IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

CONSOLIDATED LABOUR REVISION NO. 370 OF 2013

BETWEEN

SAGANGA MUSSA.....APPLICANT

VERSUS

INSTITUTE OF SOCIAL WORK.....RESPONDENT

AND

CONSOLIDATED LABOUR REVISION NO 430 0F 2013

BETWEEN

INSTITUTE OF SOCIAL WORK

VERSUS

SAGANGA MUSSA

(CMA ORIGINAL FILE NO.CMA/DSM/KIN/500/11/562)

JUDGMENT

29/05/2014 & 25/09/2014

Mipawa, J.

It would have not been plausible if I had not from the outset of this judgment of the consolidated revisions, given out the Cardinal conceptual prefixes embodied in these applications,

namely, **double employment of an employee, on the same terms and conditions of employment contract. That, an Individual being employed as Assistant Lecturer by one Public Higher Learning Institution on Permanent and Pensionable terms and at the same time taking another employment contract with another Higher Learning Institution, also on Permanent and Pensionable terms and proceeds in that status for one year; and whether that employee can be reinstated or be compensated 12 (twelve) months salary due to alleged procedural unfairness after a finding of fair termination on substantive grounds.**

The historical background of this application is that Mr. Saganga Musa (herein to be referred to as the employee) was employed by the Institute of Social Work (the employer),[1] as an Assistant Lecturer, by a letter dated 15/06/2007 taking effect from 01/07/2007. Mr. Saganga Musa (employee) accepted that offer of appointment by signing against the same (**employment *prefessio fidelitatis*...kiapo cha uaminifu kazini**) on 21/06/2007.[2] He served in that post till when he was terminated

[1] A higher Learning Institution established by Act .No. 26/1973 as amended by Act. No 03/2002
[2] See CMA records collective annexure 5-9(Letter of Appointment) filed by the employer

by his former employer on 27/06/2011 and the ground of termination being that:-

> ***.....this is because of your act which involved moral turpitude and contravention of code of ethics through serving two employers at the same time on permanent and pensionable terms for more than one (1) year...***[3]

Being discontented by that decision of the Employer, the employee filed a Labour Dispute to the Commission for Mediation and Arbitration (herein after to be referred the CMA) on 30/06/2011 claiming *inter alia* that, be paid:-

i. *One month(sic) Salary in lieu of notice*
ii. *Compensation for breach of the contract*
iii. *Severance*
iv. *Compensation for unfair termination*
v. *Leave allowance*
vi. *Unpaid leave for the year 2011*
vii. *Tshs 28,655,311/=*
viii. *Reinstatement....*[4]

That application to the CMA was fully arbitrated after mediation had failed, and CMA Form No. 5 (MEDIATOR'S CERTIFICATE OF SETTLEMENT/NON SETTLEMENT) issued thereto by Hon. Gasper Tluway.[5] Following that, arbitration

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[3] *op.cit* note 2 termination letter
[4] See CMA Form No. 1 Presented for filling On 30/06/2011 at pages 112 and 113of the same
[5] The same was issued on 02/09/2011

proceeded with both parties' submissions, evidence taking, closing arguments and the Arbitrator delivered the award thereto on 24/02/2012 into which he found that termination was substantively fair but procedurally unfair, and therefore granted the employee Tshs 18,888,156/= as compensation; accrued leave up to June 30th 2011 Tshs 918,174.25/=; one month salary in lieu of notice if not paid at Tshs 1,574,013/=; Severance pay at Tshs 2,118,863.65/=.[6]

It was noted that during the arbitration the employee also presented another new figure amounting to Tshs 145,688,840/ including subsistence allowance, withheld (sic) salary remuneration arrears, medical allowances, transport allowances etc, but Arbitrator vacated from granting of the same as that figure was never pleaded in CMA Form No. 1.[7]

Following that award of the CMA, the employee filed application for revision in this Court and it was registered as revision number 67/2012 and the employer too filed revision number 69/2012 but both were struck out by this Court and the parties were given fourteen days to file fresh applications.[8] The

[6] See CMA Award at page 21
[7] *ibid* at pages 17-22
[8] struck out on 19/09/2013 due to defects on jurat of attestation.

applications by both parties were registered as revision number 370/2013 on 02/10/2013 by the employee, and revision number 431/2013 on 01/11/2013 by the employer[9].This Court ordered consolidation of the same on 18/02/2014 because the two applications were by both the employee applicant/respondent, and employer respondent/applicant, being against the decision issued by the CMA, commonality of claims arising from the same stem.

In this Court, the applications went on by way of written submission, the employee being represented by Mr. Ezekiel Advocate from ZEK Advocates, and the employer getting legal representation from Prime Attorneys under Mr. Safari Advocate[10].

For one to easily capture the logical sequence of these applications, I find it logical to proceed with the two applications concurrently, but first, by giving the common grounds for revision of the parties, their raised legal issues on substantive and procedural aspects; relief sought thereto and orders too.

[9] See pleadings filed in this Court

[10] From the CMA record s the same Advocates had represented the parties during the hearing at the CMA.

Both parties filed notice of applications; chamber summons; affidavits; and list of documents.[11] The employee filed 41 grounds in support of the application, the main grounds being:-

1. *That the applicant be **reinstated** to his place of employment and be paid all his outstanding salaries, due wages, claimed damages as under **paragraph d (i-xiv)** of the applicant's affidavit and other entitlements as from the date of unfair termination to the date of his reinstatement.*
2. *Alternatively, in case the Honourable Court decides to make an order for compensation in lieu of reinstatement ,that the same be for wages for a period of 24 months ,severance pay,3 months wages in lieu of notice, transport fare, substance allowance, luggage transportation to Shinyanga, damages for breach of contract and other wages or entitlement appearing at **paragraph d(ii-xiv)** of the applicant's supporting affidavit being in addition to (and not in subrogation of) wages due as from the date of unfair termination to the date of payment of the compensation.*
3. *That the Applicant be paid all his due wages as from the date of unfair termination to the date of his reinstatement*
4. *Costs be provided for;*
5. *And any other relief that appears just and appropriate to grant in favour of the Applicant.*[12]

Employer's grounds for revisions were that:-

5.1 That the arbitrator improperly awarded twelve Months compensation after finding that the Respondent's termination procedurally unfair as if the termination was both substantive and procedurally unfair.

5.2 That, the arbitrator improperly found that disciplinary hearing was necessary process

[11] See parties pleadings filed in this Court on 02/10/2013and on 01/11/0213 by the respondent.
[12] See both the Applicant's Notice of Application and Chamber Summons filed in this Court on 02/10/2013.

despite the fact that there was evidence that Respondent admitted offence he was charged with.

5.3 *That the Arbitrator improperly awarded severance pay to the Respondent on ground that the Respondent's termination was on fair reason of misconduct.*

5.4 *That the severance pay awarded by the arbitrator was wrongly calculated and thus making the final Award to be improper and unjustifiable under the law.*

5.5 *That, the Arbitrator wrongly and improperly held that the respondent did not get an opportunity of being heard while he had admitted the commission of the offence charged and had asked for pardon.*

5.6 *That the arbitrator improperly granted compensation to the respondent in light of the fact that the Respondent was receiving two salaries at the expense of the respondent's time and resources.*

5.7 *That there was a misconduct on the party of the Arbitrator by his failure to deliver the Award timely and without assigning any reason for his failure.*

Also the applicant produced a 47 written submission pages in support of the filed application for revision and the employer submitting thereto thirteen pages written submission.

To easily deal with the gist of the application and avoid unnecessary confusion of the very wordy submissions, and after going fully through in the parties' pleadings,[13] I have found the

[13] See parties notices of applications; chamber summons; affidavits; and written submissions.

same are interrelated, only that, *the same dance but different tunes* (both refuting the CMA award but with different styles..reasons for revision),legally logical to frame three main issues, which are main disputed ones by the parties, arbitrator's decision unto and my decision too. The Employee started submitting on procedurally fairness rather than substantive fairness hence the first issue I have to logically to begin with is:-

1. Whether there was a valid reason for termination?

The Advocate for the employee one Mr. Ezekiel started submitting that, the Arbitrator erred in law by holding that there was valid reason for termination while the same was not proved and there was no any evidence produced to prove it. On this point he stressed that the issue of serving two employers was a closed matter because the applicant was once advised by the then Principal, one Prof. Hossea Rwegoshora to resign from Tumaini University and he resigned on 11/11/2008.[14] And that the Principal promised him not to forward the matter to the any disciplinary authority because he had followed the advice.[15]

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[14] See ground 7(seven) of the applicant's supporting affidavit filed on 02/10/2013 and pages 19 and 20 of the employee written submission filed in this court on 04th March 2014.

[15] *op.cit* note 12 ground 10 at page 3.

And that since disciplinary hearing did not take place for a couple of years () then there was no valid reason for termination because the disciplinary charges upon which the applicant was charged with had already become null and ***void ab initio*** for lapse of time[16].

He at length, insisted that since the disciplinary hearing was not conducted then there was no valid reason for terminating the applicant. That, Regulation 47 (2) of the Public Service Regulations, GN. 168/2003,[17] which the applicant was charged with specifies time limit for a public servant to be called for disciplinary hearing and extension for thereto needs leave form the permanent secretary (establishment) and that was not sought. For easy of reference I hereunder reproduce the same from the applicant's written submission:-

> .....***where the disciplinary authority has served a charge with the provisions of Regulation 44 of these regulations, <u>the inquiry shall commence not later than sixty days from the day the accused public servant was served with the charge or charges</u>...***[18]

From that passage above, Mr. Ezekiel Advocate for the applicant submitted that, failure of the employer to convene the

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[16] See Applicant's Written Submission filed on 04/03/2014 page 5.
[17] These rules are made under section of the Public Service Act, No-/2003, amended by
[18] *op.cit* note 14 at page 13

disciplinary hearing within 60 days from when the disciplinary charges were laid to the employee respondent then the same were no longer valid at the time of termination due to lapse of time. That, failure to comply with that time limit, leave was needed from the Permanent Secretary (Establishment) but the same was not.[19] That there was no valid reason for termination because the disciplinary charges had already expired so to say.....**such charges were not supposed to (sic) be used to terminate the Applicant (employee). The termination was therefore substantively unfair...**[20]

He went on to submit that since there was failure on the party of the employer to conduct disciplinary hearing as required by the law the applicant was not guilty of the offence.

That the exact disciplinary charges and evidence on record there was no any evidence that the employee was taking any unfair advantage by doing **other private employment** (emphasis mine) but the applicant was stretching himself very hard and doing extra teaching activities without violating his service contract with the respondent. That it was upon the

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[19] See regulation 47(11) of the Public Service Regulations,G.N.168/2003cited at p 14 of the applicant's written submission

[20] *op. cit* note 14 at page 15

employer to investigate to what nature the law was violated by the applicant and therefore prove the magnitude of the injustice done by the applicant to the respondent as per regulation 48 of the Public Service Regulations. And it was the inquiry committee which could have done the same and bring the inquiry report as per regulations 48 (6) of the said regulations. Since the mandatory provisions of the said regulations were not followed by the respondent even the charges placed before the employee were not valid hence no fair reason for termination[21].

Under the provisions of the law used in the charges Mr. Ezekiel Advocate for the employee said that it was difficult for one to grasp the type of the offence that the employer wanted to establish because section 19 (2) of the ELRA does not establish any offence rather time on how the employee should spend at work. He submitted that and I wish to quote..... **in Tanzania an employee may be permitted to work less hours in a day depending on the needs and schedule of the employer such as two(2) hours a day or three(3) hours a day and so on. What is prohibited is to subject an employee to work for more working hours than it is**

[21] *op.cit* note 14 at pages 16,17,18 &19.

prescribed under the law as stated under section 19 (2) of the ELRA. The question that arises here is what type of the offence did the Applicant (respondent) commit respect of the this section?.....[22]

He went further to strengthen his application by saying that the CMA misdirected itself for using the Standing Orders of 2005 and 2009 as the same were never pleaded to be applicable at the respondent's work place and that the respondent has her own laws establishing it and therefore no any offence was proved. That under the provisions the applicant was charged under, no where shows that the applicant was stealing the hours of work for the respondent ,nor failure to attend his duties and even no evidence was provided.[23] And that no evidence was produced to the CMA that between the year 2007 and 2008 when the applicant had extra-activities at Tumaini University and that the CMA was unjustified to abandon its duty of holding that the applicant has not committed any offence against section 19 (2).[24]

In response to presence of substantive fairness of termination following the submission of Advocate Ezekiel, Mr.

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[22] *op. cit* note 14 at page 19
[23] *ibid*
[24] *op.cit* note 21

Safari Advocate for the Employer submitted that, the argument by the Advocate for the employee that there was no valid reason for termination due to the reason that termination was time barred is misconceived and misdirecting, because no law that provides for time limit in concluding disciplinary process. That the employee advocate confuses the conclusion of the disciplinary process with life span or the period within which the written warning or final written warning should remain operative, whose limitation period is provided under **rule 9 (2) of the Code of Good Practice providing that.....written warnings and final written warnings should be kept on an employee's personal file and should remain operative for six months...**[25]

He went on to submit that employee's Advocate confuses his position with the position where disciplinary process is concluded, and the sanction imposed is written warning or final written warning then imposed sanction should be in force for six months. He couched that argument by saying that period of limitation is tested by looking time that was wasted before initiating the proceedings but not the time that is wasted in the course of the

[25] See employer's written submission in revision number 370/2013 at page 5

proceedings.[26] Conclusive on this aspect Mr. Safari argued that there was a valid reason for termination and he did not agree with the submission of the employee that the reason for termination was time barred only that the employer did not conduct inquiry within sixty days in terms of regulation 47(10) of the Public Regulations. He clarified that was delayed imposition of disciplinary penalty and not and inquiry as claimed by the employee's Advocate and reason for that was per PW 1 that the employer did not have the board of governors which is the disciplinary authority to impose appropriate penalty against employee.[27]

On the commission of the misconduct, Mr. Safari Advocate submitted that there was enough evidence that there was misconduct and it was committed. The employee admitted having worked at Tumaini University (admitting the offence), even though the employee said that no law bars him from working with two employers.

On the issues of time management at work, Mr. Safari also submitted that it was a misconception to the party of the employee's Advocate that there is no law that prohibits the

[26] *op.cit* note 25 at page 9
[27] *op.cit* note 25 at page 10

employee at hand to be employed by the other employer. He submitted that there is a law on that, and it was also a misconception that the Public Service Standing Orders 2009 are not applicable to the employer's premises(standing order).That the said orders restrict a public servant from being employed by another employer, orders F.3 and F.4 provide that:-

F.3 Restrictions on External Interest:-

1) Private Interests:-

a) A public servant shall not engage in any private occupation or undertaking during official hours.

b) A public servant shall not engage in any activity which would in any way impair his usefulness as a public servant, and

c) A public servant shall not engage in any occupation or undertaking which might in any way conflict with the interests of his organization or be inconsistent with his position as a public servant.

F.4 Remunerative Employment

1. A public servant shall not render professional assistance to or accept any remuneration from private persons or firms without the written permission of the employer, such permission shall not usually be given unless it is to the public advantage that it should be granted.

2. Notwithstanding the provisions of paragraph (1) of this standing order, any public servant may be employed on remunerative basis in giving part time services outside normal working hours, at any government or government grant aided educational or training institute, provided that:-

(a) A public servant who desires to be appointed on a part-time basis must apply

to the head of the Institution concerned through proper channels, and

(b) The public servant may only be appointed if his application has been supported by his Chief Executive Officer,".....[28]

On the reason of the employee's Advocate that the provisions of the law cited in the charging letter i.e. rule 42 (2)[29], and section 19 (2)of the Employment and Labour Relations Act, Mr. Safari reacted to the same by submitting that the employee was employed on permanent basis on two institutions and he was supposed to work to each employer for 40 hours per week, as conceded by the employee, meaning that he was supposed to work for at least 8 hours per day that was not practicable as he was employed by two employers at the same time.[30] For that he submitted that the employee did not render full services to his employer as he was employed at Tumaini University. He concluded that there was a valid reason for termination and it was rightly ruled by the arbitrator.

After critically going through the parties submissions on this issue, whether the termination was unfair or not on substantive

[28] *op.cit* note 25 at page 12
[29] Government Notice No. 168/2003 and Act No. 6/2004
[30] *op.cit* note 25 at pages 13 and 14

reasons, I have to pause and Ask myself that:-

(a) What are the undisputed issues.

From the records, it is undisputed that the employee applicant/respondent was employed as Assistant Lecturer at the Institute of Social Works from 01/07/2007 to 27/06/2011.[31]

(b) What are the disputed issues.

- Whether the employee was also employed by Tumaini University while employed by the Institute of social work:

On this issue from the parties' submission I am convinced that there is ample evidence that the employee was also employed at Tumaini University on permanent and pensionable terms, since 23th September 2007 in the department of Business Administration and took declaration of secrecy, loyalty and acceptance of terms and condition of employment, which were attached to that letter.[32] That letter needed confirmation from the Institute of Social Work whether the employee (Saganga Musa) was also employed at the Institute of Social Work.

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[31] *op.cit* note 2

[32] See a letter from Tumaini University Dar Es Salaam tilted Employment of Mr. Saganga Musa dated 24th October 2008, Ref. TUDARCo/PF 080/7,Issued by Prisca Olekambainei (Deputy Provost for Administration),tender as exhibit to the CMA and this Court by both parties.

Following the receiving of that letter on 27/10/2008, the employer placed charges to Mr. Saganga Mussa on 17/12/2008[33]. The employee replied to that letter into which he admitted the misconduct of working at Tumaini University and asked for pardon on the same, but also said that the law does not bar one from being employed by two employers at the same time provided he fulfils his duties[34].

Meanwhile as the records show, on 11nd November 2008 the employee tendered a termination letter to Tumaini University, and was directed to handle Employer's properties and clear loan with CRDB bank where Tumaini University was the guarantor. He was also informed that the said termination will not be automatic as he had to tender a three months notice.[35]

To go at lengthy, later on, Tumaini University informed the Institute of Social Work that Mr. Saganga was employed at Tumaini university form 3rd of September 2007 till 24 November 2008 that after they had discovered that he was also working

[33] Issued by Prof.H.Rwegoshora with reference number ISW/CPF/M.88/6
[34] See a letter dated 19th December 2008 kutokuchukuliwa hatua za Kinidhamu by Saganga Musa
[35] See letters from Tumaini University dated 29th November 2008 and the other one dated 2nd December 2008 issued by Musa Mwita for Deputy Provost(tendered as collective annexure to the CMA)

with the Institute of Social work and before disciplinary actions were to be taken unto him, he tendered his resignation letter.[36]

From this above I conclude that the employee (Saganga Musa) was employed at Tumaini University on permanent and pensionable Terms. With due respect I am forced to say that the submission by the Advocate for the employee Mr. Ezekiel is purely misleading and ought to be misdirecting the Court on this issue. The CMA file on these cases is full of the letters mentioned above which were correspondences between the two Institutions and were tendered by both the parties. And strangely the advocate for the employee has listed them as list of attachment in this Court.[37] The answer above brings me to another set of the disputed facts that is:-

- was that a misconduct under the circumstance:

The Arbitrator found that, it was misconduct for a Public Servant who is employed on permanent and pensionable terms to be employed by another entity on the same terms and conditions[38]. The Arbitrator employed the provisions of the Standing Orders for the Public Services, under Order F3 and F4 of

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[36] *op.cit* note 26 dated 25th May 2011 with reference number TUDARCo /PF 080/CONF/F16, Issued by Musa Mwita (for provost),doubt of the employee integrity was questioned and put to doubt for...

[37] *op.cit* note 2

[38] *op.cit* note 6 at page 15.

the same[39]. The Arbitrator found that the employee had engaged himself in private occupation and had not obtained even permission from the employer on performing part time duties at Tumaini University and found termination to be substantively fair.[40]

On this aspect of substantive fairness that the employee was fairly terminated, I firmly agree with the finding and decision of the Arbitrator.

The misconduct is first begotten from the reasoning that, the employee was a Public Servant by virtue of being employed at the Institute of social Work(a Public Higher learning Institution).[41]

That being the Case, the employee at the employer's premises are governed by the Public Service Act No.8/2002,as amended by the Act No 3/2002; The Public Service Regulations, Government Notice No.168 Published on 20/06/2003; The Standing Orders for the Public Services 2009.[42] These are the working instruments of the employee and employer in any public Institutions apart from the establishing statutes. Therefore,I

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[39] The same are cited by the Advocate for the employer.
[40] *op.cit* note 6 at page 16.
[41] *op.cit* note 1
[42] Made under section 35(5)of the Public Service ACT, Cap 298

sympathetically not agree with the submission by the Advocate for the employee Mr. Ezekiel that the Standing Orders for the Public Service are not applicable to the employee's at the Institute of Social Work[43]. **This is a misleading thinking from the Learned Advocate because I don't want to believe that being the Advocate he subscribes to that position.**

The employee further submitted that, he knew that there is no law that bars him from being employed by another employer that he was free to do the same[44]. This freedom of the employee ought not to be accepted that way, even if there could be no law restricting one not to be employed hence free, that freedom ought to be reasonable as a nature of human freedom. That concept of exercise of One's freedom reasonably is Couched by Fr. Alexander Lucie-Smith,[45] in his Book titled Foundation of Moral Theology on different types of freedom and moral responsibility into which he relies on St Thomas Aquinas on the elements of human acts..... ***That all moral decisions presuppose free will and freedom of choice....the human***

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[43]. *See employee's affidavit at grounds 23,24,25,26,27,28,29,30,31, and 32 filed n this court on 02 /10/2013 and pages and op.cit note 25*

[44].*op.cit* noteS 35 and 13

[45] He is a Priest of the Institute of Charity (Rosminians).he studied at Oxford University, where he earned a degree in English and literature and at the Gregorian University Rome, where he earned a licence and a doctorate in moral theology. He is currently head of the department of moral and pastoral theology at Tangaza College, Nairobi where he teaches fundamental moral theology.

act is the fruit of reason and will and must be for the sake of an end. So when we make a choice, our will chooses an end. And so does our reason-the two must always go together. There is thus no free choice without the choice of something, and that something clearly should be the good, that which all people desire. Freedom does not mean being put down in the middle of the desert without a compass and being told to go where you like. Freedom is always freedom to do good. Thomas defines the will as the power of rational desire. This means that an act of the will which is not reasoned is not really a human act at all, but more akin to the act of an animal who chooses without reason and from appetite alone. Animals are not free-only rationality makes us free..... reason and will work together in the decision making process. So the first and most important conclusion we must make is this: that the moral choice is never carried forward as it were through sheer force of will, but is always a reasoned and informed choice.[46] He went on writing on the Freedom in the teaching of Veritatis splendor by John Paul II that..***clearly the idea of human beings have supreme freedom which***

[46] *op.cit* note 36, Foundation of moral theology(2006),Paulines publications Africa, Nairobi. Pages 106-108.

involves giving the law to themselves(in other words, making it up as they go along) is not true freedom. Freedom always goes together with truth: one cannot exist without the other....veritatis splendor 32...[47]

I have purposely decided to produce that phrase above so as at least to show that the employee's argument that he was free to be employed by the other employer provided that no law that bars him from doing the same ought to be reasonable, rational and true in itself. The same was not.

The Standing orders for Public Services are made as shown earlier from the Public service Act, 2002, the Principal Legislation, it is therefore not admissible for the employee advocate to submit that the same do not apply to the employer's premises to warrant termination[48].

On the other hand one can easily see that the act of the employee in serving two masters has its danger too, meaning that the employee did not spend time with either of the employers properly and that is why the submission by counsel for the employee that section 19 of the Employment and Labour

[47] Veritatis splendor 32, ibid page 108
[48] *op.cit* note 43

Relations Act,[49] was not violated falls. That section speaks of time which the employee should spend at work per day even for the work.

Even though not accepted by the Advocate for the employee that the said section does not establish any offence which the employee was to be charged with, that section to my understanding compels the employee to spend time full discharging the duties with his employer. Since the employee served two employers for one year, it is obvious that he did not spend 8 hours at work and 40 hours per week. The said section can be read *intandem* the first schedule PART A of the Public Service regulation,[50] together with the schedule to the Public service regulations which **mentions the offences warranting formal proceedings under regulation 42 among them being one engaging in any activity outside the official duties, which is likely to lead to taking improper advantage of one's position in the public service[51],failure to perform satisfactorily duties assigned to the public**

[49] Act No.6/2004
[50] It establishes offences warranting formal proceedings (regulation 42.)
[51] *op.cit note 50* para 6

servant.[52] These are the grounds that the employee violated and were placed before him in the charge sheet.

In the employment Contract of the employee several duties were mentioned such as:-

> ***...Assisting lecturing and tutorial seminars; carry out consultancy in research and service job assignment including data collection under close supervision; prepare(sic) teaching materials for tutorial and exercises including case studies; to set examination and to invigilate; any other duties as may be assigned by the Program Coordinator or the Director of Studies; conduct lectures with guidance of senior lecturers; any other duties as may be assigned by the higher authority; Accountable to the Director of studies...***[53]

It is obvious that the employee could not discharge the said duties and responsibilities as required by being employed elsewhere (Tumaini University Dar Es Salaam).

That above can be captured if one takes the traditional nature enshrined in the employment relationship where both the employee and employer have duties and rights hitherto. There exists a duty-bearer ***vis-a-vis*** right - bearer relationship.[54] The employee has the duty to discharge all the responsibilities unto to

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[52] *Op.cit not 50.*
[53] *op.cit* note 2(letter of appointment)
[54] Rwiza N. 2010 Ethics of Human Rights; African Contribution, CUEA Press, Nairobi

him(duty bearer),where the employer has the right to receive a qualitative discharge of duty form the employee (right bearer) and at the same time the employer has the duty to pay wages(duty bearer) to the employee(right bearer).The two concepts are inseparable.

I find it compelled to make a little of academic venture on the Common law duties of Employee and employer though in a nutshell. The implied duties of the employee at common law can be even though not limited to ***indemnity; misconduct (the employee must not misconduct himself, this includes insolence, persistence laziness, immorality, dishonest ..misconduct will justify disciplinary dismissal if it directly interfere with the business of the employer, or employee's ability to perform his service); personal service (the employee must not allow others outside the scope of his employer's control to perform his tasks); loyalty and good faith; interest of the employer (the employee must not do nothing to harm his employer's interests, even in his spare time); careful service; account for property and gain; invention; obedience.....[55];***

[55] Keith Abboth *et al*, 8th ed(2007),Business Law, at pages 513-517.

At the case at hand there is much of evidence the employee did not discharge those implied duties as expected by his employer, following his ACT of serving two employers.

But on the other hand, employers have also implied duties at common law, these are ***pay; indemnity; equipment and premises; disciplinary and grievance procedure; reasonable safety; a reasonable safe system of work; vicarious liability...***[56]

I have purposely produced the above phrases so as to see at this situation, the presence of any of the concept I spoke of earlier, of duty - bearer and right-bearer when put into employment relationship as expounded by Fr. Richard Rwiza.[57]

Apart from those readings above on common law duties and rights of the employee and employer, this Court has also on several occasions dealt with the same and explained at length on that traditional concept of employer-employee relationship in the labour parlance, see among others, the cases of ***Mwaitende Ahobokile Michael Vs. Intercheck Co. Ltd*** *Labour Dispute*

[56] *Op.cit note 55*at pages 518-528

[57] *op.cit* note 54.Fr Richard Rwiza is a Lecturer and Head of Department of Moral Theology at the Catholic University Of Eastern Africa(CUEA),Nairobi Kenya, He holds Licentiate degrees (STL) in Moral Theology from CUEA and Theology from Catholic University of Leuven, Belgium. He has PhD in Moral Theology (STD) from Leuven University.

No.30/2010;[58] ***Madata Makoye & others Vs. TICTS Ltd,*** *Revision No.236/2013.*[59]

In other jurisdictions, where a Public employee/officer who is employed on permanent and pensionable terms seeks/accepts or takes another office (second office) on the same terms and conditions, generally operates as an automatic resignation from the first office.[60] I find it proper to reproduce party of the phrase here under..... ***qualification and acceptance of a second incompatible office generally operates as an automatic resignation from the first office. In other words, if a person accepts and is sworn into a second office that would conflict with the first public office, the person is deemed as a matter of law to have resigned from the first public office. It should be noted that automatic resignation operates as a matter of law only where.....;a public officer accepts a second office that is paid position..; a person accepts a second public office that***

[58] Delivered the same on 20/30/2014 at Dar Es Salaam Labour Court Main Registry (Unreported) before Mipawa, J. but available with the Registry for perusal

[59] Delivered on 28/08/2014, also available in this Court's Registry before Mipawa, J.

[60] *Pruitt V. Glen Rose Indep.Sch.Dist;*84 S.W.2nd 1004(Tex.1935),cited in 2012 Texas Dual Office Holding Laws MADE EASY Answers to the most frequently asked questions about the Texas Dual Office Holding Laws.

would present a conflicting loyalties problem under common law-incompatible....[61]

From what I have reasoned above I agree with the arbitrator that there was valid reason for termination of the employee and termination was an appropriate punishment, and the same had not lapsed.

2. **Whether procedures were adhered to before termination**:

On this ground the undisputed issue is that:-

- *The employee was never summoned to appear before the Board of Governors of the employer.*

On this issue, the Arbitrator at the CMA decided that it was procedurally unfair for the employer to terminate the employee without being heard (by not summoning him before the Board of Governors) and rejected the supposition form Mr. Safari that there was no need of the employer to summon the employee to attend the disciplinary hearing before the board of governors since he had admitted the commission of the misconduct.[62] The Arbitrator relied on Rule 12(7) (sic),[63] of the Employment and Labour Relations Code of Good Practice, GN No. 42/2007, which

[61] *op .cit* note 60.
[62] *op.cit* note 6 at pages 16 and 17
[63] The Arbitrator cited rule 7 instead of rule 12(7) of the Government Notice No 42/2007

provides for the right of the employee to be given opportunity to be heard for putting forward any mitigating factors.

Mr. Ezekiel for the employee also in this court submitted that termination was procedurally unfair since the employee was never given time to be heard. Mr. Safari on other side argued that there was no need of summoning the employee before the board of governors since the employee had admitted the commission of the misconduct. The undisputed issue on procedural aspect is that the employee was never summoned to appear before the Board of Governors of the employer. At the CMA the arbitrator decided that, since the disciplinary hearing did not take place and the employee was not given the opportunity to be heard the procedural unfairness occurred hence unfair termination.

The disputed issue is whether there is a need for summoning an employee who has admitted commission of the misconduct before a disciplinary hearing.

On this issue as shown earlier was the contentious one to both parties. The arbitrator decided that it was a must for the employer to summon the employee for disciplinary hearing even though there was admission of the misconduct, falling in the

same line with Mr. Ezekiel thinking and granted a compensation of twelve months salary for the same.

Mr. Safari reacted on that by submitting that since the termination was only unfair procedurally there was no need for the Arbitrator to order compensations for twelve months salary he ought to have ordered lesser months to the same.

On this issue I do not have to dwell much on the same because it is beyond common thinking that right to be heard is amongst the Cardinal Principles of Natural justice even where the offence is clear or known to the authority (the legalese have termed it as ***audi alteram partem***)[64]. But at the case at hand the employee was partly heard, because he had time to reply to the charges placed under his bed.[65] What missed was ***viva voce*** [live voice] right when the Board of Governors had resumed into office following expiry of the same.

I therefore partly agree with the arbitrator that termination was procedurally unfair.

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[64] .Hear the other side(one of the principles of rules of natural justice for fairness of hearing or one should not take action without hearing the other)

[65] *op.cit* note 34

But with due respect to the reasoning of the Arbitrator and decision on the aspect of procedurally fairness of the termination and the grant of twelve months salary, I wish to differ with him on this aspect in ***ex-abundant cautela*** (with eyes of caution or extreme caution) while knowing that abundant caution does not harm (***abundans cautela non nocet***). I differ with him on two reasons, **First, the gravity of the misconduct or offence.** The employee served two employers for one year, meaning that the misconduct was committed throughout a year,[66] (***a perennial/annual misconduct***), at the same time the employer was still paying him salaries despite the fact that employee was looting his employer's resources (time and monies), literally that he committed a misconduct for a year but lost nothing, he had acted with ***animo nocendi*** (malicious motive to harm) to the employers. Granting twelve Months salary to such an employee, only that even though he had the right to reply with a pen to the charges which had been laid to his bed by the respondent,[67] it would amount to an absurd so to speak. It would be making the employee to benefit from his own wrongs.[68] And on the other side it would be punishing the employer who

[66] *Op.cit note 34.*
[67] *.op. cit* note 33
[68] A traditional legal concept since immemorial.

was looted for a year. This court has taken that principle of not to give punitive compensation to the employer.[69]

Second, the duty and role of the employee as an Assistant Lecturer, entrusted with the duty to educate the students, had to conduct in a manner that reflects his Academic Status and also the role to the society. In this, I wish to use the Words from the Servant of God, Mwl. Julius Kambarage Nyerere who said... ***Those who receive this privilege therefore, have a duty to repay the sacrifice which others have made. They are like the man who has been given all the food available in a starving village in order that he might have strength to bring supplies back from a distant place. If he takes this food and does not bring help to his brothers, he is a traitor. Similarly, if any of the young men and women who are given education by the people of this republic adopt attitude of superiority, or fail to use their knowledge to help the development of this country, then they are betraying our union..."***[70]

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[69] *TUCTA Vs. Nestory Kilala Ngula* Revision No.172/2013 High Court labour Division at Dar Es Salaam () Delivered on 20/08/2014 before Hon. Mipawa, J.

[70] Address by Mwl. Julius K. Nyerere, 1963,First president of the United Republic of Tanzania, at the inaugural ceremony of the university college of dare s salaam(now University of Dar Es Salaam)

The employee by accepting the second office also denied other young men and women of this country the opportunity of employment. And this Court when in performance of its functions has residual powers in making judgments, ruling, decisions, orders, and decrees so far relevant take into account the need to maintain and expand the level of employment[71]. Taking the case at hand this Court is called to make a decision to put into place the provisions above.

That said above the grant of 12 months to the employee due to partly procedurally unfairness was not appropriate to grant rather the arbitrator would have circumvented the caps of the provisions of the law even by awarding less months to twelve.[72] This Court has also vacated the grant of twelve months salaries where the misconduct is proved but procedures not partly followed by the employer[73]. I therefore reduce the grant of twelve months salaries to four months salaries for the reasons expounded above.

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[71] See section 52(1) (b) of the Labour Institutions Act, No 7/2004.
[72] *op.cit* note 69.
[73] *Salum Omary Mavunyira Vs, The Director General NHC* ,Revision No.401/2014 High Court Labour Division at Dar Es Salaam(unreported) Delivered on 21/08/2014,before Rweyemamu, J.

3. **Alleged Irregularity by the arbitrator.**

The parties raised two issues in respect of the arbitrator's decision and conduct. Mr. Ezekiel advocate for the employee alleged that the arbitrator erred in law by holding that non pleaded issues to the CMA form No.1 cannot be granted. Following by reasoning and decision above this issue is of no importance because there are no longer tenable.

On the other side Mr. Safari raised the issue of the arbitrator failing to delivered the award within 30 days after the conclusion of mediation as per Section 88(9) of the Employment and Labour Relations Act.[74] That arbitrator violated the provisions of the law hence the award be revised and quashed.

In reply Mr. Ezekiel Advocate for the employee submitted that there was no any injury that was caused to the employer for delay of the issuance of the award.

This issue has take different thoughts of this Court. First, there was the decision of this court which was of the interpretation that when that issue arises the court must take into consideration the overall objective of the act, the proper position

[74] Hearing finalized on 19/12/2011 and award issued on 24/02/2014 and employer's submission in revision no. 431/2014 at page 20.filed in this Court on 03/03/2014.