IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO.442 OF 2022

(From the decision of the Commission for Mediation and Arbitration at Ilala in Labour Dispute No. REF: CMA/DSM/ILA/167/21, Makanyaga, A.A.: Arbitrator, Dated 11th November, 2022)

CHINA DASHENG BANK LIMITED.....APPLICANT

VERSUS

NUNU SAGHAF.....RESPONDENT

JUDGEMENT

06th June 12th July 2023

OPIYO, J

The applicant filed this application for this court to revise and set aside the award of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/ILA/167/21, delivered by Hon. Makanyaga A.A. (Arbitrator) dated 11th November, 2022.

Brief reflection on the historical background of the matter is that, the respondent was employed by the applicant on 17th May, 2018 as a Deputy Chief Executive Officer. Following the change of corporate organization

structure affecting her position in the organisation, the respondent filed a the labour dispute at CMA claiming for unfair termination. The matter was heard and the award was in favour of the respondent. The CMA found that the respondent was in fact terminated and her termination was unfair both substantively and procedurally. The applicant was ordered to pay the respondent 60 months salaries as compensation for unfair termination (TZS. 1,380,000,000/=), unpaid leave (TZS. 23,000,000/=), notice (TZS. 23,000,000/=) and severance allowance of TZS. 18,576,923/= which make the total of TZS. 1,444,567,923/=. Being aggrieved, the applicant prefered this application for revision.

The application was supported by the affidavit sworn by Frank Ntabaye, Principal Officer of the applicant having the following grounds: -

1. *The honourable arbitrator erred in law and facts in holding that the respondent was substantively and procedurally unfairly terminated.*
2. *The honourable arbitrator erred in law and facts in holding that there was retrenchment of employees and the respondent was unlawfully retrenched.*
3. *The honourable arbitrator erred in law and facts in holding that the respondent is entitled to compensation to the tune of Tanzanian shilings one billion four hundred forty four milion five hundred*

seventy six thousand nine hundred twenty three (TZS. 1,444,576,923/=) as the respondent was not unfairly terminated.

4. *The honourable arbitrator erred in law and fact in holding that the respondent is entitled to be paid Tanzanian shilings twenty three million (TZS. 23,000,000/=) as payment in lieu of notice of termination.*
5. *The honourable arbitrator erred in law and fact in holding that the respondent is entitled to be paid Tanzania shilings twenty three milion (TZS. 23,000,000/=) for unpaid leave without any proof from the respondent.*
6. *The award is illogical as the arbitrator failed to analyse the evidence and issues framed.*

The hearing of the application proceeded orally. Both parties were represented by Learned Advocates. Mr. Bernald Nkwabi, assisted by Ms. Elisabeth Majura appeared for the applicant whereas Mr. Frank Mwalongo, assisted by Mr. Juventus Katikiro were for the respondent.

In addressing the court in support of the application, Mr. Nkwabi grouped the grounds for revisions in two sets. Grounds 4.1, 4.2 and 4.6 (herein 1, 2 and 6) was submitted together as first set and grounds 4.3, 4.4 and 4.5 (herein 3, 4 and 5) as second set.

On the first set involving 1st, 2nd and 6th grounds, he submitted that the arbitrator erred in law and facts in holding that the respondent was unfairly terminated. He stated that the applicant had initiated structural changes of the organization whereby she notified the respondent of the plan. But, while she was still in initial stages of the intended structural changes, the respondent rushed to file a labour dispute before CMA claiming for unfair termination. He contended that, at trial the applicant had tendered exhibits CH1 and CH2, as documentary evidence showing compliance with preliminary procedures of the structural changes it intended. Exhibit CH1 was board resolution and CH2 was a letter from BOT acknowledging receipt of letter by the applicant on the structural adjustments and directives on steps to be followed in implementation. He argued that, the respondent also submitted email prints outs marked as NUZ A and NUZ B, but the arbitrator failed to analyze all that evidence before the commission in reaching the award.

That, it also failed to analyse different provisions of the law provided under section 38(1)(a)(b) of Employment and Labour Relations Act [CAP. 366 R.E. 2019] on the procedures to be adhered to by any employer who wishes to make some structural adjustments. The applicant had initiated

the process that was cut short by the respondent after rushing to the CMA for unfair termination and CMA erroneously determining that there was unfair termination both substantively and procedurally without any proof from respondent, he contends. To him, there was no termination of the respondent's employment contract by the applicant.

For the second set of grounds, these include grounds 3, 4 and 5 he submitted that no matter the circumstances the amount of 60 months' salary compensations awarded was unjustifiable. That, even if it was found that there was indeed termination as claimed by the respondent, the same would be substantively valid as there were valid reasons for initiating the process of structural changes. Thus, if at all, a valid reason for termination was there, leaving a chance only for procedural unfairness which usually attracts lesser compensation as was held in the case of **Felician Rutwaza Vs. World Vision, Tanzania Civil Appeal No. 213 of 2019, CAT at Bukoba in which the court** was of the opinion that all cases in which unfairness of the termination was on procedure only, less amount of compensation should be awarded.

He further submitted that, the amount that was awarded for unpaid leave was also unjustified as the respondent never adduced evidence to support the fact that she had unpaid leave. He added that, as well the award of Tshs. 23,000,000 as payment in lieu of termination was not justified as the respondent accepted to have received an email informing her that she will be paid salary in lieu of notice which she admitted to have received. All these, to him, shows lack of proper evaluation of evidence, because, if the commission would have evaluated evidence well, it could not have ordered payment of such amounts as no evidence supported the award. He then prayed for the court to revise and set aside the CMA award.

In opposition of the application, Mr. Mwalongo addressed the grounds in the same groupings adopted by the applicant and submitted that, it is true the records show that DW1 and DW2 (HR Manager and Acting CEO of the applicant) denied termination of the respondent if not for misinterpretations that ensured relating to the email communications between them as reflected at page 14 last but one paragraph of the award. However, in the same award, the arbitrator in analyzing the issue of termination found out that it was communicated to the respondent that from 1st June, 2021, the Bank would not have Deputy CEO, the position

that was held by the respondent. Also that she will be paid one month salary in lieu of notice. If there was no termination what was the payment in lieu of notice for, he wondered. He added that, in one of the emails the Board Chairman thanked the respondent for the 3 years she had worked with the bank and she was given a chance to talk to authorities to see if she would be employed as a heard of department. In his view, based on the above email communications, the arbitrator concluded that the respondent was unfairly terminated. He contended that the applicant are restrained to submit now that the respondent's termination was fairly while their testimony shows that they were not accepting the fact that the respondent's employment was terminated in the first place, he submits.

Mr. Mwalongo continued to submit that, upon determination that there was termination, it was on the applicant to prove that the termination was fair. Therefore, by failing to prove that the termination was substantively and procedurally fair contravenes section 37(2)(a)(b) and (c) of CAP. 366 R.E. 2019. He added that, the award at page 18 shows that CMA failed to understand the reason for termination of respondent, whether it was for costs, structural changes or performance as there was no procedure that was followed guiding retrenchment. He then emphasized that there was

respondent's termination that was both substantively and procedurally unfair.

On the second set of grounds, he submitted that rule 32(5) of the Labour Institutions (Mediation and Arbitrations Guidelines) Rules, G.N. No. 67 of 2007 gives a guide on remedies on occurrence of unfair termination. For their case prescribed minimum compensation is provided under Section 40(1)(c) of CAP. 366 R.E. 2019 and the maximum is guided by the circumstances of the matter. He supported his point by referring to cases of **Anna Mbakile and DED Geita**, High Court Labour Revision No. 113 of 2019, at Mwanza which compensation was raised from 15 months to 60 month and in case of **Isack Sultan Vs. North Mara Gold Mines Ltd,** Consolidated Labour Revision No. 16 and 17 of 2018, the CMA granted 48 months and this court raised it to 90 months.

He added that, rule 32(5)(b) of G.N. No. 67 of 2007 provides for the award based on the extent to which termination was unfair. He stated that the whole process of terminating the respondent took 4 hours as by then she was the acting managing Director of the applicant; she was asked to leave immediately and asked to apply for a job as a Head of Department. He

then submitted that as found in the case of **Anna Bakile** (supra) the respondent was caught in financial difficulties as a result of that. For him the compensation of 60 months awarded is appropriate and prayed for the court to confirm the award and consider the age of the respondent which was 51 years by the time of granting the award. He also stated that the leave pay and one month's salary awarded was not challenged at CMA and so he prayed for this court to uphold the award on that respect.

Mr. Mwalongo submitted further that the case of **Felician Rutwaza** (supra) Civil Appeal No. 213 of 2019 referred to is distinguishable because it was only unfair termination on unfair procedure only. He then prayed for the revision application to be dismissed with costs.

In rejoinder Mr. Majura reiterated what was submitted by Mr. Nkwabi in the submission in chief. He then submitted that, there was reason for termination which was structural changes, but the procedure was jeopardized by the respondent's action of filing a labour dispute at CMA.
He insisted that the case of **Felicians Rutwaza** (supra) which held that substantive unfairness attract more penalty than procedural unfairness and submitted that if at all there was termination in this case there was

substantive reason attracting lesser compensation to the respondent. He finalized by asking this court to revise and set aside the award with costs.

After painstakingly considering the submissions of rival parties for and against the application and perusing the records of the CMA, the Centre of dispute is whether the employment of the respondent was terminated in the first place and if so, whether it was fairly done both substantively and procedurally. In this matter the applicant is challenging the CMA award on the two main grounds, one is that the arbitrator erred in holding that the respondent's employment was terminated by the applicant while the applicant did not terminate respondent's employment contract. He puts blame on the respondent for misinterpreting the communication between her and company management on the process they were undertaking in relation to structural changes affecting her position as Deputy CEO for termination by retrenchment. The respondent argue that the aim of the emails accused of terminating the respondent's employment contract were merely informing her of the processes that were under way in the intended structural changes in the organisation initiated by the board. They were not intended to terminate her employment contract. That, the applicant had just initiated the process that was cut short by the

respondent after rushing to the CMA for unfair termination and CMA erroneously deciding that there was indeed unfair termination both substantively and procedurally without such proof from the respondent.

The finding by the CMA in holding that the respondent's employment was terminated by the respondent unfairly both substantively and procedurally was based on different email correspondences from the company management to the general team of employees and the respondent at some point which commission accepted as terminating the respondent's employment agreement. For ease reference the emails are reproduced here. The emails included the one from Nurdin Mwikoki who was the Head of Human Resource of 31/5/2021 directed to the team members with the following wordings:-

> "...
> *Subject: Change in organisation structure*
> *Dear team,*
> *please be informed that it was decided by the board of directors that there is a change in our organization structure, whereby the deputy CEO positions has become redundant, and do not exist with immediate effect.*

Those currently employed in those capacities, that is DCEO will be assigned other job, roles and duties, to be advised shortly.

The new structure comprises the CEO whose direct reportees will be heads of departments.

For those departments that were reporting to the former DCEO, Will now, during this transition temporary report to the acting CEO.
Kindly be informed accordingly
Nurdin"

Another email dated 01, June, 2021 was from Mr. Bao Dongqiang, the acting chairman of the board of Director with the following wordings

"... Dear Ms. Nunu
Hope this email finds you well.
I was instructed by the board to send you the following email.
Dear Ms. Nunu:

Based on the size of the bank as well as cost involved, the board of directors of the CDB have decided to change the current organization structure of the bank to the structure which has only Chief Executive Officer as the leader of the bank supported by a few Head of Departments.

As of today 1th June, 2021, the bank has no Deputy CEO and the board inform you with regrets that you will no longer be employed as

Deputy /CEO of this bank from today and the bank will pay you one month salary according to the employment contract.

The board of directors noted that three years ago in May 2018. You were hired by the bank which reported to the board by Mr Yu the former chairman of the board as head of business development, three years on, the bank's business development is far below the expectations of the board and shareholders. The board had also noticed that the bank salary costs occupied by the bank executive officers are too high compared to their performance.

The board of directors thanks you for your three years with the bank and suggest you to discuss with the new CEO Mr Qin who is waiting for the BOT's Vetting and the acting CEO Mr. Guydon who is now in charge of the operation of the bank about the possibility to be employed as one of the head of the department of the bank. The board will discuss whether to continue to hire you working for the bank based on their recommendations if you are willing to continue working for the bank.

Hope you well and best regards.

Mr. Bao Deongqiang
Acting Chairman of the board of directors
CHINA DASHENG BANK"

The other two emails were from the then newly appointed acting CEO, Mr. Guydon, one is dated 1/6/2021 at 9.11 am. It states as follows:-

Based on the board decision, there is changes on the organisation structure; based on the new structure the CEO will be reporting to the Board of Directors and Head of departments reporting to the CEO, as usual Head of Audit will continue to report to the Board Audit Risks and compliance Committee.

In the new structure there will be no Deputy CEO. Board had implemented this changes due to the size of the Bank as well as enhancing cost efficiency

All duties which were directed to Depute CEO will be directed to me, acting CEO

Will be advised by HR on the new structure as directed by the Board

I wish you all the best in performing Bank's duties for the benefit of CDB and shareholders
Kind Regards
Guydon Chihwelo
Ag CEO...

And the last email from the same person was sent on the same date at 9.26. It had the following words:-

"*...Due to Board Directives regarding the changes of organisation structure, please arrange a smooth hand over of your duties and duties of handed to you by staff who are on leave, (Sammy Lwendo and Hussein Hamisi) to me, Ag CEO*

Kind Regards

Guydon Chihwelo

Ag CEO..."

The reproduction of the above email messages calls upon this court to determine whether those email correspondences amounted to the termination of respondent's employment contract as claimed by the respondent and decided by the CMA. According to Rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 64 of 2007 the disputes about the fairness of an employee's termination of employment must be referred to the Commission within thirty days from the date of termination or the date that the employer made a final decision to terminate or uphold the decision to terminate. Examining the gist of the rule 10(1) above, the dispute on fairness of termination is only amenable upon there being final decision to termination or upholding the decision to terminate in case of appeal against the decision to terminate. The dispute that was referred to the CMA by the respondent was on fairness of her alleged termination. It is therefore important to examine if at all it falls within the parameters of the above provision of law. The respondent approached CMA alleging unfair termination referring to four email messages quoted above which were admitted as (exhibit NU2a and NU2b).

The CMA held that the respondent's employment was indeed terminated unfairly both substantively and procedurally. The applicants object that arguing on their first ground that the decision is wrong as the respondent was not terminated in the first place, had the CMA properly evaluated the evidence before it. Therefore, the issue for determination in the first set of grounds jointly argued (1st, 2nd, and 6th grounds) is whether the CMA was right in holding that the respondent was unfairly terminated both procedurally and substantively and whether it properly evaluated evidence in reaching such decision.

In the case where there is dispute as to whether the respondent was actually terminated or not like in the matter at hand examination of the termination means and when it occurred is of vital importance. In this matter, the respondent took her dispute at CMA alleging that she was terminated through above quoted emails. There is no single email she is identifying as amounting to termination letter; rather she infers termination from wordings from different emails. This calls for examination of the content of the said emails.

I had a chance to painstakingly and objectively going through them. Objective examination of the above email messages reveals that, all referred to the proposed structural changes the organisation was intending to embark on. None can be singled out as categorically notified the respondent of her termination. She has not singled any as well. This is because none seemed to have the effect of terminating employment contract of the employee in the organization as a result of the proposed structural adjustments, in my view. The first message was from Nurdin who was the HR for which the subject was on 'change of organization structure' dated 31 May 2021. This email was directed to the entire team informing them of the proposed changes. It went on stating that the position of the Deputy CEO's will be affected in the process, but it also categorically informed the team that, those who are holding those positions were to be assigned other job roles and duties as it was to be advised shortly. In my considered view, this connoted intention of re-categorisation of employees rather than retrenchment for the same reasons structural adjustments. The same reasons may validly lead to either retrenchment or re-categorisation depending on the outcome of actual implementation.

Retrenchment under rule 23(1) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007 mean termination of employment arising from the operational requirements of the business. And the operational requirement refers to requirement based on the economic, technological, structural or similar needs of the employer. From this, it is clear that the message from Nurdin did not at any rate refer to retrenchment as it talked of those affected in the process to be assigned other roles. The restructuring or operational requirement results to retrenchment only if it leads to removing an employee from employment. If there is retention of those affected in other roles, it results in re-categorisation. Therefore, this letter had no effect of termination as was argued by the respondent and agreed to by CMA.

Furthermore, even if it was indeed referring to termination by retrenchment, this email was not sufficient to terminate anyone's employment given the general terms it was constructed and directed. It was directed to the general team for information of the resolution by the board on restructuring. It is to be noted that, the position of the Deputy CEO was not held by the respondent alone, there were two Deputy CEO's in the organization at a time. The other one took a different approach from

the one taken by the respondent in reaction to the same message. What I perceive from the wording of this email is that, the organization intended to keep all those affected rather than retrench them but under different job positions. So for those who were to be affected, it is their positions which were becoming redundant not themselves as their usability was intended to be directed elsewhere in the organisation. For the respondent it is the position of the Deputy CEO which would become redundant not her services with the employer. This is not termination then as she perceived.

Not only that, but also ineffectiveness of the email as a termination notice comes from the fact that the maker/writer, Mr. Nurdin, was not a proper authority to terminate the respondent in the first place. According to exhibit Nu21, respondent's employment contract respondent was employed by the Board and thus the employment letter was signed by the Board Chairperson. It is a trite law that, it is only the person who has authority to hire has the capacity to fire. Therefore, any notice from the person who lacks such powers cannot be a valid termination notice to act on.

Moreover, in a closer look, it is also easy to note that, although the respondent referred to its content during trial and in her pleadings as

amounting to termination of her employment contract, it seems she also impliedly agreed that it was not because the email was received a day before the day she identified to be the date she was terminated. If it was the email she believed to have terminated her contract, she would have stated that her employment was terminated on the date of this email. That is on 30th May 2021 not 1st June 2021, a day after.

The other email was the one dated 1st June 2021 from the Acting Board chairman, Mr. Bao Dongqiang which was directed to the respondent as the one of the persons to be affected by the proposed changes. Viewing its content above, it informed her that she will no longer be employed as the Deputy CEO as per the new structure. Consequently, the same letter suggested that as the result of that the respondent should contact the acting CEO to see the possibility of being employed as one of the head of department of the bank, if she was still willing to work with the Bank. It also appreciated her service for the three years she had been working with the bank and promised for payment of one month salary in accordance to their employment contract. This email also in my view, had no effect of termination of respondent's employment rather than communicating the Board's resolution which was likely to affect respondent's position in the

organisation as one of the Deputy CEO's. I believe the same email was also sent to the other persons whose positions were likely to be affected by the structural adjustments like the respondent.

The respondent argued that, the fact that the chairman thanked her for working with the bank and promise to pay her one month salary was indeed terminating her employment with the bank as it gave her option of re-employment as the head of department. My considered view is that, her act of interpreting this message as termination letter amounted to unnecessary overreaction because the message was very clear as just notifying her of the would be the outcome of the resolution by the board on structural adjustment in her position as a Deputy CEO the position that was rendered redundant by the proposed new structure. If it was intended to terminate her, there was no need of referring her to the acting CEO for discussion over the possible employment in other position after the structural adjustments implementation. In my opinion, that reality, out of courtesy, necessitated the Board chairman's appreciation of the three years of respondents service with them, possibly because proposed re-categorisation was not going to leave her in the same position as the position was becoming redundant and also her retention depended on her

willingness to accept continuing working with the respondent in a new position. This is derived from the fact that it is the same email that suggested discussion to see the possibility of her changing roles to be head of department, the position that was to be retained by the new structure. The respondent opted not to take up the suggestion of discussing with the acting CEO as advised by the acting Board chairman for a possible new position after completion of the adjustment, instead she ran to CMA claiming unfair termination.

Objectively viewed, the misunderstandings of such nature, if any, as claimed by the respondent, are usually resolved through negotiations rather than premature litigations like the one at hand. It is only through consultations suggested by the acting Board Chairman in the impugned email which would have led to the desired conclusion on the respondent's fate with the company. Being informed of redundancy of the position is not tantamount to redundancy of employees' service with that employer. That is the reason most employment contracts give allowance for a possibility of working under a different capacity/position with the company if need be. This is equally true with the respondent's employment contract under part seven which provides that the respondent would be ready to carry out any

other duties as assigned by the Board and CEO. The respondent agreed to that term as well by signing the contract. I do not see the reason she was so much aggrieved by the information that she was ceasing to work with the bank as a Deputy CEO to the extent of refusing to venture the possibility of working with a bank as a heard of department as suggested by the acting board chairman. To me, this is the 'any other task as will be assigned' reflected in such phrases in employment contracts. Therefore, consultation was necessary before the respondent decided to quit upon receiving the emails without notice and refusing to turn back even upon several requests as was testified by DW1. He was not cross examined on that fact signifying acceptance on part of the respondent (see the holding in the case of **Shadrack Balinago v. fikiri Mohamed @ Hamza, TANROADS and Attorney General, civil appeal No 223/217 as referred in the case of Tegemeo S/o Mandindo v Zakaria s/o Chaula, PC Civil No 13/2021, HC at Mbeya at page 11)**

Which held that:-

> *As rightly observed by the learned judge in her judgement, the appellant did not cross-examine the first respondent on the above piece of evidence. We would, therefore, agree with the learned judge's inference that the appellant's failure to cross examine the*

first respondent amounted to acceptance of the truthfulness of the appellant's account."

It has to be noted that structural adjustment was something well accommodated under the law upon compliance with certain requirements depending on the nature of the business. For the applicant, it was upon approval by the BOT, which subsequently approved on 28/6/2021. If respondent's reaction to the emails informing her of the intended structural adjustments which happen to affect her position will be taken to amount to termination even before the necessary approvals are gotten like in this case, it will be tantamount to taking the right to structural adjustments from the employer through the other hand. It will render the right to structural adjustments of the employer's redundant. Imagine if whoever is likely to be affected by the changes is allowed to term the effect of what is well allowed under the law as unlawful termination, it means the employer will be denied to exercise such right.

Therefore, the only option that is available to whoever is likely to be affected in the exercise of right to structural adjustment by the employer if she/he is not willing to work with the same employer in a different capacity is to discuss the terms of her/his vacating instead of rushing to court

claiming termination resulting in frustrating the process prematurely. It is on record that by the time the emails were sent to her the approval by the BOT was yet to be sought. This fact was well known by the respondent as she noted in her testimony. So, for someone who knew the proposed structural adjustment was still not effective pending approval of the BOT belief that the emails terminated her employment was unfounded, in my view.

The last two emails also quoted above were from the acting CEO, Mr. Guydon Chihwalo. The gist of the two letters is seemingly the same with the first one, as it only informed the respondent of the changes on the intended organisation structure and the effect it would have on her position as the Deputy CEOs, save that they were from a different person.

These emails in addition informed the respondent to make arrangements for a smooth handover of her duties as one of the then Deputy CEO, since the role was made redundant by the proposed new structure. They had nothing relating to termination of the respondent's employment contract, in my view. Nothing even implies so. The respondent accuses them for asking her to arrange for smooth hand over of her tasks as amounting to telling

her she has been terminated. Again like the email from Nurdin, the first one in the quotation above, the person who communicated the message had no mandate to terminate the respondent's contract, only the Board had. The acting CEO was not yet validly in the office as his appointment was still awaiting validation by BOTs vetting. Also, the impugned email from him for hand over was not with immediate effect as it indicated no time limit contrary to what the respondent stated that the hand over was to be within four days. It just informed the Respondent to prepare for smooth handover of her duties in contemplation of implementation of the then proposed structural adjustments. To me, this email was in a mere thought for hand over upon successful restructuring. I bet that is the reason it had no time limit for the handover arrangements, just preparation for smooth handover. The respondent was also well aware that the new structure was yet to take effect as it could not take effect before BOTs approval. She clearly noted this in her testimony and it was also noted by her counsel in his submission. This was a sufficient notice to her that the emails could not be effective notices for her termination. If at all, she should have been able to identify a specific email with authoritative effect of terminating her employment contract instead of joining a number of

phrases from different emails from different people in different capacities in the organisation to insinuate her termination.

It is on record that by the time the emails were exchanged the new structure was yet to take effect. Therefore, even if one of the emails could have the implication of terminating applicant's employment contract as she insinuates, it stood to be ineffectual to the knowledge of the respondent as the BOT had not yet approved the proposed structure. The process was still at its infancy stage. It cannot be successfully challenged procedurally as it had hardly started at the time the respondent rushed to court. Implementation required cooperation of both sides.

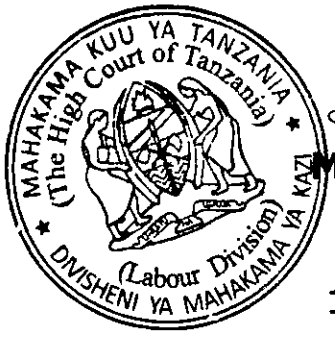
From the above finding, it is my considered view that there was no proof of termination of the respondent's employment contract. Such proof was in the shoulders of the respondent to prove as the one who alleged those facts. Section 60(2)(a) of the Labour Institutions Act [Cap. 300 R.E. 2019] provides that in any civil proceedings concerning a contravention of a labour law- the person who alleges that a right or protection conferred by any labour law has been contravened shall prove the facts or the conduct said to constitute the contravention unless the provisions of subsection

(I)(b) apply. Also, Section 110(1) and (2) of the Evidence Act [Cap.6) Under section 110 of the law of Evidence Act, Cap 6 RE 2019 one who alleges must prove.

It follows therefore that, the Arbitrator did not take the time to properly analyse the whole evidence presented before him as correctly argued by the applicants counsel in reaching the decision that there was indeed termination of respondent's employment contract. After detailed reproduction of the testimonies running through 15 pages of the award, he used two short paragraphs at page 15 stating from third paragraph to reach a decision that the respondent was terminated. He just picked up some phrases from different emails as was put to him by the respondent in her testimony like being promised to be paid one month salary, declaring position of deputy CEO redundant while the applicant was still holding the position and thanking the respondent for the three years she worked with a bank to conclude that they meant the employment was terminated. He di not say anything on the implication of other phrases in those emails and did not put effort even of showing how those phrase could be possibly interpreted as termination notices. This left much evidence unevaluated leading to the wrong decision that there was indeed termination of

respondent's contract. The whole arbitrators analysis of evidence in answering the first issue as to whether there was termination of the respondent is here by quoted

Having said so it is my view that the requirement of Rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, (supra) was not complied with as the matter was filed regarding fairness of an employee's termination without there being final decision to terminate or upholding the decision to terminate by the employer. In other words the matter was preferred prematurely. Since it was on unfair termination, it required there being final decision to terminate in the first place. For the reasons the CMA award is accordingly revised. It is quashed and set aside. Being a labour matter, I make no order as to costs.



M. P. OPIYO,

JUDGE

12/7/2023