IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT DAR ES SALAAM

CONSOLIDATED LABOUR REVISION NO. 387 & 394 OF 2022

BETWEEN
ST MATHEW'S SECONDARY SCHOOL ..... APPLICANT/RESPONDENT

VERSUS
JUMA MASAMAGA KUREBA ..... RESPONDENT/APPLICANT

JUDGEMENT

Date of last Order: *14/03/2023*
Date of Judgement: *05/04/2023*

MLYAMBINA, J.

Feeling aggrieved and dissatisfied with the decision of the Commission for Mediation and Arbitration (hereinafter CMA) in *Labour Dispute No. CMA/PWN/MKR/83/2021/333/2021* delivered by Hon. Ngalika, E., Arbitrator in favour of Juma Masamaga Kureba (hereinafter the Respondent) as against St. Mathew's Secondary School (hereinafter the Applicant), both parties herein preferred a separate Revision Application before this Court. On 17th February 2023, the two Applications were fused and cited as *Consolidated Revision Application No. 387 of 2022 and 394 of 2022.* At the closure of hearing, the Court was left at dilemma on *whether it should compose a Judgement or a Ruling.* The reason being that; in the process of my research, I found diverse Approaches "labels" properly to be termed seven Approaches of

the Court. The first Approach is to the effect that the decision on labour revision application against the decision of the CMA on substantive matters is a "Judgement". The second Approach is that a decision on labour revision application against the decision of the CMA on matters which are not substantive is a "Judgement". The third Approach is that a decision on labour revision against the decision of the CMA on matters which are not substantive is a "Ruling". The fourth Approach is that a decision on labour revision against the decision of CMA on substantive matters is a "Ruling". The fifth Approach is that of composing a "Judgement" but extracting a "Drawn Order" thereon. The sixth Approach is that of issuing a "Ruling" and extracting a "Drawn Order" thereon and the seventh Approach is that of issuing a "Judgement" but extracting a "Decree" thereon. I hesitate to call such Approaches as "schools of thought" because there is no opinion or a reflection or arguments on why composing a "Judgement" instead of a "Ruling" or *vice versa.*

The afore seven Approaches of the Court has attracted this Court to make a critical reflection on the legal value of the decision it intends to make in order to avoid ending up giving wrong "labels" such as

"Judgement" instead of a "Ruling" or "Ruling" instead of a "Judgement" or "Ruling" but extracting a "Decree" thereof, etc.

One question arises at the threshold of the argument in these circumstances: *Which is the Legal Approach to follow?* It appears to me, however, that in the light of those *Seven Approaches* with incontrovertible status, it would be unwise to jump into a decision without thoroughly setting out all of the Approaches, circumstances and the justification of the legal approach to take and lend support to the plausibility or justice in labour matters. My sole consideration is to bring clarity to the potential consumers of labour justice and to the general public.

Lord Burrows of the Supreme Court of the United Kingdom in his speech at the Annual Conference of the Superior Courts in Ireland, 2022 as quoted by Justice Dr. Dhananjaya Y. Chandrachud, J. in the case of **State of India and Another v. Ajay Kumar Sood**, Civil Appeal No. 5305 of 2022, Supreme Court of India, stressed on importance of considering the wide and varied potential audience when composing a Judgement, as follows:

> For senior judges, one's target audience must include the parties themselves, the legal advisers to those parties, other judges, other practising lawyers, academic lawyers

and students, and last but by no means least the public at large.

Justice Dr. Dhananjaya went further to quote *inter alia* Justice Daphne Barak-ERZ, in his academic work titled: Writing Law: Reflections on Judicial Decisions and Academic Scholarship, (2015)41-1 QUEEN'S LAW JOURNAL 255 in which he notes:

> For judges, the professional community is only one of their several audiences, judges write first and foremost for the parties appearing before them, for the State's Agents who are in-charge of enforcement, and for the public. Although Judgements are professional legal documents, and sometimes involve complex technical and legal analyses, they should also be accessible, or at least explicable, to people who are not professionals, as they define the law for a larger community.

To gain momentum on the instant labour revision application, I find necessary to start with the Approach of the majority of Brethren and Sisters. The High Court Labour Division is practically emphatic that the decision on labour revision application against the decision of the Commission of Mediation and Arbitration on substantive matters is a Judgement. (This represents the **First Approach**). The First Approach is spearheaded in many cases including the case of **Elia Kasalile and 20 Others v. Institute of Social Work,** Civil Application No.187 of

2013, High Court Labour Division at Dar es Salaam (unreported); **Felicia Migomba v. CRDB,** Revision No.25 of 2010 High Court Labour Division at Dar es Salaam (unreported); **Suleiman Hassan Stima v. G45 Secure Solutions Tanzania Limited,** Revision Application No. 47 of 2021, High Court Labour Division at Dar es Salaam (unreported) and **Edmund Msangi v. The Guardian Limited**, Labour Revision No. 838 of 2019, High Court Labour Division at Dar es Salaam (unreported).

Equally, the High Court Labour Division has impliedly maintained that; a decision on labour revision application against the decision of the CMA on matters which are not substantive is a Judgement. (This represents a **Second Approach**). This approach is evident in among other cases, the case of **Ibahim Joseph Mpandu v. Bulyanhulu Gold Mine Limited,** High Court Labour Division at Shinyanga, Labour Revision No. 11 of 2021 (unreported). In this application, the Applicant was aggrieved by the Ruling of the Commission for Mediation and Arbitration refusing him condonation to institute a labour dispute against the Respondent. In its decision, this Court rendered a Judgement to the effect that the condonation application was rightly refused.

Other proponents of the second approach are evident in the case of **Lawis Mtoi and 3 Others v. Nokia Solutions and Networks**

Tanzania Limited, Labour Revision No. 22 of 2021, High Court Labour Division at Mbeya (unreported); **Nazar Manase v. The Headmaster Magnus Secondary School And Another**, Revision Application No. 167 of 2022, High Court of Tanzania Labour Division at Dar es Salaam (unreported); **Meru Pamimu Nzobe v. Angelico Lipani Nursery and Primary School,** Revision Application No. 92 of 2019, High Court Labour Division at Arusha (unreported); **Danford Evans Omari v. Tazama Pipeline Limited**, Revision Application No. 684 of 2019, High Court Labour Division at Dar es Salaam (unreported); **Maurizio Mian v. Skol Building Contractors Limited,** Revision No. 675 of 2018, High Court Labour Division at Dar es Salaam (unreported) and **John Elias v. The Registered Trustees of Chama Cha Mapinduzi**, Revision No. 75 of 2018, High Court Labour Division at Dar es Salaam (unreported).

Further proponents of the second approach are evident in the case of **Vikas Mahajan v. Crown Paints Tanzania Limited,** Labour Revision No. 41 of 2022, High Court Labour Division at Arusha (unreported). This is an application for revision filed by the Applicant challenging the decision of the CMA of Arusha at Arusha given in an application for condonation No. CMA/ARS/61/2022. In that application, the CMA refused the condonation sought by the Applicant in labour

dispute involving the Applicant and the Respondent. Upon hearing the parties on revision, this Court rendered a Judgement basing on the proof of sickness presented in the affidavit filed with the CMA, by giving the Applicant 14 days within which to file his labour complaint before the CMA.

The same stance of the second approach was also taken by this Court in the cases of **Willa Madema v. The Aga Khan,** Revision Application No. 407 of 2021, High Court of Tanzania Labour Division at Dar es Salaam (unreported); **Falesi Benjamin Sanga v. Tanbreed Poultry Limited,** Labour Revision No.33 of 2021, High Court Labour Division at Moshi (unreported); **Sauda Muhidin and 2 Others v. Premium Ingredients Limited,** Revision No. 113 of 2021, High Court Labour Division at Dar es Salaam (unreported); **Jivan Mkambala v. Swahili Glass Aluminium Limited,** Revision Application No. 219 of 2021, High Court of Tanzania Labour Division at Dar es Salaam (unreported); **Mohamed Marekani v. Auric Services Limited,** Revision No. 964 of 2018, High Court of Tanzania Labour Division at Dar es Salaam (unreported); **Maria Jackson Mwita v.Vijiji Centre Company Limited,** Revision No. 109 of 2021, High Court Labour Division at Arusha (unreported) and **Ndovu Resources Limited v.**

Thierry Murcia, Revision Application No. 371 of 2022, High Court of Tanzania Labour Division at Dar es Salaam (unreported).

In the case of **Meena Ludovic and Others v. TRIDEA Cosmetics Limited,** Revision No. 125 of 2013, High Court Labour Division at Dar es Salaam (unreported), the Applicant moved the Court to revise the decision of the CMA. However, it was found that the matter was at the stage of disciplinary hearing and had not been finalised. It was further found that the dispute has to be resolved at the CMA as per *section 86 of the ELRA (supra)* after the disciplinary hearings have been concluded at the work place, thereafter, revisions to the High Court. By way of Judgement, this Court held as follows:

> Since the matter was filed at CMA prematurely because the Applicants had not been terminated, this Court lacks jurisdiction to entertain the matter. I therefore dismiss the matter and make no orders as to costs.

It is also noteworthy that the second approach is reflected in the case of **Secularms (T) Limited v. Sauli Awaki Nada,** Labour Revision No. 11 of 2020, High Court of Tanzania Labour Division at Moshi (unreported). In that labour revision application, the Applicant basically challenged the manner in which the CMA embarked on arbitration soon after granting condonation without mediating the

parties. The Court after hearing the parties, by way of Judgement, faulted such procedure for violating *section 86(3) of the the Employment and Labour Relations Act [Cap 366 Revised Edition 2019] [hereinafter ELRA]* which requires; on receipt of the referral made under subsection (1), the Commission must; (a) appoint a mediator to mediate the dispute; (b) decide the time, date and place of the mediation hearing; and (c) advise the parties to the dispute of the details stipulated in paragraphs (a) and (b). For such reason, the Court ordered the matter to be returned to CMA for compliance with mediation procedure in accordance with the law.

Again, the High Court Labour Division has impliedly maintained that; a decision on labour revision against the decision of the CMA on matters which are not substantive is a Ruling. (This represents a **third approach**). The proponents of this approach are evident in among other cases, the case of **African Nursery and Primary School v. Iddi Mtali,** Revision No. 287 of 2021, High Court Labour Division at Dar es Salaam (unreported). In this application, the Respondent herein lodged a Labour Dispute No. CMA /DSM/TEM/193/2021 at the Commission for Mediation and Arbitration for Ilala against the Applicant herein. Along with his CMA Form No.1 which initiated a dispute at the CMA. Also, the

Respondent filed a CMA Form No. 2 seeking for condonation of time, supported by an affidavit of the Respondent herein. The subsequent condonation form was filled as required under clause 7 of the form. The CMA heard the parties and was satisfied with the reason for the delay and proceeded to grant the condonation ordering the dispute to subsequently proceed on the 1st day of March, 2022. The Applicant was dissatisfied by findings and order of the CMA. He lodged the revision before this Court.

After hearing of the application in the case of **African Nursery and Primary Approach**, *(supra)* by way of Ruling, this Court found that; unless the condonation is dismissed, where the Applicant's right would finally be barred from determination, granting of the condonation is nothing but an interlocutory order falling under the prohibition provided for under *Rule 50 of the Labour Rules.* As such, the application was struck out with an order that the parties go back to the CMA to proceed with mediation.

The third approach by this Court is also reflected in the case of **Zambia Railway Authority (TAZARA) v. The Attorney General and Salum Nyika,** Revision No. 80 of 2022, High Court Labour Division at Dar es Salaam (unreported). In the case of **Flora Munuo v. Suba**

Agro Trading and Engeneering, Revision Application No. 89 of 2019, High Court Labour Division at Arusha (unreported), the CMA rejected the Applicant's request for condonation in that she did not sufficiently account for the delay in filing her claims. Aggrieved, she filed revision application before this Court seeking to challenge that Ruling in order to be allowed to pursue her rights before the CMA. After hearing, this Court, by way of Ruling, found the Applicant failed to account for the delay to file her Application within a reasonable time. She also failed to demonstrate why condonation should be given to her on criteria other than the delay.

On remarkably similar facts, the third approach was maintained in the cases of **Ally Mussa and 3 Others v. East Africa Spirit (T) Limited,** Misc. Labour Application No. 46 of 2020, High Court Labour Division at Shinyanga (unreported) and **Moruo Saitore Laizer v. Kagera Sugar Limited**, Labour Revision No. 02 of 2022, High Court Labour Division at Bukoba (unreported).

In other scenarios, this Court, at the closure of hearing of an application for revision against the decision of CMA on substance, have in a number of times issued a Ruling. (This represents the **Fourth Approach**). This approach is evident in the *inter alia* cases of

Happiness Karugaba v. MSPH Tanzania LLC (ICAP), Consolidated Labour Applications No. 25 and 27 of 2021, High Court Labour Division at Musoma (unreported); **BIDCO Oil and Soap Limited v. Robert Matonya and 2 Others,** Revision No. 70 of 2009 and **Valentina Lucas Kinawiro v. Brookside Dairy Tanzania Limited,** Labour Revision No. 54 of 2016, High Court Labour Division at Mwanza (unreported). In the later case of **Valentina Lucas Kinawiro***(supra),* the Applicant being aggrieved with the decision of the CMA at Mwanza, advanced *inter alia* grounds for revision; that the Applicant was unfairly terminated from employment in terms of reasons and procedures. After full hearing inter parties, by way of Ruling, the Court found merits in the application. Thus, by not affording the Applicant a right to be heard, the Applicant's termination was procedurally unfair.

In the case of **Buta Khan Buta v. Kenya Kazi Security (T) Limited,** Revision No. 242 of 2010, High Court Labour Division at Dar es Salaam (unreported), the Applicant sought for revision of impugned award which was issued on 10/08/2010 on grounds that the Arbitrator wrongly evaluated the evidence reaching a conclusion that his termination was fair and that he was not entitled to payment of salary arrears. Upon hearing of the application, by way of Ruling, this Court

held on substance *inter alia* that the Applicant was fairly terminated on ground of absenteeism. The Court went further to entitle the Applicant to the payment of salary for October, 2008 to 29th October, 2008.

Again, in the case of **Security Group Tanzania v. Athumani S/O Abdallah**, Revision No. 250 of 2008, High Court Labour Division at Dar es Salaam (unreported), the key issue on revision application was on the applicability of the double jeopardy principle in workplace disciplinary procedures. Upon hearing both parties, this Court by way of a Ruling, hastened to fault the CMA decision that termination was unfair in all fronts.

Besides, in the case of **Raphael Patroba Bwire v. Triachem (T) Ltd,** Labour Revision No. 11 of 2022, High Court Labour Division at Morogoro, the Court decided on the merit of the case and dismissed the entire application through a Ruling. The same stance was taken in the case of **Trustees of the Tanzania National Parks v. Ernatus I. Aron**, Labour Revision Application No. 19 of 2021, High Court Labour Division at Musoma (unreported).

In other instances, this Court have issued a Judgement but extracted a Drawn Order thereon. (This represents the **Fifth Approach**). This approach is evident in the case of **Nokia Solutions**

and Networks Tanzania Limited v. Honest Mangale, Labour Application No. 43 of 2020, High Court Labour Division at Moshi (unreported). This Court have consistently issued a Ruling and extracted a Drawn Order thereon. (This represents a **Sixth Approach**). There are many in number. To mention one, is the case of **The Registered Trustees of the Anglican Church of Tanzania v. Reverend Canon Dr. Mecka Okoth**, Labour Revision No. 14, High Court Labour Division at Dodoma (unreported). Those who are issuing a Judgement do extract a Decree thereon. (This represents the **Seventh Approach**). There are also many in number, I equally need not mention any.

It however remains a fact that Ruling and Judgement are *jural* concepts relating to rights and obligations used in administration of justice. It is in the course of administering justice, Ruling and Judgement may be rendered.

Unfortunately, under the labour laws, the word "Ruling" and "Judgement" have not been clearly defined or interpreted. Such position renders this Court to use "Ruling" or "Judgement" interchangeably as synonymous while others make a decision by terming it a Ruling simply probably because it emanates from the chamber summons supported with an affidavit.

Despite of the *lacuna* on the definition of the words "Judgement" and "Ruling" under the labour laws, *Rule 21(4) of the Labour Court Rules G.N. No. 106 of 2007* provides for content of Judgement to contain: *One*, a concise statement of the case. *Two*, the point for determination. *Three*, the decision thereon. *Four*, the reasons for such decisions.

More so, Labour Court has also been empowered *under Rule 21(1) of G.N. No. 106 of 2007 (supra)* to pronounce Judgement in an open Court after the hearing of the case either at once or at a future date of which due notice must be given to the parties or their Advocates.

Again, *section 52(1) of the Labour Institutions Act [Cap 300 Revised Edition 2019]* provides for the powers of the High Court; two of such powers being making a Ruling and Judgement. *Section 52 (1) (supra)* provides:

> In the performance of its functions, the Labour Court shall have all the powers of the High Court, save that in making a Judgement, Ruling, decision, order or decree in so far as it is relevant...

I would also draw attention to *Rule 48(4) of G.N. No. 106 of 2007* which provides kinds of decision to be made by the High Court among of them being a Ruling and Judgement. *Rule 48 (4) (supra)* provides:

> For the purpose of this Rule, decision means any decision, Judgement, Award, Decree, Ruling, Settlement Agreement or Order made by the Court, the Labour Commissioner, Commission or Other body authorised by law to have its decision or orders enforced by this Court.

It follows, therefore, that, *Rules 21, (1), (4), 48 (4) of G.N. No. 106 of 2007* and *section 52(1) of the Labour Institutions Act (supra)* does not define or state at what particular time or in which circumstance the Labour Court has to issue a Judgement or Ruling. As such, there is a dire need to understand in details the two legal concepts of Judgement and Ruling.

According to the **Essential Law Dictionary, first edition**, SPHINX Publishing, an imprint of Sourcebooks, INC. Naperville, Illinois, 2008, the word Judgement means; final. A Judgement that ends a legal controversy by conclusively stating whether or not the Plaintiff is entitled to relief. While a Ruling is defined as; Judge's or Court's decision or authoritative statement about a question of law, the admissibility of evidence, etc.

According to **Oxford Dictionary of Law, 5th edition**, oxford university press, 2002, Judgement means a decision made by a Court in respect of the matter before it. Judgements may be interim (interlocutory), deciding a particular issue prior to the trial of the case; or final, finally disposing of the case. They may be in *personam*, imposing a personal liability on a party (e.g. to pay damages); or *in rem,* determining some issue of right, status, or property binding people generally.

While **Black's Law Dictionary, 8th edition,** Deluxe United States of America, 2004 defines Judgement as a Court's final determination of the rights and obligations of the parties in a case. The term Judgement includes an equitable decree and any order from which an appeal lies. Also termed (historically) Judgement *ex cathe dra.*

The same **Black's Law Dictionary** *(supra)* defines Ruling as the outcome of a Court's decision either on some point of law or on the case as a whole. It goes on to make a distinction between Rules and Rulings. Whether or not a formal distinction is declared.

According to **Black's Law Dictionary** *(supra),* in common usage, 'legal Ruling' (or simply 'Ruling') is a term ordinarily used to signify the outcome of applying a legal test when that outcome is one of relatively

narrow impact. The immediate effect is to decide an issue in a single case. This meaning contrast, for example, with the usual meaning of 'legal Rule' (or simply 'Rule'). The term 'Rule' ordinarily refers to a legal proposition of general application. A 'Ruling may have force as precedent, but ordinarily it has that force because the conclusion it expresses (for example, 'objection sustained') explicitly depends upon and implicitly reflects a legal proposition of more general application.

In the premises of the above Legal Dictionaries, the definitions of the term Judgement and Ruling especially in the **Oxford Dictionary of Law, 5th edition** *(supra)* and **Black's Law Dictionary** *(supra)* are not easy to grasp and confusing. However, it is the considered view of this Court that, as can be discerned from such definitions, a Judgement is the final order of the Court in respect of the substance of a matter. It brings the matter to an end by determining the rights and liabilities of the parties involved. The word "Judgement" generally includes the brief facts of the case, the decision itself, the reasons for a decision reached by a Court, and any order made under it. Usually, a Judgement is a decision based on the law and evidence presented to a Court. It is the decision of the Court in response to the relief claimed in an action.

Whereas "Ruling" is an order or a decision of a Court on point of law in respect of an issue which arises within the course of or pending the determination of a substantive matter. It can be a determination on admissibility of evidence. It does not determine the rights and liability of the parties. It deals with the incidental issues. A Ruling can also be a judicial interpretation of a provision of a statute, order, or regulation.

In nutshell, the difference between a Ruling and Judgement is that; a Judgement is the final decision of the Court which disposes the substance of the dispute, whereas Ruling is the final decision of the Court with respect to an interlocutory matter which arises from and within the proceedings of the substantive matter.

The other distinction between Ruling and a Judgement is that; a case can have several Rulings, but within the jurisdiction of the stated Court, there can only be one Judgement on that matter, unless otherwise stipulated by law.

A point of law settled by authority, for example determination of preliminary objection raised by the parties in a revision application since does not need evidence in its determination, then it's decision will be termed as a Ruling. In the case of **Soitsambu Village Council v. Tanzania Breweries Limited and Another**, Civil Appeal No. 105 of

2011, Court of Appeal of Tanzania (unreported), it was held that; point of law to be raised must be free from evidence.

As a general rule, a Ruling does not determine the rights and liabilities of the parties in *stricto sensu* except for instance, such Rulings convicting one for contempt of Court, custody order, application for review of the decision made in error or mistakes or alleged error or mistakes or on any interlocutory application. The examples are the Ruling in the case of **Hassan Marua v. Tanzania Cigarette Company Limited**, Civil Application No.338/01/2019, Court of Appeal of Tanzania at Dar es Salaam (unreported).

Yet, in a wider sense, Ruling does not determine the subject matter giving rise to the parties' present in Court. When the Court gives its Ruling on a point of law, it thereafter proceeds to the question of the substantive dispute as illustrated by the Court of Appeal Ruling in the case of **Serenity on the Lake Limited v. Dorcus Martin Nyanda**, Civil Revision No.1 of 2019, Court of Appeal of Tanzania at Mwanza (unreported). Save only in exceptional circumstances, the Ruling does not touch the substantive dispute.

If I may add, a Court Ruling is not directed to the substance of the case and as such, does not affect it, although its implication may put the

parties against whom it is Ruled in jeopardy. Court's Ruling has an element of finality but only with respect to the particular issue which it disposes. Court's Ruling in respect of a subject is final in the sense that the Court cannot reverse its Ruling unless in exceptional circumstance if established by way of application for review.

Court's Ruling can also be appealed against, although in most cases leave of Court may be required in some cases. A Court Ruling has the capacity to dismiss a dispute. For instance, where the Court holds that it has no jurisdiction to determine a dispute; as such, that Ruling is final. Court's Ruling in most cases does not render the subject matter and the dispute *res judicata* since the substance of the proceeding has not been decided. It is only a Court Judgement on the substance of a dispute that can give rise to *res judicata.*

Some instances though not exhaustive where Ruling may be made are: *One*, issues of jurisdictions of the Court or Tribunal or Commission. *Two*, other preliminary objections. *Three*, applications. *Four*, objection to tendering of documents. *Five*, objection to certain questions during testimony of witness. *Six*, interim order or injunctions.

It is trite principle that Court's Judgement is the finality of proceedings on substantive matters. Eg, a final decision on land matter

commenced by way of application is Judgement. It is not a Ruling because it is a final verdict on evidence tendered by parties on substance of their dispute. However, Court's Ruling in some cases can arise and be given even after the final judgement has been rendered. This is evident in the Court of Appeal Ruling after the Judgement in the cases **of Kasalile and Marua** *(supra).*

The other exception lies in cases of review based on certain prescribed cases. A Court Judgement cannot be questioned before the Court that rendered the Judgement. A Court Judgement on the substance of a dispute clearly gives rise to *res judicata* as long as the elements constituting *res judicata* are present. Judgement therefore relates only to a Court decision disposing of the substance of the dispute.

The similarity between Ruling and Judgement includes that; both are decisions made by the Court or a Tribunal or Commission in the course of determining parties' rights and liabilities. Both Judgement and Ruling actually disposes of issues. The decisions forming Court's Ruling and Judgement can be appealed against. Also, both Court Ruling and Judgement can be appealed if the decision rendered thereof have a finality effect.

A Judgement is given in respect of the substantive issue which has brought the parties to Court for determination. Ruling refers to matters which spring up in furtherance of the proceedings in the substantive suit. Court Ruling is necessary for attaining the end of litigation whereas Judgement brings litigation in respect of a particular suit to an end. Both are clearly different concepts and applications but in one way and the other, they complement.

The question as to whether the Judge or Deputy Registrar or Magistrate or Chairperson or Mediator or Arbitrator or any Judicial Officer has to deliver a Ruling or a Judgement depends on the facts before him or her and the nature of the matter. There is no hard and fast Rule because the disputed facts might start with the characteristics resulting to Judgement but abruptly change to feature the elements of Ruling. However, it suffices to understand that Judgement is the result of determination of main matter and Ruling is determination on matters which are incidental thereto, interlocutory or on legal procedural issues.

To deepen our understanding, I am alarmed with the position of this Court in the case of **TANAPA Arusha v. Victor Stephen Mongi,** Revision Application No. 04 of 2016, High Court Labour Division at Morogoro (unreported). The Court while distinguishing between the

Ruling and the Award of the CMA, cited with approval its earlier decision in the case of **Suresh Ramaya v. Asha Migoko Juma,** Revision No. 207 of 2015 High Court Labour Division at Dar es Salaam (unreported), in which it quoted Du Toit Darcy *etal* **Labour Relations Law, A Comprehensive Guide, 6th Edition** 2015 p.164 where Ruling is defined as:

> ...is a decision on a limited issue, usually made at the conclusion of interlocutory proceedings. A Ruling may be made before arbitration commences or during the course of it, examples include a decision on condonation rescission of an Award and a decision on a request for recusal by the arbitrator.

This Court in **TANAPA Arusha** case *(supra)* went on to reason *inter alia* that the Award of CMA is a final Judgement or decision especially by Arbitrator and therefore revisable as per the law. In reaching to such position of distinguishing a Ruling and Award, the Court borrowed the wisdom of the Labour Court of South Africa in the case of **Kwazulu Transport (Pty) Limited v. Mnguni** [2001] BLLR 770 (LC) where it was stated:

> ...Award finally determines the substantive dispute and is issued at the conclusion of arbitration proceedings. A Ruling could however have the effect of concluding the

> proceedings in certain circumstances for example by refusing condonation of late referral of a dispute...It has been therefore a practice of the Court that Rulings order (s) or incomplete proceedings cannot be appealed, reviewed or revised while the substantive proceedings are still in progress in the Court a quo or the Commission. However, note bien (it should carefully be noted) that the High Court may intervene in interlocutory proceedings, Ruling or orders...where justice may not by other means be obtained or where a gross irregularity has occurred or where grave injustice may result, it has been held that the Labour Court may intervene in incomplete proceedings...

Further, it is thus worthwhile to note that; the Arbitrator is required to issue "Award" and not a "Ruling" at the end of arbitration of a substantive matter such as unfair termination and or breach of contract. *Section 88 (11) of the ELRA (supra)* provides:

> Within 30 days of the conclusion of Arbitration Proceedings, the Arbitrator shall issue an Award with reasons signed by the Arbitrator.

The same emphasis is given under *Rule 27 (1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007 [GN No. 67 of 2007]* which requires the Arbitrator to write and sign a concise

Award containing the decision within the prescribed time with reasons. The CMA can issue a Ruling only in respect of matters which are not substantive such as on condonation and determination of preliminary legal objections.

From the afore references, it must be seriously understood that there are peculiar features when it comes to composing Judgement or Ruling in labour matters. For instance, a person who applies for revision before the Labour Court on matters pertaining to condonation, the decision thereof cannot be a Judgement. It is a Ruling. However, a person who applies for revision of the decision affecting substance of the matter eg. on unfair termination and or breach of contract, the decision thereof is a Judgement and not Ruling.

Notably, as a general rule, a revision is not an alternative of the appeal. Revision is preferred if not challenging quality of the Judgement. In normal Courts, the High Court under the provisions of *section 79 of the Civil Procedure Code [Cap 33 Revised Edition 2019]* may exercise its revisional powers only in three circumstances, by calling for the record of any case which has been decided by any Court subordinate to it and in which no appeal lies, if the subordinate Court; *one*, have exercised jurisdiction not vested in it by law; *two*, have failed to exercise

jurisdiction so vested; or *three* have acted in the exercise of its jurisdiction illegally or with material irregularity.

But the grounds of revision in labour Court have inevitably been expanded to include all grounds of appeal. The grounds are expanded beyond the grounds of revision. *Section 94(1) (b) of the ELRA (supra)* empowers the Labour Court with jurisdiction to determine Revision application in respect of Arbitrators Award and decisions of the Essential Service Committee (not in place so far). *Section 91 (2) of the ELRA (supra)* provides for grounds of setting aside the Arbitration Award to include: *One*, misconduct on the part of the Arbitrator. *Two*, The Award was improperly procured. *Three*, the Award is unlawful, illogical or irrational.

Needless, the afore expansion of the grounds of revision in labour matters to the extent of been an appeal in disguise, the decision arising out of revision of the CMA on substantive matters has to be a Judgement and not Ruling because it is on substance of the matter.

In furtherance, and for the herein above considerations, the right response to the issue before the Court, in my view, is to support the third approach and demonstrate a proposition that; a decision on revision against the decision of CMA or Essential Service Committee on

matters which are not substantive such as condonation results into a Ruling and not a Judgement because it is a decision on matters which are not substantive. A decision labelled a Ruling is followed by a Drawn Order which is its operating part.

By analogy, I further support the first approach that the decision on Labour revision against the decision of the CMA on substance has to be a Judgement followed by a Decree which is its operating part. This takes the Court to the brief facts giving rise to the present application.

The Respondent was employed by the Applicant on 19th September, 2014 through an appointment letter which was tendered and admitted before CMA as exhibit A1. The Applicant's terms of service were on contractual basis for a duration of two years cycle renewable on expiration. The first contractual term of service commenced on 19th day of August, 2014 when his service was approved through an appointment letter and the term expired on the same season in 2016.

The Respondent was re-engaged by the Applicant on 16th day of September, 2016 for the second term following the expiration of his first term of service on 2016. The Respondent second term of service in the cycle came to an end on September 2018. That, the Respondent's third term of service was implied by the act of the Applicant accepting his

service after the expiration of his second term of service which came to an end in September 2018. The third term cycle of service commenced in September 2018 and was expected to come to an end in September 2020. The dispute arose when the Respondent was serving his third term of service in July 2019, whereby, he had served only 9 months in the two years cycle of his third term. The Respondent was terminated on the ground of retrenchment on 01/07/2019.

Aggrieved by the termination, the Respondent referred the matter to the CMA. After considering the evidence of the parties, the Arbitrator awarded the Respondent one-month salary in lieu of notice, leave of 15 days, certificate of service, unpaid wages for May, June and July, 2019 as well as six month's salaries for the remaining period of the contract.

Dissatisfied by the CMA's Award, the Applicant filed *Revision Application No. 387 of 2022* on the legal ground that; the trial Arbitrator erred by failing to evaluate properly the evidence adduced before him. As a result, the learned trial Arbitrator ended up misguiding himself and erroneously concluding that the procedure for terminating the Respondent's employment were not followed.

On the other hand, the Respondent was also dissatisfied by the CMA's Award. He filed *Revision Application No. 394 of 2022* on the following grounds:

i. That, the CMA failed to analyse the evidence tendered during the trial which demonstrated the right of the Respondent.

ii. That, the CMA erred in law and facts for holding that the Respondent is not entitled to the claimed compensations.

The Respondent further proposed the following issues to be determined by this Court:

(a) Whether the Respondent is entitled to payment of salary of the remaining 15 months from the date of termination

(b) Whether the Respondent's monthly remuneration was 1,620,000/= or 400,000/=

(c) Whether the Respondent was entitled to compensation and other terminal benefits.

The applications were jointly argued by way of written submissions. Before the Court, the Applicant was represented by Mr. Helmes Marcell Mutatina, Learned Counsel. Whereas, Mr. Angros Jeston Ntahondi, Learned Counsel appeared for the Respondent.

Arguing in support of the application and in opposition of the Respondent's application, Counsel Mutatina submitted that; the Arbitrator failed to evaluate properly the evidence by failing to take into consideration the whole contents of the Notice of Retrenchment. Instead, he relied in a single paragraph of the said notice to decide. Hence, the Arbitrator erroneously ruled that the procedures for retrenchment were not followed by the Applicant.

Counsel Mutatina submitted that; upon reading between the lines of the said notice, it is glaring clear that the Respondent was informed that he was provisionally selected for retrenchment and further informed through that notice that there will be a consultation to be held at the Second Master's Office on Tuesday 25th June 2019 at 8:00 up to 10:30 am. He added that; the aim of the said consultation was disclosed to the Respondent by listing the issues for discussion within the said notice.

According to Counsel Mutatina, the testimony of DW1 and exhibits A4 and R3 are proof that the consultation meeting was done on 25th June, 2019. Mr. Mutatina argued that; if the trial Arbitrator could have evaluated properly the evidence adduced by DW1, he could have noticed what was discussed in the meetings held on 14th and 21st June, 2019. Thus, the omission to evaluate evidence by the trial Arbitrator is

fatal in the light of the decision in the case of **Hussein Iddi & Another v. Republic** [1986] TLR 166.

Further, Counsel Mutatina argued that; under the provision of *Section 38 of the ELRA (supra)* read together with *Rule 24 of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 G.N. No. 42 of 2007 (to be referred as 'GN. No. 42/2007'),* it is crystal clear that provisional selection is allowed. Counsel Mutatina strongly reiterated that; if the Arbitrator could have evaluated properly the evidence adduced before him, he could have noticed that the Applicant followed all procedures for retrenchment.

Counsel Mutatina urged the Court on two things. *First*, to rely on the Applicant's averments stated at paragraph 5, 6, 7, 8, 15, 16, 17 and 18 of the affidavit. The Respondent through his counter affidavit did not dispute the facts stated therein. *Two*, to note that, it is established principle of the law that facts sworn to, if not controverted then they are deemed to be admitted. To support his assertion, he referred the Court to the case of **East African Cables (T) Limited v. Spencon Services Limited,** Misc. Application Case No. 61 of 2016, the High Court of Tanzania (Commercial Division) at Dar es Salaam, (unreported), p. 7, 1st paragraph, where the Court had this to say:

> ...When the fact sworn to or affirmed is not controverted then it is deemed to be admitted. When a person swears or makes a sworn declaration of a fact, the best way to challenge him/her is to swear a fact which tends to show that what he sworn to was false. Putting him to strict proof of the fact without giving your side of the story which you want to be believed, amounts to admission of the fact...

On the basis of the above decision Counsel Mutatina strongly submitted that; it was not proper for the trial Arbitrator to rule out that the Applicant did not comply with the procedure while even the Respondent via his counter affidavit admitted that the procedures were fully followed by the Applicant.

As regards to *Revision No. 394 of 2022* it was submitted by Counsel Mutatina that the Respondent wants this Court to believe that his monthly remuneration was at the tune of TZS 1,620, 000/- and not TZS 400,000/-. Thus, it is a settled law, he who wants the Court to give verdict in his favour on a certain right or liability depending on existence of certain facts must prove that the same do exist. Counsel Mutatina submitted that; during cross examination at the CMA, being probed by the Applicant's Advocate, the Respondent replied that he was paid his monthly remuneration via his bank account. Therefore, under the

provisions of *Sections 110 and 112 of the Evidence Act [Cap 6 Revised Edition 2019],* the Respondent was expected to come up with vivid and concrete proof such as his bank statement and or his salary slips to show the Court that his monthly remuneration was at the tune of TZS 1,620, 000/- and not TZS 400,000/-. In the upshot, Counsel Mutatina urged the Court to uphold the prayers contained in the *Labour Revision No. 387 of 2022* and dismiss the prayers contained in the *Labour Revision No. 394 of 2022.*

In response to the application and submissions in support of his application, contrary to the above proposed listed issues, the Respondent centered his submission on the following legal issues:

1. *Whether the Applicant Juma Masamaga Kureba and the Respondent St. Mathews Secondary School entered a contract of service on 1st day of January 2017 as contended by the Respondent.*
2. *Whether the Applicant's monthly remuneration was TZS 1,620,000/= or TZS. 400,000/=.*
3. *Whether the remaining time of service in the last contractual cycle (third cycle) was 15 months as was claimed by the Applicant or 6 months as decided by the Arbitrator.*

4. *Whether the Respondent had suffered any economic loss as a result of the decrease in the number of students as alleged.*

This Court will ignore the first and fourth issues and the submissions thereto *because were not pleaded in his affidavit.* As to the second issue, Counsel Ntahondi submitted that; there was no contract on 1st day of January 2017 due to the fact that the Respondent failed to prove the validity of the said contract which came into being in 2017 while the contract renewed on 16th September 2016 ending in September 2018 was in existence. He insisted that; the Respondent's monthly remuneration was TZS 1,620,000/= and not TZS 400,000/=. He pleaded the Court to ignore the agreement which is not genuine and declare that the Respondent's monthly remuneration was TZS 1,620,000/=.

As regards to the third issue, Counsel Ntahondi submitted that; there is no where one can be convinced that once upon a time the Applicant had a contract with the Respondent dated 1st day of January 2017. He demanded the Applicant to prove that in the course of service the Respondent was terminated from service and later on re- engaged.

Counsel Ntahondi added that; considering that there is no admitted contract proving that the contract of employment commenced

on 1st January 2017 which would amount to a contract as alleged by the Applicant, the real contract of employment was the one commenced in 2014. Thus, on the date of its termination, there were 15 months were remaining to complete the term. In the result, counsel Ntahondi urged the Court to grant the prayers contained in the *Labour Revision No. 394 of 2022* and dismiss the prayers contained in the *Labour Revision No. 387 of 2022.*

After considering the grounds for revision in both applications, parties' rival submissions, CMA and Court records, I find the Court is called upon to determine the following issues: *One; when did the employment contract between the parties commenced and what were the terms agreed thereon. Second; whether the Applicant followed procedures in retrenching the Respondent. Third; what relief(s) are the parties entitled.*

I will start with the first issue; *when did the employment contract between the parties commenced.* The record indicates that the employment relationship between the parties commenced from 19/08/2014 with a letter titled Employment for Teaching Post (exhibit A1). In the referred letter, the Respondent was informed *inter alia* that, he will work under a probation period of six months. Thereafter, the

Respondent was to sign a two years renewable contract. The record is silent as to; *whether after the expiry of the probation period the parties signed the two years contract or not.* At the CMA, both parties tendered employment contract which had different terms from the other and they were both admitted as evidence. The Applicant tendered the employment contract which commenced on 01/01/2017 and agreed to end on 31/12/2018 with the salary of TZS 400,000/= (exhibit R1). On the other hand, the Respondent tendered the employment contract which commenced on 17/09/2016 and agreed to end on 16/09/2018 with the salary of TZS 1,620,000/= (exhibit A2). In his decision, as to which contract prevailed, the Arbitrator stated as follows at page 10 paragraph 4 of the impugned Award:

> Nikihitimisha kwa kuamua hoja ya pili kwamba nini stahiki kwa pande zote mbili. Ninaona ingawa kulikuwa na sababu za msingi za Mlalamikiwa kupunguza Wafanyakazi lakini kwa kushindwa kufuata utaratibu, ninaamuru Mlalamikiwa kumlipa Mlalamikaji kipindi kilichobaki cha mkataba na kupitia kielelezo R1 mkataba wa mwisho wa Mlalamikaji inaonekana ulianza tarehe 01/01/2017 na uliisha tarehe 31/12/2018 na kwa vile aliendelea mpaka alipokuja kupokea barua ya kuachishwa kazi, yaani kielelezo A4 kilichotolewa na Mlalamikaji ambapo inaonekana Mlalamikaji alipokea barua ya kuachishwa kazi tarehe

> 17/07/2019 ni wazi kwamba mkataba wa Mlalamikaji ulihuishwa kwa mujibu wa kanuni ya 4(3) ya Tangazo la Serikali Namba 42 la mwaka 2007 kwamba ulitakiwa kuendelea mpaka tarehe 31/12/2019 ndio ufikie kikomo.

The above quotation can be loosely be translated as follows: I conclude by deciding the second point on the remedies for both parties. I find that although there were reasonable grounds for the Respondent to reduce the staff but on non-compliance to the procedure, I am ordering the Respondent to pay the Complainant the remaining period of the contract. And through exhibit R1, the last contract of the Complainant apparently commenced on 01/01/2017 and expired on 31/12/2018. And since he continued to work till he received the termination letter on 17/07/2019 (exhibit A4), it is clear that the contract of the Complainant was renewed in accordance with *Rule 4(3) of Government Notice No. 42 of 2007*. Thus, the contract was required to continue till 31/12/2019. The Arbitrator went further at page 11 paragraph 2 of the contested Award to decide as hereunder quoted:

> Ingawa Mlalamikaji alieleza mshahara wake ni TZS 1,620,000/= lakini katika ushahidi ameshindwa kuithibitishia Tume kama kweli alikuwa akilipwa mshahara huo, na upande wa Mlalamikiwa aliweza kuleta kithibitisho

cha mshahara wa Mlalamikaji kupitia mkataba wake wa ajira, yaani kielelezo R1.

The unofficial translation of the above quotation is that; although the Complainant stated his salary was TZS 1,620,000/= but in evidence he has failed to prove to the Commission whether he was indeed being paid such salary. However, the Respondent was able to bring proof of the Complainant's salary through the employment contract (exhibit R1).

Considering that there were two contracts of employment contradicting each other, it is my settled view that, the Arbitrator ought to have assigned reasons for his decision to rely on the employment contract tendered by the Applicant. An Award just like a Judgement is manifested by reasons. The reasons provide the basis of the view which the Arbitrator has adopted, of the balance which have been drawn. Reasons makes the Award legitimate. It is the reasons which provide an insight of the analysis, explaining to the leader why what is written has been written.

The reasons for an Award are subject of scrutiny on this revision stage, even on appeal to the Court of Appeal. Reasons whether arising out of a major premise, a minor premise, and or a conclusion, whether valid or fallacious, arbitrary, capricious, unsupported by law, or contrary

to precedent helps other Courts, arbitrators, magistrates, chairpersons, lawyers and judges to use and follow or distinguish the ruling or depart therefrom in subsequent proceedings. On the same footage, reasoning helps the public and law students to understand the basis of the decision and therefore enhance their critical understanding of legal studies. A poor reasoning in a judicial decision can retard growth of jurisprudence and produce law students who thinks mechanically.

Indeed, requirement of providing reasons in Award is in accordance with *Rule 27(3)(e) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, GN. No. 67 of 2007 (herein referred as GN. No. 67 of 2007)* which provides as follows:

> An Award shall contain the following-
>
> (e) reasons for the decision;

A judgement or Award worth of its meaning, in its analysis, apart from the brief facts of the case, issues in dispute, begins at the point of reason, continue along a path of logic and arrive at a fundamentally fair result.

The Applicant urged the Court to disregard the employment contract tendered by the Respondent (exhibit A2), because it is a fake document intending to mislead the Court. Counsel Mutatina maintained

that the first contractual term of service commenced after the expiration of a probation period of six months from 19th August, 2014 (as per exhibit A1 read together with exhibit R1) which is a second contractual term of service signed after the expiration of the first contractual term of service. I entirely agree with Counsel Mutatina's argument that the first term contract had to commence after the expiry of the probation period (exhibit A1). However, as stated above, the record is silent as to whether after the expiry of such period the contract of two years was signed or not.

The probation period expired on 18/02/2015. Hence the first contract is presumed to have commenced from 19/02/2015 and ended on 18/02/2017. The employment contract tendered by the Applicant (exhibit R1) which the Applicant urges this Court to rely on was signed on 01/01/2017 and agreed to end on 31/12/2018. On the basis of such analysis, it is crystal clear that the second contract was signed while the first contract still subsisted. No reason has been adduced why the said contract was signed before the end of the first contract. Worse indeed, the second contract do not stipulate if it was an addendum to the first contract.

The issue to be addressed by the Court is; which contract between the two should be relied upon. After thorough perusal of the records, this Court have the following reasons to rely on the contract tendered by the Respondent. *First*; in the CMA F1 which initiates disputes at the CMA, the Respondent calculated his terminal benefits in reliance to the salary mentioned in the contract tendered by himself. The CMA F1 was the first document served to the employer (Applicant herein). Therefore, the employer had an ample time to prepare for his evidence to counter the Respondents assertion. But he has no any other proof than tendering a counter employment contract.

Second, before the case commences at the CMA, parties are required to file their opening statements together with the documents to be relied upon during hearing. This is pursuant to the requirement provided under *Rule 24 of GN. No. 67 of 2007 (supra)*. For easy of reference, *Rule 24 (1) (supra)* provides:

> Each party to the dispute shall provide a concise opening statement containing the following-
> (a) a statement of the issue or issues in dispute;
> (b) a brief outline of the dispute; and
> (c) an indication of the outcome that party will seek at the conclusion of the arbitration.

(4) At the conclusion of the opening statements, the Arbitrator shall attempt to narrow down the issues in dispute as much as possible and explain to the parties the purpose of doing so is to eliminate the need for evidence in respect of factual disputes.

(5) Where an Arbitrator is required to determine a dispute in which no factual disputes occur, the parties may argue their respective cases or the basis of their agreed facts.

(6) Parties shall provide copies of each document intended to be used as evidence, for the Arbitrator and for each party to the dispute.

On the premises, prior to the hearing of the case, the Applicant had knowledge on the employment contract intended to be relied upon by the Respondent. As stated above, sufficient evidence ought to have been adduced to challenge the contract tendered by the Respondent.

Third, during tendering of exhibit A2 no objection was raised from the Applicant. Therefore, any further objection thereto is an afterthought. It is a trite law that once a document is admitted, it forms part of the records as it was decided in the case of **Japan International Cooperation Agency (JICA) v. Khaki Complex Limited** [2006] TLR 343. There is no any reason or objection to challenge the genuine of the contract tendered by the Respondent. In

the case of **Makenji Kumara v. Republic**, Criminal Appeal No. 30 of 2018 it was held that:

> At this juncture, we find it important to observe that, the evidence of PW4 and PW1 was not challenged by way of cross examination or independent evidence. There is thus no reason why such evidence should not be believed. For, as held in **Goodluck Kyando v. R** [2006] TLR 363, every witness is entitled to credence and must be believed unless there are cogent and good reasons for not believing him. We therefore take it that the evidence of PW1 and PW4 was credible and reliable.

Fourth, the Respondent's duty of proving about his contract was discharged upon tendering unobjectionably the first contract. If the Applicant herein was of view that the first contract was forged, the burden of proof shifted to him. Since the question of forgery is a criminal issue but raised in Civil trial, the Applicant had a duty to prove above the standard required in normal Civil cases but of-course not beyond reasonable doubt. That was the position in the case of **Ratila Gordhanbhai Patel v. Lalji Makanji** [1957] EA 314 as cited in the case of **Twazihirwa Abraham v. James Christian Basil (As Administrator of the Estate of the Late Christian Basil Kiria,**

deceased), Civil Appeal No. 229 of 2018, Court of Appeal of Tanzania at Dar es Salaam.

Fifth, the law requires the employer to avail the employee with the written contract which has the particulars provided under *Section 15 of the ELRA*. If any of the particulars referred under *Section 15(1) (supra)* changes, the alteration has to be made in consultation with the employee and the changes must be in writing. The relevant provision provides as follows:

> 15.-(1) Subject to the provisions of subsection (2) of section 19, an employer shall supply an employee, when the employee commences employment, with the following particulars in writing, namely-
> (a) name, age, permanent address and sex of the employee;
> (b) place of recruitment;
> (c) job description;
> (d) date of commencement;
> (e) form and duration of the contract;
> (f) place of work;
> (g) hours of work;
> (h) remuneration, the method of its calculation, and details of any benefits or payments in kind; and (i) any other prescribed matter.

(2) If all the particulars referred to in subsection (1) are stated in a written contract and the employer has supplied the employee with that contract, then the employer may not furnish the written statement referred to in section 14.

(3) If an employee does not understand the written particulars, the employer shall ensure that they are explained to the employee in a manner that the employee understands.

(4) *Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the written particulars to reflect the change and notify the employee of the change in writing.*

(5) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.

(6) If in any legal proceedings, an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in subsection (1) shall be on the employer. [Emphasis supplied]

Therefore, if the first contract commenced from 19/02/2015 and ended on 18/02/2017, reasons had to be adduced for change of terms of the contract as to why the second contract was signed before the end of the first contract. As stated above the record is silent as to what transpired thereto.

In the event, on the basis of the foregoing analysis, it is the findings of this Court that the contract tendered by the Respondent is the genuine one and has to be relied upon together with the terms therein. Thus, since the second contract commenced on 17/09/2016 and ended on 16/09/2018 in absence of any further contract, the third contract which is the subject matter of this dispute was renewed by default pursuant to the provision of *Rule 4(3) of GN. No. 42 of 2007*. As such, the third contract commenced on 17/09/2018 and had to end on 16/07/2020.

As per the termination letter (exhibit A4), the Respondent was terminated on 01/07/2019. Therefore, the remaining period of his contract is 15 months and his monthly salary was TZS 1,620,000/=.

Coming to the second issue; as the records speaks, the Respondent was terminated on the ground of retrenchment where its procedures for termination are provided under *Section 38 of the ELRA (supra)*. For easy of reference: *Section 38 (1) (supra)* provides:

> In any termination for operational requirements (retrenchment), the employer shall comply with the following principles, that is to say:
>
> a) *give notice of any intention to retrench* as soon as it is contemplated;

b) *disclose all relevant information* on the intended retrenchment for the purpose of proper consultation;

c) *consult prior to retrenchment* or redundancy on:

i. The *reasons for the intended retrenchment;*

ii. Any *measures to avoid or minimize the intended retrenchment;*

iii. The *method of selection of the employees* to be retrenched;

iv. The *timing of the retrenchments;* and

v. *Severance pay* in respect of the retrenchments. [Emphasis is mine]

The above stipulated procedures and principles are mandatory requirements and must be followed by any employer who decides to terminate his/her employees by way of retrenchment. The section is also *in pari materia* with *Rules 23 and 24 of GN. No. 42 of 2007*. The Applicant insisted that he followed the procedures in terminating the Respondent. The main contention in this application is; *whether the Respondent was properly consulted.* The purpose of consultation meeting as provided by the law is to enable both parties to reach agreement on certain terms as stipulated under *Rule 23(4) of GN No. 42 of 2007* which provides as follows:

> Rule 23 (4) the obligations placed on an employer are both procedural and substantive. The purpose

of the consultation required by *section 38 of the Act* is to permit the parties, in the form of a joint problem-solving exercise, to reach agreement on:

(a) the reasons for the intended retrenchment (i.e. the need to retrench);

(b) any measures to avoid or minimize the intended retrenchment such as transfer to other jobs, early retirement, voluntary retrenchment packages, lay off etc;

(c) criteria for selecting the employees for termination, such as last-in-first-out (LIFO), subject to the need to retain key jobs, experience or special skills, affirmative action and qualifications;

(d) the timing of the retrenchment;

(e) severance pay and other conditions on which termination took place; and

(f) steps to avoid the adverse effects of terminations such as time off to seek work.

Equally, the importance of consultation was expounded by this Court in the case of **Johnson Nyabange Waluse v. Epsom Limited,** Labour Revision No. 42 of 2021, Revision No. 42 of 2021, High Court Labour Division at Mwanza (unreported), p. 15 where it was stated:

> Before I take a side on whether consultation was conducted or not, I find appropriate to explain a bit about consultation in the retrenchment exercise. In brief, consultation is one among the important procedure that employers owe a duty to do it before making any decision to retrench as it is one of the rights of an employee. It is an important stage or process in retrenchment exercise as it gives chances between the two (employer and employee) to discuss on possible measure to eliminate or reduce chances of losing the job or being redundant and if it is necessary to do redundancy, who should be dismissed. If the employees belong to a certain trade union, the employer is required to discuss with them when a number of issues, the aim being to reduce the chances of redundancy. During the consultation, the employer is ought to exhaust all avenues before making the ultimate decision as to whether to make redundancy. There should be a genuine attempt and meaningful engagement on the constructive dialogue discussing chances to eliminate retrenchment...

Further, the Arbitrator found that the retrenchment procedures were not followed in the matter at hand. He was of the view that the notice of retrenchment (exhibit R2) is not a proper notice of retrenchment because the respondent was selected for retrenchment

exercise before consultation. He was of the firm view that exhibit R2 contravened the provision of *Section 38(1)(a), (b) of the ELRA (supra).* The Arbitrator's findings based on what is provided under paragraph 1 of exhibit R2 which provides as follows:

> We have performed a selection exercise and I regret to inform you that you have been provisionally selected for retrenchment. The retrenchment pool in which you have been placed for selection includes all of employees that receive gross salary of equal or more than Tshs. 400,000/= and performing the following role(s):-
> 1. Teacher
> 2. Science subjects

Section 38 of ELRA (supra), which was found by the Arbitrator to have been violated, require the employer to issue notice of the intended retrenchment and disclose all relevant information on the intended retrenchment. The quoted provision together with the rules governing labour matters, do not specifically state what should be stated in the notice of retrenchment. In this aspect, I find it pertinent for the Court to make reference to the International Labour Standards which specifically requires that the notice of retrenchment should include the reasons for the intended retrenchment, number and categories of employees likely to be affected by the exercise as well as the period of the intended exercise.

Article 14 (1) of the Termination of Employment Convention, 1982 (No. 158) which provides that:

> When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, he shall notify, in accordance with national law and practice, the competent authority thereof as early as possible, giving relevant information, including a written statement of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out.

In the instant matter, after going through the content of exhibit R2, it is my view that, the Respondent was notified to be one among the selected employees who are likely to be affected by the retrenchment exercise subject to consultation and further confirmation. He was not retrenched before consultation as found by the Arbitrator. The notice (exhibit R2) further informed him the aims of the intended meeting including for the measures to avoid or minimise the intended retrenchment as well as the available alternative to be considered.

The record shows that, even in the consultation meeting, the Respondent was offered with the alternative of salary reduction as a means to avoid the retrenchment exercise. As evidenced by exhibit R3,

the Respondent did not agree to the proposed option. On such circumstance, the Applicant had no any other option than to terminate the Respondent's employment.

Upon going through the records, I noted, the Respondent was issued with the retrenchment notice (exhibit A3) on 21/06/2019. Thereafter, the consultation meeting was held on 25/06/2019 (exhibit R3). Also, the consultation minutes shows that both parties agreed to terminate the contract by way of retrenchment and the Respondent signed the minutes thereto. The agreement was to the following effect which I hereunder quote the last part of the retrenchment consultation form (exhibit R3):

> **AGREEMENT REACHED/DISCUSSION OUTCOME**
>
> Baada ya majadiliano kati ya mfanyakazi na uongozi wa shule pande zote mbili zimekubaliana kwamba mkataba wa mfanyakazi utasitishwa.
>
> Nakubaliana pamoja na marekebisho yaliyofanyika.

It is my view that, if no agreement had been reached, the Respondent could have not signed the relevant form. At the CMA, the Respondent did not dispute that he signed the consultation form. The Arbitrator faulted the Applicant because the termination letter referred into the meetings held on 14th and 21st June, 2019 in which its minutes were not tendered before the CMA.

It is my further view, even if the alleged minutes were not tendered, it is undisputed fact that before retrenchment, the Respondent was consulted in accordance with the provision of *Rule 23(4) supra* and the parties reached into agreement as indicated herein above. Even the letter of response to termination letter (exhibit A5) indicates that the Respondent impliedly agreed to have been consulted as of his opinion in the intended retrenchment. Thus, it should be noted that, employment contracts are like any other contracts where parties are bound to its terms. This was the position in the case of **Hotel Sultan Palace Zanzibar v. Daniel Leizer and another**, Civ. Appl. No. 104 of 2004 (unreported) where it was held that:

> It is elementary that the employer and employee have to be guided by agreed terms governing employment. Otherwise, it would be a chaotic state of affair if employees or employers were left to freely do as they like regarding the employment in issue.

If parties reached into an agreement for retrenchment, the same must be honoured by both parties. I have also observed compliance by the parties of other procedures as stipulated under *Section 38 of the ELRA (supra)*. On such basis, it is my view that, in the present case, the Applicant followed the retrenchment procedures as required by the law.

Turning to the last issue on the parties' reliefs, at the CMA the Respondent prayed for the following reliefs; unpaid wages for May, June and July 2019, payment in lieu of annual leaves, remuneration for the remaining 15 months of the contract, severance pay and other terminal benefits. The Arbitrator awarded the Respondent one month salary in lieu of notice, leave of 15 days, certificate of service, unpaid wages for May, June and July 2019 as well as six month's salaries for the remaining period of the contract.

As regards the unpaid wages for May, June and July 2019, even in the consultation meeting, the Respondent pleaded the same to be paid out of his retrenchment package. To the contrary, the Applicant did neither dispute the same nor pay him as prayed. Therefore, as correctly held by the Arbitrator, the Respondent is entitled for the same save for the calculation of a salary of TZS 1,620,000/= as agreed in the employment contract. Also, this Court, find no justifiable reason to interfere the Award of other remedies save for the payment of six month's salaries awarded as compensation for breach of contract.

It is quite clear that the Applicant followed procedures in terminating the Respondent. Therefore, the Respondent is not entitled

to the Award of such compensation. As such, the compensation is hereby quashed and set aside.

In the end result, I find *Revision Application No. 394 of 2022* to have partly succeeded. In respect of *Revision Application No. 387 of 2022*, it is found that the retrenchment procedures were dully followed. Therefore, the Applicant is ordered to pay the Respondent the total sum of TZS 7,414,615.38/= being unpaid wages for the months of May, June and July 2019, one month salary *in lieu* of notice and 15 days leave. It is so ordered.

Y. J. MLYAMBINA

JUDGE

05/04/2023

Judgement pronounced and dated 5th day of April, 2023 in the presence of Learned Counsel Helmes Marcell Mutatina for the Applicant and the Respondent in person. Right of Appeal fully explained.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) Labour Division DIVISHENI YA MAHAKAMA YA KAZI

Y. J. MLYAMBINA

JUDGE

05/04/2023