IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 401 OF 2022

(Arising from an award issued on 21/10/2022 by Hon. Abdallah, M, Arbitrator in Labour dispute No. CMA/DSM/ ILA/248/2021/82/21 at Ilala)

M-PESA LIMITED ..... APPLICANT

VERSUS

LOUIS EPIPHANE MARO ..... RESPONDENT

JUDGMENT

Date of last Order: 15/2/2023
Date of Judgment: 21/3/2023

B. E. K. Mganga, J.

Facts of this application briefly are that, on 1st September 2011, Vodacom Tanzania Limited now Vodacom Tanzania Plc, employed Louis Epiphane Maro, the respondent for unspecified period contract as a KAM; Electronic Recharge & Registration. On 26th June 2019, respondent's employment was transferred from Vodacom Tanzania plc to M-PESA Limited, the applicant. On 11th November 2020, respondent was suspended from work for unspecified period allegedly, due to breach of company

Code. On 30th November 2020, respondent was served with the notice of inquiry containing two counts namely, (i) disclosure of confidential information to a third party i.e., Bill Trade and (ii) misuse of resources such as handsets which were supposed to be equally distributed to other partners. It is undisputed by the parties that investigation was conducted and thereafter respondent was served with additional notice of inquiry. In the additional notice of inquiry, three counts were added. In the said additional notice of inquiry, the three counts that were added are that (i) on 21st October 2020, the line manager of the respondent approved MPS with the aim to acquire DSTV account but after the said approval, on 3rd November 2020, respondent altered the document to include Bill Trade name, (ii) that respondent was absent from work station and travelled outside the work station without applying for work leave or permission from line manager and (iii) that, there was relationship between the respondent and Bill Trade, which stands in the way of company's business put the respondent at a conflicting position with the company's interest hence conflict of interest.

On 27th and 28th April 2021, the disciplinary hearing was conducted. The disciplinary hearing committee found the respondent guilty of breach

of confidentiality and absence from work for more than five days without permission and recommended termination of employment of the respondent. On 9th June 2021, applicant terminated employment of the respondent.

Aggrieved with termination, on 8th July 2021, respondent filed labour dispute No. CMA/DSM/ ILA/248/2021/82/21 before the Commission for Mediation and Arbitration henceforth CMA at Ilala for unfair termination. In the Referral Form (CMA F1), respondent indicated that he was claiming to be paid (i) TZS 670,902,570 being 120 months' salaries from the date of termination to the date of reinstatement and (ii) TZS 2,000,000/= being leave pay. On validity of reason, respondent indicated in the said CMA F1 that, there was no valid reason for termination. On fairness of procedure, he indicated that (i) he was suspended for five(5) months' from 11th November 2020 pending investigation, (ii) the notice of inquiry of 23rd November 2020 was from Vodacom Tanzania Plc which is not his employer, (iii) no investigation report was served to him, (iv) Notice of hearing was from Vodacom (T) Plc, (v) he was denied access to information for defence hence denial of right to be heard, (vi) the disciplinary hearing was not

impartial and was improperly constituted and (vii) the termination letter does not mention the misconduct that led to termination.

On 21st October 2021, Hon. Abdallah, M, Arbitrator, having heard evidence and submissions from the parties issued an award that termination was unfair both substantively and procedurally. The arbitrator therefore awarded respondent to be paid TZS 201,270,771/= being 36 months' salary compensation and TZS 13,547,071.125 being severance pay all amounting to TZS 214,817,842.125.

Aggrieved with the award, applicant filed this application for revision. In the affidavit of Joseph Tungaraza, applicant's senior Legal Specialist, in support of the Notice of Application, raised four issues to be determined by the court namely: -

1) *Whether arbitrator was justified to find that there was no valid reason for termination.*
2) *Whether procedure for termination were adhered to.*
3) *Whether arbitrator was justified to award 36 months salaries*
4) *Whether severance pay was legally awarded.*

In resisting the application, respondent filed both the Notice of Opposition and the counter affidavit.

When the application was called on for hearing, applicant was represented by Ms. Miriam Bachuba and Ms. Fatuma Mgunya, learned

Advocates while respondent was represented by Mr. Juventus Katikiro, learned Advocate.

In support of the application, Ms. Bachuba submitted that, respondent was terminated for (1) absence from work for more than 5 working days and (2) breach of confidentiality. She submitted further that; respondent was absent from work for a total of 52 working days at different dates. She went on that, the arbitrator held that applicant did not act in time until investigation was conducted a sign showing that reason was not valid. She strongly submitted that respondent was absent for five days consecutively as testified by Alice Robert Luwis(DW1) and Kiligan Muya Kamota(DW2) but respondent alleged that he was working from home. She submitted further that, when working from home, respondent was supposed to log in at the time alleged that he was working from home. She went on that, the VPN (exhibit D20) shows that respondent was not working from home because he did not log in. She added that, exhibit D19 which is an email, shows that employees were supposed to log in for them to work from home but respondent did not.

Counsel for the applicant submitted that, Section 61 and 63 of the Evidence Act [Cap. 6 R.E. 2019] provides that evidence can be oral or

documentary. She submitted further that, evidence of DW1 and DW2 and exhibits D20 and D19 proved how employees were supposed to work from home. Counsel for the applicant submitted that, both DW1 and DW2 were not discredited under cross examination because they were not cross examined hence their evidence were accepted by the respondent. To support her submissions, counsel for the applicant cited the case of ***Paul Yustus Nchia v. National Executive Secretary Chama Cha Mapinduzi & Another***, Civil Appeal No. 85 of 2005 CAT (unreported) and ***Bomu Mohamedi v. Hamisi Amiri***, Civil Appeal No. 99 of 2018 CAT (unreported) and concluded that the arbitrator erred to hold that there was no valid reason for termination.

Ms. Bachuba submitted that the Arbitrator also held that applicant discovered that respondent was absent after investigation. She argued that the fact that the employer did not discover the misconduct at early stage, does not exonerate the employee because the employer is only required to prove that the misconduct was committed. She went on that, there is no time frame within which employer can take disciplinary action against the employee. But, in her submissions, upon being probed by the court as to whether, the employer can wait even for three years, she conceded that it

will depend on circumstances of each case. She strongly submitted that exhibit D22 proved that respondent was not only absent from work but he was also out of his duty station. She added that, that evidence was not disapproved. Further to that, Ms. Bachuba submitted that, in the disciplinary hearing, respondent admitted that he was out of station but was authorized as shown in exhibit D12. She strongly submitted that, in his evidence, DW2 testified that respondent was never authorized to be out of station.

It was submissions by Ms. Bachuba, learned counsel for the applicant that Arbitrator based his decision on leave benefit policy (exhibit D21) not to hold that respondent was not absent from work for five days because the said exhibit was issued by Vodacom (T) PLC and not M-PESA Limited. In her submissions, counsel for the applicant conceded that respondent was employed by M-PESA Limited and not Vodacom (T) PLC. She was, however, quick to submit that according to evidence of both DW1 and DW2, the two are sister companies and share the policy that was binding the respondent. She added that, in his evidence, while under cross examination, respondent(PW1) admitted that he was bound by that policy.

On the 2nd reason for termination namely, breach of confidentiality Ms. Bachuba submitted that respondent shared confidential information namely email (exhibit D25) with Bill Trade Co. She submitted further that, some of that information was church conversation from direct to indirect acquisition. She also submitted that, one of the witnesses who participated in the meeting in which the said confidential information was discussed by the applicant is DW2. She submitted further that, both DW1 and DW2 explained as to what is meant by confidential information and that they tendered Vodacom Code of Conduct (Exhibit D18) which defines what constitutes confidential information. She strongly submitted that, by forwarding internal email to Bill Trade, respondent breached confidentiality. She added that, the shared informed is shown in investigation report (exhibit D25) under Item 1.3.1 and 3.3 and findings No. 5(1)(c), (d) and (f). Counsel added that, during disciplinary hearing, respondent admitted having shared the said information.

Ms. Bachuba learned counsel for the applicant criticized the arbitrator in holding that applicant did not prove loss caused by the respondent in sharing the said information. She submitted that, in his evidence, DW2 testified that there was potential loss. Counsel for the applicant further

submitted that, Rule 9 of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 only requires the employer to prove reason for termination and that it is not necessary to prove loss. She added that, whether loss occurred or not, it is immaterial. She cited Rule 12 of GN. No. 42 of 2007(supra) and submit that seriousness of the offence/misconduct is based on the nature of the misconduct and not the loss occasioned. She further cited the case of ***Rapoo v. Metropolitan Botswana (PTY) Ltd***, 2006(1) BLR 186 (IC) and ***Nassoro Khatau Yahya V. Toyota Tanzania Ltd,*** Revision No. 192 of 2016 HC, (unreported) to support her submissions that disclosure of confidential information to the outsider amount to breach of trust and warrant termination.

Ms. Bachuba further criticized the Arbitrator by holding that the misconduct was not proved because witnesses to whom the information was shared or disclosed to, were not called to testify. It was her submissions that, there was no need to call those witnesses because evidence adduced proved the misconduct. She cited Rule 9(3) of GN.No. 42 of 2007(supra) and submit that the said Rule only requires the employer to prove at balance of probability and not beyond reasonable doubt. She

added that, the requirement to call witnesses to whom the information was shared had the effect of changing the standard of proof from balance of probabilities to beyond reasonable doubt. She cited the case of ***Paulina Samson Ndawavya v. Theresia Thomasi Madaha,*** Civil Appeal No. 45 of 2017, CAT (unreported) to support her submissions that balance of probability means evidence that is more credible than the other.

Counsel for the applicant criticized the findings of the Arbitrator that the policy used was from Vodacom. She submitted that, after transfer from Vodacom to the applicant, terms of employment remained the same as testified by DW1 and DW2 and as shown in exhibit D3.

On procedural fairness, counsel for the applicant criticized the findings of the arbitrator that termination was unfair because only part of the investigation report was served to the respondent. She submitted that, respondent was served only with the relevant part of the investigation report as was testified by both DW1 and DW2 just to enable him to prepare for his defence and that no injustice was occasioned. She argued that, unfortunately, the arbitrator did not look it to that point. She submitted further that, DW1 and DW2 testified that respondent was served with only the relevant part and no injustice was occasioned. She cited the

case of ***Paschal Bandiho v. Arusha Urban Water Supply & Sewerage Authority (AUWSA*)**, Civil Appeal No. 4 of 2020, CAT (unreported) to support her submissions that investigation prior to hearing is a valuable and the central point for the employee to be afforded right to be heard prior dismissal. She strongly submitted that the part of the investigation report that was served to the respondent was enough to enable him to defend against the accusations levelled against him.

Ms. Bachuba submitted that, respondent was also served with a show cause notices (exhibits D27 and D26) and was heard in the disciplinary hearing. She criticized the findings of the Arbitrator that respondent did not have faith with two(2) members of the disciplinary hearing. She argued that the same was not raised in the disciplinary minutes that he had no faith with the two members. She submitted further that, in his evidence, respondent(PW1) testified that he had no faith with two members because there were allegations against them as they employed a person subordinate to him. She further submitted that; respondent had a duty to prove those allegations against the two members but he failed. In short, she submitted that respondent did not prove biasness by the two members.

On the 36 months salaries relief awarded to the respondent, Ms. Bachuba, submitted that 44 years age of the respondent used by the arbitrator and difficulty in securing another employment is not supported by evidence. She argued that Arbitrator was supposed to grant relief based on evidence on record. She cited the case of ***International Medical & Technological University v. Eliwangu Ngowi,*** Revision No. 54 of 2008 to support her submissions that the only figure that is certain is 12 months' and that in awarding any other figures/months', there must be justification through evidence. She submitted further that; the arbitrator used post termination effect which cannot be considered in awarding compensation. She added that, the statement by the arbitrator was speculations without proof.

On the award of severance pay, Counsel for the applicant submitted that, in terms of Section 42(3) of the Employment and Labour Relations Act[Cap. 366 R.E. 2019], severance pay is not awardable if termination is based on misconduct. She therefore prayed that the application be allowed.

Resisting the application, Mr. Katikiro, learned counsel for the respondent submitted generally that DW2 admitted during hearing at CMA

that respondent objected at the disciplinary hearing committee as he did not have confidence with some of the members. He concluded that the disciplinary hearing committee was not impartial.

On breach of confidentiality and absence from work as reason for termination, counsel for the respondent submitted that, these were not valid reasons. He submitted further that; these misconducts were raised after investigation report. He added that, these misconducts are not in the investigation report that was availed to the respondent. He cited the case of ***Ovadius Mwangamila & 2 Others v. Tanzania Cigarette Co. Ltd***, Consolidated Revision No. 334 & 335 of 2020, HC (unreported) to support his submissions that failure to serve the investigation report denies the employee right to prepare defence. He went on that; respondent was served with part of the report and not the whole report. He further submitted that, in his evidence, respondent(PW1) testified that the part of the report that was served to him was not relevant and did not help him to make his defence. Counsel for the respondent submitted further that, in ***Bandiho's case*** (supra), it was held that investigation report should be served to the employee to enable him to prepare his defence and added that, the Court did not state that part of the report must be served.

Counsel for the respondent submitted that there was no evidence tendered showing that respondent attended a meeting in which the alleged confidential information was shared. He submitted further that, DW2 testified under cross examination that the full investigation report was not shared to the respondent.

Counsel for the respondent submitted that, in his evidence, respondent(PW1) testified that he was not absent from work for consecutive five days and that he has never been out of station. He added that, VPN was part of the investigation report that was not availed to the respondent to prepare for his defence.

On compensation of 36 months', counsel for the respondent submitted that, based on evidence on record, the arbitrator was justified to award the said 36-month months' salaries. He submitted further that, respondent worked for 14 years with the applicant without record of misconduct and was 44 years hence unable to be re-employed by any other employer.

On severance pay, counsel for the respondent cited Rule 26(1) of GN. No. 42 of 2007(supra) and submitted that, the same was correctly awarded after the arbitrator has found that termination was unfair both

substantively and procedurally. He therefore prayed that the application be dismissed for want of merit.

In rejoinder, Ms. Bachuba, learned counsel for the applicant reiterated her submissions that severance was not properly awarded. She further submitted that, Rule 26(1) of GN. No. 42 of 2007(supra) provides only how severance pay should be calculated but does not provide circumstances in which it should be paid. She further submitted that; no evidence was adduced to justify the award of 36 months compensation.

On failure to serve the respondent with the full investigation report, counsel for the applicant submitted that, that does not invalidate reason for termination. She submitted further that; VPN was not part of investigation report. She added that, whether there was a meeting or not, that is not the issue, because the allegation was that respondent forwarded confidential information to third party. She went on that; respondent did not testify that the part of the investigation report that was availed to him was not relevant. She maintained that respondent defended himself to the charges and was fully heard. On impartiality, Ms. Bachuba, submitted that there is no evidence showing that DW2 admitted that respondent raised the issue of impartiality during hearing.

I have carefully examined evidence of the parties in the CMA record and considered respective submissions made on behalf of the parties in this application. The main issues in my view, are whether, termination was fair or not; and to what reliefs are the parties entitled to.

It is undisputed facts that, initially respondent was employed by Vodacom Tanzania Limited now Vodacom Tanzania Plc but on 26th June 2019, respondent's employment was transferred from Vodacom Tanzania plc to M-PESA Limited, the herein applicant. It is also undisputed that, on 11th November 2020, respondent was suspended from work for unspecified period allegedly, due to breach of company Code. It is also undisputed that on 30th November 2020, respondent was served with the second notice of inquiry and that on 27th and 28th April 2021 disciplinary hearing was conducted and respondent was found guilty leading to termination of his employment. It is further undisputed that, in the CMA F1, respondent indicated that disciplinary proceedings were initiated by Vodacom Plc who is not the employer. It was submitted by counsel for the applicant that Vodacom Plc is a sister company to the applicant and that, the two shares the Code of Conduct and Policy and that, there was valid reason for termination. It is also undisputed that respondent was found guilty for

breach of confidentiality contrary to Vodafone's Code of Conduct and absence from work for more than five days without permission.

I have examined evidence of Alice Robert Luwis (DW1) and find that while testifying in chief, she stated *inter-alia* that, respondent was terminated for sharing sensitive information to 3rd party that may cause loss or damage contrary to Vodacom Code of Conduct (exhibit D18) and for absenteeism during COVID 19 Pandemic though they agreed to work from home according to exhibit D19. I should point out that, exhibit D18 is Vodacom **Tanzania PLC Disciplinary Policy** and the **Code of Conduct of Vodafone** and exhibit D19 is a directive issued by Hisham to all all employees of **Vodacom Tanzania** on how they can work from home during COVID 19 pandemic.

When under cross examination, DW1 testified that, the Notice of inquiry dated 23rd November 2020 was issued by Vodacom and that the Notice to appear for a disciplinary hearing (exhibit D6) referred to Vodacom Notice and that permission to investigate the respondent (exhibit D5) was issued by Vodacom. I should point that, exhibit D5 dated 14th January 2021 shows clearly that Vodacom Corporate Security Forensic Service sought permission from Kilian Kamota(DW2), Epimack Mbeteni, Luis Kanijo and

Agapinus Tax to investigate the respondent for (i) abscondment, (ii) alteration of an approved content in the document, (iii) favouring Bills Trade Limited and causing the business to incur cost, (iv) sharing of unauthorized insider information, (v) non-disclosure of potential conflict of interest and (vi) irrational conversion of direct acquisition into indirect acquisition that led to unnecessary increased commission costs to Vodacom. I should also point out that the permission was granted.

In her evidence under cross examination, DW1 also testified that, respondent was accountable to the applicant. That, respondent was served with part of the investigation report especially the one that could have helped him to defend but she did not recall the parts of the investigation report that was served to the respondent. She admitted that, in the termination letter, there were no alleged misconducts. She testified further that, the CDR report (exhibit D22) came from investigators and suspected that investigators retrieved it from the company system and that, she cannot explain in detail but only experts who printed it can. She testified further that; she cannot testify on the VPN report(exhibit D20) because that can only be done by experts who printed it. DW1 was recorded in her own words stating that:-

"CDR Report imetoka katika team ya investigator ambayo anahisi itakuwa wamepata katika system ya company. Siwezi kuelezea kwa undani kielelezo D22 wanaweza wataalam walio print…Siwezi kuelezea kwa undani kielezo D20 mpaka mtaalam mtu aliye print."

I should point albeit briefly that exhibits D19 and D20 were tendered by DW1 who in her evidence was unable to explain its contents because she did not participate in the process of obtaining those exhibits. In other words, competence of DW1 to tender those exhibits were questionable. I should also point out that those exhibits were admitted without objection. In my view, admission is one thing and weight to be attached to the exhibit a different.

While under cross examination, DW1 testified further that, exhibit D19 was issued by Director of Vodacom to Vodacom employees. While under re-examination, DW1 testified that Vodacom policy applied to the respondent because M-PESA is subsidiary to Vodacom and the two stay in the same building. She testified further that; respondent was bound by Vodacom Policy because initially he was Vodacom employee.

On his part, Kiligan Muya Kamota(DW2) testified in chief that, employees of Vodacom based in Dar es Salaam works from 08:00 to 15:00 from Monday to Friday and that CDR report (exhibit D22) shows that

respondent was not in Dar es Salaam. He testified further that, email(exhibit D27) shows that respondent was not at his duty station for 52 days working and 75 days in total. In his evidence, DW2 mentioned the dates respondent was not in Dar es Salaam and mentioned the respective towns or City in which respondent was.

While under cross examination, DW2 testified that investigation report was done by Vodacom and that he was not sure whether, M-PESA Limited, the herein applicant conducted investigation. He testified further that, the notice of inquiry (exhibit D23) that was served to the respondent on 23rd November 2020 bears the address of Vodacom and that the notice of inquiry is based on the Code of Conduct of Vodacom. He testified further that, an employer in a different company cannot take disciplinary action against an employee in a different company. He also testified that, he was not sure whether, Vodacom had disciplinary power over the respondent or not and that, he cannot talk in detail about that. He testified further that, Vodacom conducted investigation for three months and that he didn't know if the report was served to the respondent. He admitted that the said investigation report was prepared by Corporate Security Personnel

Vodacom who are the competent to explain the findings thereof because he did not participate in preparation of the said report.

On the other hand, Louis Epiphane Maro(PW1) testified *inter-alia* that, he was transferred from Vodacom to M-PESA as per exhibit D3 and that, on 11th November 2020 he was suspended by Vodacom for undisclosed reasons. He testified further that; the show cause (exhibit (D23) was from Vodacom alleging that he violated Vodacom Policy. He added that, he was not employee of Vodacom and that, on 2nd December 2020, he replied (exhibit D24) that he was not Vodacom employee hence the charge was invalid. He testified further that, on 25th March 2021, he was served with the charge(exhibit D26A). He added that he was not served with the investigation report. He testified further that, during the Disciplinary hearing, he prayed one Alice, the Human Resources Officer and DW2 to recuse but they didn't and that, he was not afforded right to representation. PW1 testified further that, during COVID 19 Pandemic, he was working from home and that there was no complaint from the applicant that he performed poorly.

While under cross examination, respondent(PW1) testified that the 1st inquiry is from Vodacom because the address is clear and that the charges shows that he violated Vodacom Policy.

It is my considered view that, from evidence adduced by the parties, termination of the respondent was unfair. I am of that view because, upon transfer of employment of the respondent from Vodacom to the applicant, Vodacom ceased to exercise power over the respondent. I am of that view because, employment relationship between the two ended after transfer. In my view, all documents relating to Vodacom ceased to regulate the conduct of respondent. In fact, the transfer of Employment Contract to M-PESA Limited (exhibit D3) that was tendered by the applicant is loud to that position. The said transfer of Employment Contract to M-PESA Limited reads in part:-

> *"**RE: transfer of Employment Contract to M-Pesa Limited.***
>
> *As discussed, Vodacom intends to separate its operations of M-Pesa as part of structural re-organization. This will involve the transfer of M-Pesa business and resources to M-PESA Limited. As part of business and resources transfer and since you are providing services to M-Pesa operations it was agreed that **Vodacom transfers its rights, obligations and liabilities under the Contract to M-Pesa Limited** on the terms set out below.*
>
> *Upon execution of this letter(Effective date)therefore:*

1. ***Vodacom's rights and obligation under the contract will be transferred to M-Pesa Limited under the same terms and obligations***.

2. ***M-PESA Limited will perform the contract and be bound by its terms in every way as if it were the original party to it in place of Vodacom***.

3. ***You will perform the contract and be bound by its terms in every way as if M-PESA were(sic) the original party to it in place of Vodacom***.

In addition, also with effect from the effective date:

1. ***Each of us releases and discharges the other from all claims and demands under or in connection with the contract, whether arising before, on, or after the effective date, and in each case whether known or unknown to the releasing party***.

2. ***You and M-PESA Limited will have the right to enforce the contract and pursue any claims and demands under it against the other with respect to matters arising before, on , or after the Effective date, as if M-PESA Limited were(sic) the original party to the contract instead of us***.

3. *The contract will, in all other respects continue on its existing terms.*

4. *From the Effective date,* ***you should deal solely with M-PESA Limited in respect of the contract***.

…"

As pointed hereinabove, upon the respondent and Vodacom signing transfer of Employment Contract to M-PESA Limited (exhibit D3) and upon

the applicant accepting the respondent on the terms and conditions stated in exhibit D3 as quoted hereinabove, employment relationship between Vodacom and respondent came to an end and new employment relationship between applicant and respondent was established. From there on ward, respondent became employee of the applicant and Vodacom ceased to have power whatsoever, over the respondent because; in terms of section 61 of the Labour Institutions Act[Cap. 300 R.E. 2019], respondent was under control of the applicant and not Vodacom. The mere fact that M-PESA Limited, the herein applicant is a sister company of Vodacom, that alone did not cloth power to Vodacom to exercise powers over the respondent. I am of that view because applicant is a legal entity separate from Vodacom.

I have examined the suspension letter dated 11th November 2020(exhibit D4) that was tendered by DW1 and find that it bears the address of Vodacom Tanzania Public Limited Company and not the applicant. As I have pointed above, Vodacom had no power to suspend the respondent because respondent was not her employee. I have further noted that, in the said letter, it was just stated that respondent breached the Company Code but the nature of breach was not disclosed. It is my

view that exhibit D4 was issued in violation of Guideline 5(3) issued under the Employment and Labour Relations(Code of Good Practice) Rules, GN. No. 42 of 2007 that requires a suspension letter to disclose reason for suspension.

Further to the foregoing, the Notice of Inquiry (exhibit D23) dated 23rd November 2020, was also issued by Vodacom and not the applicant. Exhibit D23 referred respondent as employee of Vodacom and not M-PESA Limited, the applicant. It is my view that, it was not correct for exhibit D23 to refer the respondent as an employee of Vodacom while exhibit D3 explicitly stated that, upon transfer, respondent became employee of the applicant and Vodacom ceased to have any right or obligation over the respondent.

It is undisputed by the parties that, the investigation report that led to termination of the respondent was conducted by Vodacom Corporate Security Forensic Services as evidenced by exhibit D5 as it was also testified by both DW1 and DW2 the only witnesses of the applicant. The investigation report itself(exhibit D25) shows that it was conducted by Vodacom Tanzania PLC. There is no evidence proving that applicant outsourced Vodacom Tanzania PLC to conduct investigation on her behalf.

The Notices to appear to the Disciplinary hearing(exhibits D6 and D9) and the Disciplinary hearing reports(exhibits D12.1, D12, D13) shows that respondent was charged and found guilty for breach of confidentiality in violation of Vodafone's Code of Conduct. Again, Vodafone was not the employer of the respondent, as such, it cannot be said that respondent was bound by the said Code of Conduct hence respondent cannot be terminated for breach of the said Code. For the foregoing, I uphold the CMA award that the count relating to disclosure of confidential information was not proved.

In the disciplinary hearing, respondent was also found guilty for the count of absenteeism from duty station for more than five days without permission. It is my considered opinion that, the said count was also not proved. Reasons for this conclusion is not far. One; evidence that led respondent to be found guilty for absenteeism is the investigation report(exhibit D25), CDR report(exhibit D22), VPN report(exhibit D20) and emails (exhibit D27) as it was testified by both DW1 and DW2. Both DW1 and DW2 testified that the investigation report, CDR report and VPN report were prepared by Vodacom Corporate Security Forensic Services and that, there is no evidence proving that applicant commissioned them to do so on

her behalf. None of applicant's witness associated himself or herself with exhibit D27. More so, both DW1 and DW2 testified that they were not competent persons to clarify matters contained therein because they did not participate in preparation of those reports. In short, both DW1 and DW2 disassociated themselves with those reports. Evidence is clear that, makers of those reports and the emails did not testify at CMA and that both DW1 and DW2 were ignorance of the contents therein. Their evidence in relation to those exhibits were hearsay. It is my view that, the mere fact that those exhibits were admitted without objection is not a guarantee for the court not to scrutinize them as to whether they were tendered by competent witnesses. None of the witnesses between DW1 and DW2 claimed to be competent to tender those exhibits because no foundation was laid prior tendering those exhibits.

Two; the investigation report (exhibit D25), the CDR report (exhibit D22), VPN report(exhibit D20) and emails (exhibit D27) were prepared by persons who did not testify. In his evidence, DW2 admitted that he was incompetent or ignorance of the matters stated therein. I therefore draw adverse inference against the applicant for her failure to call makers of those exhibits. It was open to the applicant to call makers of those exhibits

to explain contents therein rather than allowing both DW1 and DW2 just to rump them in the CMA record. It is my further view that, those exhibits were prepared just to make rid of the respondent. In reaching that conclusion, I have considered *inter-alia* the time when those exhibits were prepared. It is on record that, investigation was conducted after respondent was served with the Notice of inquiry (exhibit D23) dated 23rd November 2020 and after respondent has served applicant with his response to the Notice of inquiry(exhibit D24) dated 2nd December 2020 as clearly shown by the "permission to investigate" (exhibit D5) dated 14th January 2021. Therefore, all other exhibits including but not limited to D5, D20, D22, D25 and D27 to mention but a few, were prepared as an afterthought just to make sure that respondent's employment is terminated. I therefore, uphold the CMA award that applicant failed to prove that respondent absconded from work for more than five days without permission.

For the foregoing, I hold that there was no valid reason for termination of employment of the respondent.

On procedural fairness, it was testified by both DW1 and DW2 that respondent was not served with the full investigation report. The argument

that respondent was served with only the relevant part that would have helped him to prepare for his defence cannot be said complied with the law. The Court of Appeal had an advantage of discussing a similar issue in the case of ***Severo Mutegeki & Another vs Mamlaka Ya Maji Safi Na Usafi Wa Mazingira Mjini Dodoma*** (Civil Appeal 343 of 2019) [2020] TZCA 310 wherein it held that an employee is entitled to be served with the full report to enable him to prepare for his defence and that failure to serve a full investigation report amounts to denial of right to be heard. I therefore hold that respondent was denied right to be heard.

Evidence in the CMA record is clear that respondent prayed to be supplied with his computer but the same was not done and in the last instance, it was done on the date of hearing namely 28th April 2021 that was not sufficient to prepare for his defence. It was testified by both DW1 and DW2 that respondent was served with the part of the relevant investigation report to enable him to defence. The two witnesses however, failed to explain the part of the report that respondent was served with. It is unknown whether, respondent was served with the CDR report(exhibit D22) or VPN report(exhibit D20) that were crucial in proving the misconduct of absenteeism or not. I therefore hold as it was held by the

Court of Appeal in the case of ***Kiboberry Limited vs John Van Der Voort*** (Civil Appeal 248 of 2021) [2022] TZCA 620 that failure to serve the respondent with the investigation report amounted to unfair termination procedurally.

It was submitted by counsel for the applicant that, VPN was not part of investigation report. With due respect, that submission cannot be valid. From evidence of the applicant, it was clear that during COVID 19 Pandemic, employees were working from home. According to the evidence of the applicant, it was discovered through VPN that respondent did not log in during working hours or sometimes did log in for few minutes only. Based on that, applicant formed opinion that respondent was not working. From evidence of the applicant, VPN report was important to prove absence of the respondent from duty, which is why, it was tendered. Therefore, failure to serve respondent with that report was unfair procedurally.

It was submitted by counsel for the applicant that, respondent did not testify that the part of the investigation report that was availed to him was not relevant. With due respect to counsel for the applicant, there is enough evidence to support that complaint. I have read an email dated 1st

April 2021 (exhibit D27) written by the respondent to DW2 and others and find that respondent raised that concern. In the said email, respondent stated inter-alia:-

> *"Dear Kilian Kamota… it's(sic) important that I respondent with a truth and fats which shall have the sufficient supporting evidence of any inquiry allegation toward me. However; (sic)I have noted that you insist that I should respond without seeing the documents you made reference to in the notice of inquiry, which is difficult for me because I do not recall the contents of documents you have referred to hence I do not want to write a guess or respond with incorrect information…"*

I should point that, exhibit D27 was tendered by the applicant hence it is her evidence. That evidence supports the complaint by the respondent on denial of documents that could have helped him to prepare for his defence. For all what I have discussed herein above, I hold that termination was also unfair procedurally.

It was submitted on behalf of the applicant that there was no justification for the respondent to be awarded 36 months' compensation instead of 12 months. I should point out that the 12 months' provided for under section 40(1)(c) of the Employment and Labour Relations Act[Cap. 366 R.E. 2019] is the minimum and not the maximum. In awarding compensation, arbitrator is required to consider the provisions of Rule 32

of Labour Institutions (Mediation and Arbitration Guidelines)Rules, GN. No. 67 of 2007. The said Rules requires the arbitrator to consider *inter-alia* the extent to which termination was unfair. I have held hereinabove that termination was unfair both substantively and procedurally hence justification for the arbitrator to award beyond the minimum of 12 months provided under section 40(1)(c) of Cap. 366 R.E. 2019 (supra). It is my view that, the extent of unfairness in this application was high hence a need to carefully consider the amount respondent is entitled to. In the case of ***Veneranda Maro & Another vs Arusha International Conference Center*** (Civil Appeal 322 of 2020) [2022] TZCA 37 the Court of Appeal noted that there is no clear guide on what constitutes an equitable and just compensation due to absence of the maximum amount that can be awarded to an employee. But, after considering the provision of Rule 32 of GN. No. 67 of 2007(supra), the Court of Appeal confirmed the amount that was awarded beyond the 12 months salaries compensation to the appellant. Guided by the decision of the Court of Appeal in ***Maro's case*** (supra), I find that the 36 months salaries compensation was fairly awarded to the respondent considering the circumstances of the application.

It was submitted by counsel for the applicant that respondent was not entitled to be paid severance because termination was due to misconduct. This complaint cannot detain me. I have held hereinabove that applicant failed to prove reasons for termination. Therefore, there is no misconduct that was committed by the respondent for him not to be entitled to be paid severance. I therefore hold that severance pay was properly awarded.

For all said hereinabove, I hereby uphold the CMA award and dismiss this application for want of merit.

Dated in Dar es Salaam on this 21st March 2023.

B. E. K. Mganga
JUDGE

Judgment delivered on this 21st March 2023 in chambers in the presence of Ms. Miriam Bachuba and Ms. Fatuma Mgunya, Advocates, for the Applicant and Juventus Katikiro, Advocate for the Respondent.

B. E. K. Mganga
JUDGE