IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 184 OF 2022

(Arising from an Award issued on 6/5/2022 by Hon. Kiangi N, Arbitrator, in Labour dispute No. CMA/DSM/ILA/012/21/64/21 at Ilala)

STANDARD CHARTERED BANK TANZANIA LTD .... APPLICANT

VERSUS

JUSTIN TINEISHEMO .... RESPONDENT

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JUDGMENT

Date of last Order: 18/10/2022
Date of judgment: 15/11/2022

B. E. K. Mganga, J.

On 20th May 2013, applicant employed the respondent as Associate Director, Financial Markets Sales for unspecified period. On 1st April 2017, applicant promoted the respondent to Principal, Financial Markets Sales. On 11th December 2020, applicant terminated employment of the respondent allegedly that the role of Principal, Financial Markets sales was no longer required due to Financial Markets reorganization. Aggrieved with redundancy, on 8th January 2021, respondent filed the dispute before the

Commission for Mediation and Arbitration henceforth CMA at Ilala claiming to be paid (i) TZS 546,456,503/= being compensation for unfair termination, (ii) TZS 54,733,857.38 being severance pay and (iii) TZS 48,458,243/= being year 2020 bonus all amounting to TZS 649,648,600.38. In CMA F1, respondent indicated that the dispute arose on 11th December 2020. Respondent indicated further in the CMA F1 that, there was no justifiable reasons issued by the applicant for retrenchment and that neither notice was issued nor consultation was made by the applicant prior retrenchment.

On 6th May 2022, Hon. Kiangi, N, Arbitrator, having heard evidence and final submissions of the parties, issued the award in favour of the respondent that applicant had no valid reasons for retrenching the respondent. The arbitrator therefore awarded respondent to be paid TZS. 430,632,542.88 being 36 months' salaries for unfair termination and TZS. 48,458,243/= being bonus for the year 2020 all amounting to TZS 479,090,785.88. Arbitrator being aware that evidence proved that on 14th December 2020 respondent acknowledged to receive TZS 54,733,857.38 being redundancy package, she deducted that amount from the amount awarded the respondent and ordered that respondent is entitled to be paid

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TZS 424,356,928.5. The arbitrator dismissed other claims by the respondent.

Applicant was aggrieved with the award, as a result, she filed this application for the court to revise the said award. In the affidavit in support of the application, applicant raised 14 grounds as hereunder:-

a. *That, the award is tainted with illegality on the face of record.*
b. *That, the Commission erred in law by refusing to admit into evidence email correspondences that proved grounds for retrenchment by relying on the provisions of the Electronic Transaction Act, 2015.*
c. *That, the arbitrator erred in not admitting into evidence documents of the applicant that were also filed before the Commission by the respondent.*
d. *That, the arbitrator failed to properly analyze evidence as a result ended at a wrong conclusion on reason and procedures for termination of the respondent.*
e. *That, the arbitrator erred in law in holding that termination of the respondent was unfair while evidence proved to the contrary.*
f. *That, the arbitrator erred for not considering evidence that proved that respondent agreed to be retrenched and signed retrenchment agreement and received retrenchment package.*
g. *That, the arbitrator erred in law by her failure to use her discretionary powers properly in awarding respondent to be paid TZS 430,632,542.88 as 36 months salaries compensation in disregard of the evidence adduced and retrenchment package that was paid to the respondent.*
h. *That, the arbitrator erred in law in accepting claims by the respondent in absence of evidence proving those claims and without analysis of evidence.*

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i. That, the arbitrator erred in law for failure to hold that retrenchment of the respondent and payment of TZS 142,475,561/= to the respondent was legally valid due operational requirement of the applicant.

j. That, the arbitrator erred in law in awarding respondent to be paid TZS. 48,458,243/= as bonus in absence of evidence.

k. That, the arbitrator erred in admitting into evidence exhibits that were obtained after the dispute was filed before the Commission.

l. That, the arbitrator erred in law in admitting into evidence electronic documents and emails in absence of an affidavit contrary to what she held while rejecting documents of the applicant.

m. That, the arbitrator did not consider provisions relating to retrenchment and did not took into account failure of the respondent to refer the matter to the Commission.

n. That, the arbitrator erred in law in denying applicant right to examine her witness on exhibits of the respondent hence denial of right to be heard.

In opposing the application, respondent filed both the notice of opposition and the counter affidavit.

When the application was called on for hearing, Mr. Tazan Mwaiteleke, Advocate, appeared and argued for and on behalf of the applicant, while Ms. Lige James, Advocate, appeared and argued for and on behalf of the respondent.

Mr. Mwaiteleke argued jointly grounds (b), (c) and (l) submitting that Section 18 of the Electronic Transaction Act does not mandatorily require an affidavit to be filed for emails or electronic documents to be admitted.

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He argued that the only requirements are (i) reliability of the document (ii) integrity of the document (iii) origin of the document (iv) authenticity of the document and (v) weight to be attached to the document i.e., relevance of the document in question. He went on that, emails that the arbitrator refused to admit were authored by DW1 who was seeking to tender them in evidence. Counsel argued further that the same emails were also attached to the list of documents to be relied upon by the respondent. He submitted further that, since all parties filed the same documents, there was no longer a need of proving their authenticity because there was an affidavit of the respondent proving authenticity of those documents. He cited the case of ***Freeman Aikael Mbowe & 7 Others v. The Republic***, Criminal Appeal No. 76 of 2020, HC (unreported) to support his submissions that it is not mandatory to file an affidavit to prove authenticity. He argued further that, the arbitrator wrongly refused to admit emails authored by DW1 due to absence of a certificate of authenticity of the emails. He further cited the case of ***EAC Logistic Solution Ltd v. Falcony Marines Transportation Ltd,*** Civil Appel No. 1 of 2021 HC (unreported) to bolster his argument that when a person is tendering his email communications with others, no certificate or

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affidavit is needed. Mwaiteleke submitted that emails that were refused admission relates to consultation and the notice that was issued to the respondent hence relevant to the application at hand. He csubmitted that while the arbitrator refused to admit electronic documents of the applicant, he admitted exhibit P9, P6, P4 all being emails without admitting into evidence the affidavit of authenticity. He argued that the arbitrator was supposed first, to admit the certificate of authenticity in evidence before admitting the emails but the said affidavit of authenticity was not admitted hence it is not part of evidence.

On grounds (a), (f) and (m), Mr. Mwaiteleke submitted that Section 38(2) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] provides that, if there is no agreement in consultation, the matter shall be referred to mediation. Counsel added that, the notice of redundancy (exhibit D2) which is agreement for retrenchment date 10th December 2020 shows that respondent acknowledged and agreed to its terms of termination as full and final claims on retrenchment. Counsel for the applicant went on that, retrenchment package (exhibit D4) shows how much respondent was paid after he has reached agreement with the applicant as per exhibit D2. He submitted further that, respondent was

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paid TZS 142,475,561/= as gross amount that included 8 months' salary and loan benefit. Counsel argued that, by signing the agreement and receiving retrenchment package, respondent acknowledged that the process was fair. He strongly submitted that, if respondent was aggrieved, he was supposed to invoke the provisions of Section 38(2) of Cap. 366 R.E. 2019 (supra)by referring the matter to CMA for mediation. To bolster his submissions, counsel cited the case of ***Resolution Insurance Ltd v. Emmanuel Shio & 8 Others***, Labour Revision No. 642 of 2019, HC (unreported) and ***Mainline Carries Ltd V. Delifrida Filbert Libaba & 7 Others***, Revision No. 264 of 2019, HC (unreported). Counsel continued to argue by citing the provisions of section 112 of the Evidence Act[Cap. 6 R.E. 2019] that, since respondent signed and received payment, he is estopped to deny that the procedure was proper. On issue estoppel, counsel cited the case of ***Getha Ismail Ltd v. Soman Brothers*** [1960] EA 26 and ***Ngaile V. National Insurance Corporation of Tanzania Ltd*** [1973] EA 56 and argued that by conduct and declaration, respondent accepted truthfulness of the contents of retrenchment agreement and package thereof and was estopped to deny it. Counsel for the applicant went on that, by the wording of exhibit D2 that was signed by the

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respondent, it was improper for the later to go back to CMA and challenge it. He concluded that the arbitrator did not consider exhibit D2 and its application in terms of Section 38(2) of Cap. 366 R.E. 2019 (supra).

On ground (g) i.e., on failure of the arbitrator to exercise properly his discretionary powers by awarding respondent 36 months' salary compensation of TZS 430,632,542.88, Mwaiteleke submitted that there was no evidence justifying granting the said award. He submitted that, in CMA F1, respondent pleaded to be paid 36 months salaries but no reasons were advanced in the said CMA F1 but respondent (PW1) only gave justification at the time he was testifying. Counsel submitted further that, reasons for praying 36 months were supposed to be in CMA F1 and opening statement hence it was not open for the respondent to justify in his evidence at the time of testifying. But during his submissions, Mr. Mwaiteleke conceded that opening statement is not evidence.

Mr. Mwaiteleke submitted that the arbitrator used the loan respondent had, to justify the award of 36 months salaries compensation. Counsel for the applicant submitted that the arbitrator did not consider Rule 32(5) of the Labour Institutions (Mediation and Arbitration Guidelines)

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Rules, GN. No. 67 of 2007 in awarding the respondent and cited the case of ***Veneranda Maro & Another v. Arusha International Conference Centre**,* Civil Appeal No. 322 of 2020, CAT (unreported). He therefore referred the court to the case of ***MIC Tanzania Ltd v. Edwin Kasanga***, Revision No. 860 of 2019, HC (unreported), ***Barclays Bank Tanzania Ltd v. Jacob Muro***, Revision No. 6 of 2015 HC (unreported), ***Barclays Bank Tanzania Ltd v. Kombo Ally Singano**,* Revision No. 65 of 2013 HC (unreported) and prayed that upon this court finding that the arbitrator exercised his discretion improperly, the award be reduced to 12 months.

On ground (j) relating to payment of bonus for the year 2020, Mwiteleke submitted that bonus was awarded contrary to clause 7 of the employment agreement (exhibit D1) and exhibits P1 and P5. Counsel argued further that, in awarding bonus, the arbitrator used an auto generated email (exhibit P9) which provides that respondent was eligible to be considered but does not provide that he was entitled. He submitted further that, exhibit P9 was brought after respondent has instituted the dispute at CMA. During submissions, counsel conceded that exhibit P9 was admitted without objection.

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On grounds (k) and (n) relating to admission into evidence exhibits obtained after the dispute has been filed and failure to give applicant right to examine DW1 in chief on those exhibits, Mwaiteleke submitted that, exhibit P6 and P9 were obtained by the respondent after filing the dispute at CMA and that were not supposed to be admitted or relied on by the arbitrator. He argued that the arbitrator decided the dispute based on exhibit P6 that the position of the respondent was advertised immediately after retrenchment. Again, during submissions counsel conceded that there was no objection at the time of admitting those exhibits. He was, however, quick to submit that, advertisement was done after death of one Msuya. Counsel submitted further that; the arbitrator barred DW1 to testify on documents of the respondent hence unfair hearing.

On grounds (d), (e), (h) and (i), Mwaiteleke submitted that, the Notice for retrenchment (exhibit D3) was issued notifying the respondent and gave certain days for consultation and maintained that consultation was done on 12th November 2020 as per evidence of DW1. He added that, DW1 testified that all employees in the department of the respondent participated in the said consultation. Counsel submitted further that, reasons for retrenchment was reorganization of the department and that,

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according to evidence of DW1, two people were retrenched. Counsel cited the case of ***Kuehne and Nagel Limited V. Grace Urassa***, Revision No. 190 of 2019 HC (unreported) and argued that Section 38(1) of Cap. 366 R.E. 2019 (supra) should not be used as a cheque list. He submitted further that, the burden of proof that is to say, on balance of probability provided for under Rule 9(3) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 was discharged by the applicant and concluded that termination was both substantive and procedurally fair. He therefore prayed that the application be allowed.

On the other hand, Ms. James, counsel for the respondent, in her submissions, resisted the application. Responding to grounds (b), (c) and (l), Ms. James submitted that, it is a cardinal principle that when tendering electronic document, an affidavit must be filed to prove authenticity of the document. She argued that the aim of the affidavit is to prove genuineness of the documents. She argued that applicant did not file affidavit to prove authenticity hence the documents were not admitted. She cited the case *of* ***Reference Point Limited v. Overseas Infrastructure Alliance (l) P. Ltd***, Civil Case No. 71 of 2018, HC (unreported) to support her arguments. Counsel submitted further that, ***Mbowe's case*** (supra) and ***Logistic***

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Solution's case (supra) are distinguishable and are not relevant because in the application at hand, it was not stated as whether, the witness was the in charge of the computer or not. She submitted further that, respondent complied with the law by filing a certificate of authenticity, which is why, her electronic documents were admitted. Upon being probed by the court, as whether, the said certificate was admitted as exhibit, she readily conceded that it was only filed. She argued further that, electronic documents complained of by the respondent were never objected to at the time of tendering. She cited the case of ***Bomu Mohamedi v. Hamisi Amiri,*** Civil Appeal No. 99 of 2018, CAT (unreported) to the position that an object/a document not objected to, is equally accepted. Counsel argued further that, DW1 on behalf of the applicant was never prevented to explain the content of the document, rather, was prevented to use documents as evidence before they were admitted in evidence. Counsel cited Rule 23(6) of the Labour Institutions (Mediation and Arbitrations Guidelines)Rules, GN. No. 67 of 2007 and submitted that the said Rule requires each party to file a list of documents intended to be relied upon during hearing. She went on that, parties agreed on the date of filing the documents but applicant did not use that chance to add documents to be

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relied upon and tried to use documents of the respondent that was not yet admitted in evidence. Counsel for the respondent cited the case of ***Mhubiri Rogega Mong'ateko v. Mak Medics Ltd,*** Civil Appeal No. 106 of 2019 CAT (unreported) to support her submissions that documents not admitted cannot be used as evidence.

Responding to submissions made on grounds (a), (f) and (m), Ms. James submitted that, respondent never agreed to the retrenchment. She went on that, there was no agreement for retrenchment, rather, a notice for retrenchment which is not an agreement. She submitted further that, that was a mere information to the respondent about redundancy. Counsel for the respondent submitted that agreement is a consensus of the parties but in the case at hand, termination was done by the applicant giving a notice to the respondent and that there was no consensus. She submitted further that, DW1 admitted that the notice of redundancy together with the package were prepared by the applicant. Counsel for the respondent submitted further that, Respondent acknowledged only receipt of the notice (exhibit D2) and applicant forced the respondent to sign. Ms. James submitted that respondent indicated that he did not agree to some of the clauses i.e., on bonus, release, and discharge. She cited case of ***Sharaf***

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Shipping Agency (T) Ltd v. Bacilia Constantine & 5 Others*,* Civil Appeal No. 56 of 2019, CAT (unreported) to support her submissions that there could be no agreement where the reason for retrenchment have not been proved. She strongly submitted that, respondent never accepted retrenchment package till the time of filing the dispute at CMA and that no money was paid to the respondent. She submitted that, in February 2021, some money was deposited directly in respondent's bank account when the matter was at CMA. She submitted further that; applicant did not tender evidence showing that respondent was paid.

On failure of the respondent to refer the matter to CMA for mediation, counsel for the respondent submitted that the matter can only be filed at CMA after consultation has failed. She argued that in the application at hand, no consultation was made hence respondent could not refer the matter for mediation. She went on that; consultation is intended to alert the employee *inter-alia* the reason for retrenchment and timing thereof. Counsel for the respondent submitted that on 12th November 2020, the date claimed that there was consultation, respondent was simply called by the Human Resources to be told that he will be retrenched. She submitted that, when respondent asked for explanation, he was informed

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that he will receive the letter with full detail. Counsel went on that, on the same date, respondent received exhibit D3 namely, the notice of redundancy which informed him to look for suitable post to avoid redundancy. Counsel argued that the alleged consultation was for the respondent to find another post and not the applicant to find for him an alternative suitable post. She submitted further that, applicant had a duty to find another post for the respondent and not the later to find for himself another post as alternative. Counsel for the respondent cited the case of ***Msimbazi Creek Housing Estate Ltd v. Johnson Edson Kategela,*** Revision No. 64 of 2022 HC (unreported), to cement on her position that applicant was supposed to consult the employee and agree that the employer was in economic difficult. She maintained that in the application at hand, there was no consultation, rather, applicant came only with the notice.

Responding to submissions made on ground (g), counsel for the respondent submitted that, CMA F1 does not require reasons to be given, rather, it requires only the applicant to fill the outcome. She submitted that, respondent indicated what he thought will be the outcome namely, 36 months salaries compensation. She submitted further that, during hearing,

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respondent testified that termination caused him economic hardship because he had a loan and a family and that his employment was unspecified hence was sure to repay the loan. She cited Rule 32(5) of GN. No. 67 of 2007(supra) and submit that the said Rule uses the word "may" to mean that it is not mandatory. Counsel for the respondent submitted that ***Veneranda's case*** (supra) and other cases cited by counsel for the applicant are not applicable in the application at hand and invited the Court not to apply them.

On ground (j), counsel for the respondent submitted that bonus was correctly awarded to the respondent due to the fact that, at CMA, both parties agreed that respondent have receive bonus for the previous 7 years. She argued that bonuses were payable in March each year. Counsel argued further that, respondent was retrenched in December hence he was entitled for bonus for the work he worked for. She argued further that, applicant sent an email (exhibit P9) to the respondent informing him that he will be eligible for bonus even if he was retrenched and that the said email was admitted without objection.

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On grounds (k) and (n), Ms. James, submitted that, it is not true that the arbitrator accepted documentary exhibits filed after commencement of hearing because documents complained of were on the list of the documents filed on 11th June 2021. She submitted further that, Rule 23(6) of GN. No. 67 of 2007 (supra) requires parties to file the list of documents intended to be relied on and that, documents were filed before commencement of hearing hence it cannot be said that they were filed as an afterthought. Counsel for the respondent cited the case of ***Yara Tanzania Ltd v. DB Shapriya & Co. Limited***, Civil Appeal No. 244 of 2018, CAT (unreported) and submitted that Advocates are officers of the Court with the role of ensuring administration of justice, and that, they have a duty to share with the Court relevant information that comes to their hands. Counsel went on to submit that, since the emails came to the attention of Counsel for the respondent, the same was listed as documents to be relied upon so that applicant can be aware. Counsel submitted further that, arbitrator correctly prohibited witness of the respondent to refer to the respondent's documents that were yet to be admitted as exhibit. She went on that; arbitrator allowed the witness to testify on the

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contents of the respondent's documents without relying on them as exhibits and referred the court to ***Mhubiri's case*** (supra).

On grounds (d), (e), (h) and (i), counsel for the respondent submitted that arbitrator considered all exhibits as part of evidence of both sides. Counsel cited the case of ***Alex Ndendya v. The Republic***, Criminal Appeal No. 207 of 2018, CAT (unreported) to the position that Court record presents what happened. She further submitted that, in holding that there was no consultation, arbitrator was correct in terms of Section 38(1) of Cap. 366 R.E. 2019(supra) which provides how retrenchment should be conducted. She maintained that no notice was served to the respondent because exhibit D3 does not qualify to be a notice as it only notified the respondent that he is redundant. She went on that, there is no proof that applicant issued a notice and that there was no disclosure of relevant information to enable respondent to be consulted effectively. Counsel for the respondent submitted further that, applicant claimed that the reason for retrenchment was reorganization but did not tender evidence proving presence of reorganization. Counsel went on that, in his evidence, DW1 testified that retrenchment was due to Covid 19 which is also contrary to exhibit P3 which shows that no employee will be affected by Covid 19 and

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that the said exhibit was admitted without objection. She went on that, applicant offered USD 50 million to the most Covid 19 vulnerable persons in our communities. Ms. James submitted further that; applicant used Covid 19 as a pretext to terminate the respondent. She submitted further that, method of selection of the person to be retrenched was not proved. She argued that DW1 testified that selection was through desktop review i.e., competency, but the review was never tendered at CMA. She added that, in no time respondent was told that he was incompetent during his 7 years career with the applicant. Ms. James submitted further that, there were no operation changes of the applicant and maintained that there was no reason for retrenchment. She wound up her submissions by praying that the application be dismissed for lack of merit.

In rejoinder, Mr. Mwaiteleke, counsel for the applicant submitted that ***Ndendya's case*** (supra) is not applicable because applicant is not complaining about accuracy of the CMA record. He reiterated his submissions in chief that applicant's witness was prevented to explain on documents of the respondent. He submitted that, both ***Bomu's case*** (supra) and ***Sharaf Shipping's case*** (supra) does not apply to the application at hand. He maintained further that, exhibit P9 was obtained

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after institution of the dispute at CMA and that its authenticity is questionable. In his rejoinder submissions, counsel for the applicant conceded that no objection was raised at the time of admission of exhibit P9. He submitted that ***Msimbazi Creek's case*** (supra) is not applicable to the application at hand because in the application at hand, there was consultation while in the later there was none. He argued that respondent was paid retrenchment package immediately. In his rejoinder submissions, counsel for the applicant conceded that the documents that the witness was prohibited to refer to, were not admitted as exhibit. He conceded also that respondent signed exhibit D2 showing that he did not agree with some terms thereon. He submitted further that DW1 testified on the whole procedure adopted in the retrenchment process and concluded by praying the application be allowed.

I have carefully examined the CMA record and considered submissions made by the parties thereof. I should from the outset, thank both counsel for their hot submissions and research they conducted in relation to the issues raised in this application. Though I may not apply all case laws and various provisions of the law they have referred to in their submissions, admittedly, I value their industrious work and indeed, they

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have helped me a lot in this judgment. That said, it is my turn to weigh evidence adduced at CMA and submissions made by counsels in this application and decide on either way according to the law. I will therefore dispose this application in the manner or order it was argued by the parties.

It was submitted by counsel for the applicant on the grounds relating to admissibility of electronic evidence namely grounds (b), (c) and (l), that the arbitrator refused to admit applicant's emailed documents on ground that there was no affidavit proving authenticity of the said electronic documents but on the other hand, arbitrator admitted in evidence email documents of the respondent contrary to the ruling issued earlier refusing to admit applicant's electronic documents. It was further argued by counsel for the applicant that Section 18 of the Electronic Transaction Act, 2015 does not mandatorily require an affidavit to be filed for emails or electronic documents to be admitted, rather, it only requires reliability, integrity, originality, and authenticity of the document to be established. It was also submitted on behalf of the applicant that emails that the arbitrator refused to admit were authored by DW1 who was seeking to tender them in evidence, who, could have established integrity, reliability, originality, and

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their authenticity. It was also submitted that there was an affidavit of the respondent proving authenticity of some of the applicant's documents that were refused admission. It was further submitted that electronic documents namely, exhibit P9, P6, P4 all being emails tendered by the respondent were admitted without admitting into evidence the affidavit of authenticity. It was argued that the arbitrator was supposed first to admit the affidavit as certificate of authenticity and then the said exhibits in evidence.

On the other hand, it was submitted by counsel for the respondent that it is a cardinal principle that when tendering electronic document, an affidavit must be filed to prove authenticity. It was argued that the aim of the affidavit is to prove genuineness of the documents. It was submitted by counsel for the respondent that applicant did not file an affidavit to prove authenticity of electronic documents. It was further submitted on behalf of the respondent that DW1 did not state whether, he was the in charge of the computer or not. It was further submitted that respondent complied with the law by filing a certificate of authenticity, which is why, his electronic documents were admitted as evidence. But upon being probed by the court, as whether, the said certificate was admitted as

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exhibit and forms part of evidence, counsel for the respondent readily conceded that it was only filed. Counsel for the respondent was quick to submit that there was no objection raised by the applicant at the time of admitting into evidence the said electronic evidence and that in the strength of the case of ***Bomu Mohamedi v. Hamisi Amiri****,* Civil Appeal No. 99 of 2018, CAT (unreported), the documents were equally accepted by the applicant.

I have given due consideration of the above rival arguments of the parties and I wish to point out that there is no requirement of filing an affidavit under the provision of section 18 of the Electronic Transactions Act No. 13 of 2015 or section 64A of the Evidence Act[Cap. 6 R.E. 2019] as a condition for admissibility electronic documents into evidence. The said provision reads:-

> *"18.-(1) In any legal proceedings, nothing in the rules of evidence shall apply so as to deny the admissibility of data message on ground that it is a data message.*
>
> *(2) In determining* ***admissibility*** *and* ***evidential weight*** *of a data message, the following shall be considered-*
>
> *(a) the* ***reliability*** *of the manner in which the data message was* ***generated****,* ***stored*** *or* ***communicated****;*

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*(b) the **reliability** of the manner in which the integrity of the data message was **maintained**;*

*(c) the manner in which its **originator** was **identified**; and*

*(d) **any other factor that may be relevant in assessing the weight of evidence**.*

*(3) The **authenticity** of an electronic records system **in which an electronic record is recorded or stored shall**, in the absence of evidence to the contrary, **be presumed** where-*

*(a) there is **evidence that supports a finding that** at all material times **the computer system or other similar device was operating properly** or, if it was not, **the fact of its not operating properly did not affect the integrity of an electronic record** and there are **no other reasonable grounds on which to doubt the authenticity of the electronic records** system;*

*(b) it is established that the electronic **record was recorded or stored by a party to the proceedings** who is adverse in interest to the party seeking to introduce it; or*

*(c) it is established that an electronic record **was recorded or stored in the usual and ordinary course of business by a person who is not a party to the proceedings and who did not record or store it under the control of the party seeking to introduce the record**.*

*(4) **For purposes of determining whether an electronic record is admissible under this section**, **an evidence may be presented in respect of any set standard, procedure, usage or practice on how electronic records are to be recorded or stored**, **with regard to the type of business or endeavours that used, recorded or stored the electronic record and the nature and purpose of the electronic record**."* (Emphasis is mine).

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On the other hand, section 64 of the Evidence Act,(cap. 6 R.E. 2019] provides:-

*"64A.-(1) In any proceedings, electronic evidence **shall be admissible**.*

*(2) The **admissibility and weight** of electronic evidence **shall be determined in the manner prescribed under section 18 of the Electronic Transaction Act**.*

(3) For the purpose of this section, "electronic evidence" means any data or information stored in electronic form or electronic media or retrieved from a computer system, which can be presented as evidence." (Emphasis is mine)

It is my view that section 18(2) of the Electronic Transactions Act No. 13 of 2015 has combined two things at once namely (i) admissibility and (ii) weight to be attached. It is my view that the way the section was drafted has created confusion. I am of that opinion because admissibility and weight to be attached to the evidence are two different things. Normally evidence must be cleared for admission before its weight is considered. In other words, evidence must pass first criteria or test for admissibility namely, (i) competence of the person intending to introduce the exhibit into evidence, (ii) relevance of the intended exhibit in the question in issue and compliance with the law relating to the intended

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exhibit to the fact in issue, (ii) originality that is to say, whether it is original or copy or its origin, etc. Once cleared for admission and being admitted, at the time of considering the evidence in its totality is when the issue of weight to be attached to that exhibit comes in. It is my view that the bolded words or sentences in the above quoted section are criteria or guidance in deciding whether the electronic evidence should be admissible or not. Importantly to note are the bolded wording of section 18 (3) and (4) of the Electronic Transactions Act No. 13 of 2015 quoted above. In my reading of the afore quoted sections of the two laws, I have found that there is no requirement of filing an affidavit for electronic evidence to be admissible.

As pointed out herein above, there is no requirement of filing an affidavit for as a condition for admissibility of electronic evidence. It is my view that all matters such as originality, how the evidence was generated or stored, who is the originator and how was identified can be proved without filing an affidavit. In my view, these are matters that can be cleared after looking on competence, relevance, and originality. It is my view that requirement of filing of an affidavit unnecessarily complicates the matter. I am of that view because it is a settled principle of law that both

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affidavit and counter affidavit are substitutes of oral evidence. See ***Uganda v. Commissioner of Prison Exparte Matovu*** [1966] EA 514, ***Phantom Modern Transport (1985) Ltd v. DT Dobie (TZ) Ltd,*** Civil References Nos. 15 of 2001 and 3 of 2002, CAT(Unreported), ***Bruno Wenceslaus Nyalifa v. the permanent Secretary, Ministry of Home Affairs & Another***, Civil Appeal No. 82 of 2017 ,CAT (Unreported), ***Rosemary Stella Chambejairo v. David Kitundu Jairo,*** Civil Reference No. 6 of 2018, CAT (unreported), ***Rustamali Shivji Karim Merani v. Kamal Bhushan Joshi***, Civil Application No. 80 of 2009 (unreported) to mention but a few. In other words, affidavit is a substitute of evidence of a witness in the witness box given orally. Now, the requirement of a witness to file an affidavit relating to authenticity of electronic evidence, in my view, is as if the witness giving evidence in the witness box cannot be believe on what she /he will state orally under oath before a judicial officer unless an affidavit is filed. Ironically, the requirement is assuming that, in the affidavit, the witness tells nothing but the truth and that, in oral evidence, while in a witness box, a witness can be allowed to tell lies. That is not the position in my view. After all, in the affidavit, the witness swears or affirms before the commissioner for oaths

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in the absence of judicial officer. More so, in the affidavit, the demeaner of the deponent cannot be assessed so to speak, unlike in oral testimony. In my view, the requirement of filing an affidavit for electronic evidence to be admitted is intended to demean oral evidence and show that affidavit is superior and oral evidence is inferior. But, things are not that way, which is why, under Order XIX of Civil Procedure Code [Cap. 33 R.E. 2019], a deponent can be required to appear before the court to be cross examined on matters stated in the affidavit or counter affidavit. This, in my view, is intended to give assurance to the court on matters stated in the affidavit. Now, refusal to admit electronic documents authored by the witness who is in the witness box as it happened in the application at hand, on ground that an affidavit was not filed, while all issues including authenticity of the documents can be cross examined, in my view, is double treatment of evidence namely oral testimony and affidavit evidence.

It was submitted by counsel for the respondent that affidavit must be filed to prove authenticity of electronic evidence. With due respect, in my view, that is not the proper position of the law. Section 18(3)(a), (b) and (c) of the Electronic Transaction Act(supra) that relates to authenticity, has no such a requirement. In my view, matters to be considered whether

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electronic evidence is admissible or not are provided in section 18(4) of the Electronic Transaction Act(supra) that also as pointed hereinabove, does not require an affidavit to be filed. It is my further view that section 18(2) of the Electronic Transaction Act(supra) must be read together with section 20(1) and (2) of the same Act, on issues of admissibility and weight to be attached to electronic evidence. It is my view therefore that, the arbitrator erred to refuse admission of electronic evidence that was authored by DW1 simply because there was no affidavit proving authenticity. Again, as rightly conceded by counsel for the respondent, the affidavit filed by the respondent allegedly proving authenticity was not admitted as evidence, as such, that affidavit cannot be acted or relied on because it is not part of evidence. Mere filing of the affidavit purporting to prove authenticity but the witness in his or her evidence without adducing evidence relating to authenticity, in my view, cannot be said that authenticity was proved. I therefore associate myself with the reasoning of my learned brother I.C. Mugeta, J in the case of ***Freeman Aikael Mbowe and Others vs Republic***, Criminal Appeal 76 of 2020, [2021] TZHC 3705 and ***EAC Logistic Solution Limited vs Falcon Marines Transportation Limited,*** Civil Appeal 1 of 2021 [2021] TZHC 3197 that it is not a

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requirement of the law for an affidavit to be filed to prove authenticity of electronic evidence. The witness himself can prove authenticity by oral evidence.

One of the issues that appears to confuse most of us is what is electronic document. We think that electronic document is limited to emails etc forgetting that the definition is wide. From where I am standing, even the documents filed by the parties and this judgment is electronic document in terms of section 3(1) and 64(3) of the Evidence Act[Cap.6 R.E. 2019]. I am of that view because section 3(1) of Evidence Act(supra) defines document as follows:-

> "*document" means any writing, handwriting, typewriting, printing, Photostat, photography,* ***computer data and every recording upon any tangible thing****,* ***any form of communication or representation including in electronic form****, by letters, figures, marks or symbols or more than one of these means, which may be used for the purpose of recording any matter provided that recording is reasonably permanent and readable*."

In addition to that electronic evidence is defined under section 64(3) of the Evidence Act(supra) as:-

> *"64(3) For the purpose of this section, "****electronic evidence****" means any* ***data or information stored in electronic form or electronic media or***

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retrieved from a computer system, which can be presented as evidence".

The phrase computer system is defined under section 3 of the Electronic Transaction Act(supra) as:-

> *"computer system" means a device or combination of devices, including network, input and output devices capable of being used in conjunction with external files which contain computer programmes, electronic instructions, input data and output data that perform logic, arithmetic data storage and retrieval communication control and other functions.*"

Not only that but also the said section define data to means any information presented in an electronic form and define "electronic record" to mean a record stored in an electronic form. It is my view therefore that,by these definitions, what we think are not electronic evidence, may be included in that category. It is my view further that, if people become fascinated with electronic evidence and continue to raise preliminary objections that affidavit was not filed prior to seeking electronic evidence to be admitted, then, every document will be objected to, and courts will only be compelled to issue rulings now and then, without going to the merits of the cases because the documents that people think they are not electronic evidence, in fact they are. The judgment I am delivering now is

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a data or information stored electronically in my computer into intangible means but upon printing it becomes tangible. That said, I hold that the arbitrator wrongly failed to admit into evidence emails authored by DW1 simply because there was no affidavit proving authenticity.

It was argued by counsel for the applicant on the (a), (f) and (m) grounds that arbitrator did not consider evidence which shows that respondent agreed to his termination by signing retrenchment agreement and receiving the package. It was further submitted that if respondent was dissatisfied, prior to receiving retrenchment package, he was supposed to file the dispute at CMA. It was further submitted on behalf of the applicant that upon receiving retrenchment package, respondent was estopped to deny truthfulness of the agreement he has entered with the applicant. On the other hand, it was submitted on behalf of the respondent never agree to the retrenchment and that, there was no agreement for retrenchment, rather, a notice for retrenchment which is not an agreement.

I have examined evidence of Mzilas Mbena (DW1) Head of Financial markets and find that he testified that applicant and respondent agreed on retrenchment terms and that based on that agreement, respondent was

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paid his retrenchment package. DW1 testified that respondent was paid TZS 83,738,105.58 as severance pay, TZS 11,962,015.08 as one-month salary in lieu of notice and that on 14th December 2020 respondent signed the Notice of Redundancy dated 10th December 2020 (exh. D2) agree with reasons for redundancy and the terms therein to be final. It was evidence of DW1 that in November 2020 employees were notified of retrenchment through emails. He gave reasons for retrenchment that was due to (a) performance, (b) Covid 19 and (c) productivity. He testified further that criteria for retrenchment were desktop review i.e. (i) competency, (ii) growth effect of candidate, (iii) culture and conduct of the person and (iv) potential of the person. In his evidence, DW1 concluded that respondent was paid severance, outstanding leave, loan benefit 15% hence net pay TZS 54,733,857.38 as evidenced by Redundancy package (exh. D4).

On his part, Justine Tineishemo (PW1) testified that there was no reason for retrenchment and that there was no consultation. In the same evidence, respondent(PW1), admitted having received redundancy package. While under cross examination, he further admitted that he signed exhibit D2 to acknowledge that the payment will be full and final and that money was paid in his bank account. When asked why he signed

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while he had option not to sign, he replied "***Sikufahamu kama ninaweza kutosaini***". In his evidence, PW1 testified that he did not agree to clause 3, 8(a) and (b) of the Notice of redundancy(exhibit D2).

From evidence of the parties, it is clear that parties agreed to retrenchment and package thereof. It is clear in that evidence that respondent signed the Notice of redundancy on 14th December 2020 indicating that he agreed with the terms thereof save for clause 3, 8(a) and 8(b). I have read exhibit D2 and find that respondent did not dispute clause 2 that relates to payment of TZS 83,734,105.58 as severance pay and TZS 11,962,015.08 being one month salary in lieu of notice. I have noted that clause 2(a)(i), (ii) and (iii) relates to the amount payable to the respondent, which, according to evidence of the respondent, was not in dispute and clause 2(c) of exhibit D2 shows that respondent agreed that apart from the sum in that exhibit, he will have no further claim. As pointed hereinabove, respondent signed exhibit D2 on 14th December 2020. It is my view, that the evidence by the respondent that he was not aware that he had option not to sign as baseless and cannot invalidate what he signed.

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It was submitted by counsel for the applicant that respondent is estopped to deny the truth that he agreed to retrenchment and that he would have no further claims. I totally agree with him because that is the correct position under the principle of issue estoppel. See the case of ***Getha Ismail Ltd V. Soman Brothers*** [1960] EA 26 and ***Ngaile V. National Insurance Corporation of Tanzania Ltd*** [1973] EA 56, ***Denis s/o Magabe vs Republic,*** Criminal Appeal No. 7 of 2010 [2011] TZCA 45, ***Bytrade Tanzania Limited vs Assenga Agrovet Company Limited & Another,*** Civil Appeal No. 64 of 2018 [2022] TZCA 619, ***Trade Union Congress of Tanzania (TUCTA) vs Engineering Systems Consultants Ltd & Others,*** Civil Appeal No. 51 of 2016 [2020] TZCA 251, ***Muhimbili National Hospital vs Linus Leonce,*** Civil Appeal No. 190 of 2018 [2022] TZCA 223. In ***TUCTA's case*** (supra) while discussing issue estoppel held:-

> *"In an Article by Shreya Dave, titled; The Doctrine of Promissory Estoppel, the learned author writes the following: -*
>
> *'The true principle of promissory estoppel is where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or effect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to*

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whom the promise is made and it is in fact acted upon by the other party the promise would be binding on the party making it and he would not be entitled to go back upon it."

The Court of Appeal went on:-

"Under the Evidence Act, Cap 6, R.E. 2019, there is a provision relevant to the above doctrine, and that is section 123 which provides;

'123. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and that person or his representative, to deny the truth of that thing".

The Court of Appeal was persuaded and endorsed the decision of the High Court of Kenya in the case of ***Nairobi County Government v. Kenya Power and Lighting Company Limited*** [2018] eKLR wherein it was held:-

"Upon applying the law to the facts of this case, I find that in the circumstances of this case, the doctrine of estoppel applies against the Petitioner. The Petitioner is estopped by the said doctrine from turning around and reneging on what it had agreed and committed itself into and even performed its part of the agreement The Respondent in reliance to the agreement and commitment not only agreed to the arrangement and acted in reliance of the same".

The Court of Appeal concluded:-

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"We are similarly of the view that the overt conduct and expressions of the appellant's predecessors during the signing of the contract and during the respondent's claims for payment, are binding on it."

In ***Leonce's case*** (Supra), the Court of Appeal found as factual, that, parties agreed to terminate employment of the employee and that the latter was paid terminal benefit. Having so found and based on issue estoppel, the Court of Appeal held that, by their choice of agreement, the employee was barred to file the dispute. In ***Leonce's case*** (Supra), the Court of Appeal held as hereunder:-

"It is our considered opinion therefore that from the above parties' partly quoted letters, any prudent reader would conclude... that on account of frustration of the contract of service between the parties, the appellant had no other option but to terminate the contract and pay the appellant the proposed benefits... the respondent had two voluntary options, to accept the offer and the proposed terminal benefits or otherwise... respondent accepted the offer of mutual termination of the contract. He acceded to the proposed termination upon the appellant's undertaking to pay the proposed package within two weeks of his reply. Accordingly, the respondent was paid. They were done and parted company.

It follows therefore that with all that undisputed, by necessary implication on such terms the respondent agreed the appellant's offer for termination and received the agreed terminal benefits. In other words the appellant did all the needful in compliance with s. 2(1)(a) of the Law of Contract Act Cap.345 R.E.2019.

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In other words, the Common Law doctrine of estoppel bars the parties, in this case the respondent from running away from their previous freely made choices. It bars them denying their previous freely made choices. The ground of appeal is allowed. We think the labour dispute was misconceived."

Facts in ***Leonce's case*** (supra) are almost similar to the application at hand because respondent does not dispute of having been paid retrenchment package and in fact, he was paid as per redundancy package computation (exhibit D4) that he signed on 14th December 2020. Guided by the Court of Appeal decision in ***Leonce's case*** (supra) and the principle of issue estoppel, respondent was estopped to file the dispute at CMA complaining that he was unfairly terminated and claim to be paid compensation for unfair termination, severance pay and bonus. I therefore hold that, arbitrator erred in awarding respondent to be paid TZS 430,632,542.88 being 36 months' salary compensation for unfair termination and TZS 48,458,243/= being bonus for the year 2020 minus TZS 54,733,857.38 that respondent was paid as retrenchment package as per exhibit D4.

Having found that respondent agreed to retrenchment and accepted retrenchment package, all grounds and submissions relating to validity of

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reason and procedures for termination advanced by the parties becomes irrelevant. I will therefore not consider them.

For the foregoing, I hereby allow the application by revising the CMA award, quash, and set it aside.

Dated in Dar es Salaam on this 15th November 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 15th November 2022 in chambers in the presence of Seni Malimi, Advocate for the applicant and Denis Kahana, Advocate for the respondent.

B. E. K. Mganga
JUDGE

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