said offer was given and the respondent refused. It was expected for the applicant to submit the minutes signed by parties proving that there was such a meeting and the respondent's response toward an offer was expected to be in writing. In the absence of record, no one can be convinced that the respondent was offered an alternative position.

Subject to the above discussion, I agree with the counsel for the respondent there was no fair reason for termination as the applicant was unable to show that she took measures to ensure that the respondent was ill to the extent of not resuming work or even of being accommodated in the alternatives listed under subrule (5) of Rule 19.

Apart from that, nothing shows that the procedures were followed as so required under Rule 20 of the same GN No. 42 of 2007. The said Rule requires the employer to conduct investigation on employee's incapacity due to ill health or injury in consultation of the employee. The employer is also bound to advise the employee to consider alternatives and if not accepted, the employee is bound to give reason. Nothing was

presented as investigation report regarding the employee incapacity and nothing shows the respondent's response to alleged given alternative.

The law under that Rule also requires an employer to call for a meeting before termination. In this matter, the HR claimed to have called the meeting on the date the termination letter was issued. This was also noted by the CMA ad discussed in its decision. The evidence by HR reveal that he called the meeting while they have made a decision to terminate the respondent but again, no minutes was tendered to verify the alleged meeting. Thus, such meeting even if existed, could not fit within the meeting prescribed under subrule 5 which requires a meeting to be held prior to the decision terminate the employment. In that regard, subject to the requirement under section 39 of the ELRA, the applicant was unable to prove that the respondent's termination was fair because, apart from not being on fair reason, the termination did not comply to fair procedures. Thus, there was no fair reason and fair procedures for termination of the respondent's employment as so required under Section 37 (1), (2), (a) (i) and (4).

Having concluded so, the question is what relief the respondent was entitled. The applicant challenged the award of damage on ground that the same is not provided for under labour laws, referring Section 40 of the ELRA. The respondent on the other hand insisted that the CMA and

this court has powers to award any compensation. Basically, awards in labour disputes are specifically governed by labour laws. Having concluded that the respondent was unfairly terminated, remedies on unfair termination is provided for under section 40 (1) of the ELRA. The said section reads: -

"40(1) If an arbitrator or labour court finds a termination unfair, the arbitrator or court may order the employer: -

(a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to unfair termination; or

(b) to re-engage the employee of any terms that the arbitrator or court may decide; or

(c) to pay compensation to the employee of not less than 12 months remuneration."

General damage in my view is not among the reliefs recommended under the above provision. It was contended by the respondent's counsel that damage is awardable compensation under Rule 32 (1) and (5) of the Labour Institution (Mediation and Arbitration Guidelines) GN NO. 67 of 2009. That under that provision, the CMA has discretion to award any reliefs in the arbitration and the test should be determined in the circumstances of each case. He was of the view that reliefs provided under

section 40 of the Employment and labour Relations Act Cap 366 R.E 2019 are not the only reliefs awarded when it comes to unfair termination. The said Rule 32 of GN NO. 67 of 2009 read: -

"32 (1) Where an arbitrator finds a termination to be unfair, the arbitrator may order the employer to reinstate, re- engage the employee or to pay compensation to the employee.

(2) the arbitrator shall not order re-instatement or re- engagement where-

(a) the employee does not wish to be re-instated or re-engaged;

(b) the circumstances surrounding the termination are such that a continued employment relationship would be intolerable;

(c) it is not reasonably practical for the employer to re-instate or re-engage the employee; or

(d) the termination is unfair because the employer did not follow a fair procedure.

(5) Subject to sub-rule (2), an arbitrator may make an award of appropriate compensation based on the circumstances of each case considering the following factors-

(a) any prescribed minima or maxima compensation;

(b) the extent to which the termination was unfair;

(c) the consequences of the unfair termination for the parties, including the extent to which the employee was able to secure alternative work or employment;

(d) the amount of employee's remuneration;

(e) the amount of compensation granted in previous similar cases;

(f) the parties conduct during the proceedings; and any other relevant factors."

From the above provision which the counsel for the respondent relied on to conclude that damage was correctly awarded, you will agree with me that the said provision does not provide for award of general damage in employment disputes. Basically, Rule 32 (1) above provides for the remedies that can be awarded by the CMA for unfair termination disputes. Subrule (1) of Rule 32 is more or less similar to section 40 (1) of the ELRA as it gives powers to the arbitrator or court to order re-instatement, re-engagement or order compensation to the employee. Subrule (5) of Rule 32 refers to subrule (2) in which, compensation can be awarded where the employer does not prefer to instate or re-engage the employee. The compensation referred under subrule (5) is basically the compensation referred under section 40 (1) of the ELRA in which the arbitrator or court can make assessment of the amount of compensation in considering factors so provided under subrule (5) of Rule 32 of GN NO. 67 of 2009. Thus, the contention that the said GN NO. 67 of 2009 provides for general damage is misconceived. The award of TZS. 10,000,000 as general damage is therefore found invalid and quashed.

In circumstance of this case where termination was unfair for there was no fair reason for termination and for failure to follow proper procedures, an order for re-instatement or re-engagement could not be suitable remedy to the employee and compensation in my view, was appropriate remedy. There is an argument that by awarding compensation of 24 months salary, the CMA awarded more than what is provided under the law. The CMA award shows that the compensation was for 20 months only at a salary of TZS 413,763/= and a total of TZS TZS 8,275,260/= was awarded computed at 20 months only and not 24 months as raised by the counsel for the applicant. As well pointed out, under section 40(1)(c), the arbitrator can award compensation to the employee of not less than twelve months remuneration. The applicant counsel agree that the said provision gives minimum award and, in that sense, it does not give the maximum award either. It only limits the compensation not to be less than 12 months. Thus, the applicant misconstrued the above provision by thinking that the compensation was limited to twelve months. I have not seen any reason advance by the applicant which could justify the deduction of the awarded compensation. I therefore find that compensation of 20 months based on salary was appropriate in considering the agony the respondent went through after her employment was terminated. The same was reasonably awarded

hence, I uphold the finding on 20 months compensation at the tune of TZS 8,275,260/=.

On the award TZS 2,165,170.77 as terminal benefits, nothing was submitted by the counsel for the respondent to dispute such award. I therefore find no reason to interfere with such award.

The revision is therefore partly allowed and partly dismissed by quashing and setting aside the award of TZS. 10,000,000 as general damage. However, the award of TZS 8,275,260/= as compensation for unfair termination and the award TZS 2,165,170.77 as terminal benefits are hereby upheld. In considering that this application emanates from labour dispute, parties shall bear their own costs.

DATED at **ARUSHA** this 20th Day of December, 2023.

D.C. KAMUZORA

JUDGE