IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., GALEBA, J.A., And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 25 OF 2018

MAGNUS K. LAUREAN .... APPELLANT

VERSUS

TANZANIA BREWERIES LIMITED .... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Labour Division at Dar es Salaam)

(Nyerere, J.)

dated the 22nd day of September, 2017
in
Revision No. 283 of 2016

....

JUDGMENT OF THE COURT

25th August & 12th October, 2021

NDIKA, J.A.:

The appellant, Magnus K. Laurean, contests the decision of the High Court of Tanzania, Labour Division at Dar es Salaam (Nyerere, J.) dated 22nd September, 2017 in Revision No. 283 of 2016. In that decision, the High Court partly allowed the revision by the respondent, Tanzania Breweries Limited, against the award of the Commission for Mediation and Arbitration ("the CMA") dated 7th December, 2015 which had held that the appellant's termination from employment was substantively and procedurally unfair. In essence, the present appeal assails the High Court's finding that the termination was substantively fair but procedurally unfair,

an outcome that led to a consequential diminution of the reliefs the CMA had awarded the appellant.

It is necessary to set out the essential facts of the case at the beginning. The appellant was employed by the respondent on 20th August, 2002 as a Pump House Operator. He rose through the ranks and became a Logistics Officer with effect from 4th May, 2007. On 2nd May, 2012, he was notified by the respondent vide a letter dated 27th April, 2012 that his employment had been terminated with effect from 24th April, 2012 for the offence of negligence in his performance of work following disciplinary proceedings held on 24th April, 2012.

The said proceedings arose following the stealing of 687 bags of sugar equivalent to 34.3 tons worth TZS. 65,003,940.00 that occurred in the night of 10th March, 2012 or early morning on 11th March, 2012 at the respondent's warehouse at Kipawa, Dar es Salaam ("the warehouse"). Of the stolen sugar, 12.9 tons was recovered, implying that the loss suffered by the respondent from the stealing was confirmed to be TZS. 40,497,360.00. The stealing was reported to the police who mounted their own investigations into the matter.

Meanwhile, the respondent received an investigative report on the sugar storage warehouse dated 4th April, 2012 (Exhibit TBL-1) from Mark

Hart (DW2), an official from KK Security, a security company contracted by the respondent to provide round the clock security services at the warehouse. The report included a recommendation that the appellant and Mr. Ambakisye A. Gambi, then the respondent's Issuing and Receiving Officer and the appellant's subordinate officer, be suspended with immediate effect and disciplinary action be taken against them. The basis of the recommendation was that both employees were implicated in negligence and collusion in the stealing of the sugar. As regards negligence, DW2 reported that on 25th February, 2012 one of three locking devices was removed from the warehouse without authority and that the security management was not informed of the action. It was claimed in the report that there was no replacement of the lock from the time the faulty lock was removed until the time of the reported stealing. It was further reported that the appellant and the said Mr. Gambi claimed that a new lock was fixed but at the scene of the crime only two locks were found instead of three locks. Furthermore, it was reported that the defective lock was presented to Mul-T-Loc distributor, a supplier of high security products and access control solutions, for inspection and that a specialist established that the lock had been tampered with. In fact, it was claimed that all three locks had been tampered with at an earlier stage in preparation for the stealing.

It was also claimed in the report that a serious malpractice was detected involving the bypassing of the alarm system at the warehouse. In addition, it was alleged that there was irregular handling of stores evidenced by a blatant disregard of the basic laid down stores operating procedures.

Acting on the report, the respondent suspended the appellant from work and later subjected him to disciplinary proceedings as hinted earlier.

On the part of the appellant, it was his case that on Saturday 25th February, 2012 he carried out a routine monthly stocktaking at the warehouse accompanied by Mr. Gambi, a Stock Verifier Irene Nguruwe and one KK Security official. According to the applicable protocol at the material time, the warehouse had to be securely locked by using three Mul-T-Loc locking devices two of which were controlled by the respondent and the other one was under the care and control of KK Security. At the end of the stocktaking in the evening, it was noted that one of the two locking devices under the respondent's control was faulty. In response, in line with his authority he took the faulty locking device to the head office with the view to replacing it. He reported the matter to the Office Administrator, one Eveline Msuya, who availed him a replacement, and that his immediate supervisor, DW1 Julius Kawacha, was kept abreast of the matter.

Meanwhile the warehouse was securely locked by the two remaining devices, one under the control of the respondent and the other under KK Security's care and control. On 27th February, 2012 the replacement lock was handed over to Mr. Gambi, the custodian of the warehouse, who stated in his statement, at pages 37 and 38 of the record of appeal, that he fixed the new lock on the same day he received it.

The appellant was insistent that since before the replacement lock was fixed the warehouse was securely locked by the two remaining devices, one under the control of the respondent and the other under KK Security's care and control, stealing was impossible without the keyholders from the respondent and KK Security conspiring to do so. It was also the appellant's case that DW2's report was unauthentic and implausible, having been made by an official of KK Security which was also blameworthy for the stealing.

In its award, the CMA found it unproven that the appellant breached any rule or standard regulating conduct relating to his employment in terms of Rule 12 of the Employment and Labour Relations (Code of Good Practice) Rules, 2007, Government Notice No. 42 of 2007 ("the Rules"). Furthermore, the CMA's arbitrator found that the investigative report made by DW2 was unreliable on three grounds: first, it was noticeably

unauthentic because it was not made on any official headed paper and that it lacked the signature of its maker. Secondly, it was implausible because it was not made by an independent investigator but an official from KK Security who had an apparent interest to serve. Thirdly, that the claim that the locking devices had been tampered with was hearsay. Such a claim could only be made by specialists from Mul-T-Loc offices, none of whom was called at the hearing to testify for the respondent.

As regards the claim that the appellant was guilty of gross negligence, the arbitrator held that since it was established in the evidence that the said Mr. Gambi was the custodian of the keys to the two locking devices under the control of the respondent, it was the said Mr. Gambi, not the appellant, who ought to have known whether the devices had been tampered with or not. That the appellant properly handled the matter after the discovery of the faulty locking device by seeking and obtaining a replacement which was handed over to the said Mr. Gambi who was responsible for locking the warehouse. Moreover, there was no proof of irregular handling of stores by the appellant nor was there evidence that he had a hand in the bypassing of the alarm system at the warehouse.

As to the process by which the respondent terminated the appellant's employment, the arbitrator found that it was unfair on the ground that he

was not afforded reasonable time to prepare for the hearing after he was served with the charges against him. It was in evidence that while he was served with charges and notice of the hearing on 4th April, 2012, he was required to submit his reply by 17:00 hours on the same day. This was found to be a violation of Rule 13 (3) of the Rules stipulating as follows:

> *"The employee shall be entitled to a reasonable time to prepare for the hearing and to be assisted in the hearing by a trade union representative or fellow employee. What constitutes a reasonable time shall depend on the circumstances and the complexity of the case,* ***but it shall not normally be less than 48 hours.****"* [Emphasis added]

In conclusion, the arbitrator held the impugned termination unfair, both substantively and procedurally. The respondent was thus ordered to reinstate the appellant without loss of remuneration for the period the appellant was absent from work due to the unfair termination. The said remuneration was calculated to be TZS. 58,394,000.00 as at the time the award was made.

On revision by the respondent, the High Court (Nyerere, J.) held, at page 313 of the record of appeal, that:

> *"It is apparent in the present case that the respondent [the appellant herein] failed to exercise the degree of care which a reasonable man/person or ordinary prudence would exercise by failure to replace the malfunctioning padlock in time and caused his employer/applicant [the respondent herein] to suffer irreparable loss. The argument by the respondent's counsel that the general principle of the law of negligence arises where there is duty of care and a person breached that duty and as a result the other person suffers loss or some kind of damage applied here because there is clear evidence on record that the respondent was [the] responsible person for making sure [that] the malfunctioning padlock was replaced on time but he failed to discharge the responsibility."*

The learned Judge also took into account what was contained in "Exhibit A-3" that the appellant admitted to have asked a subordinate to remove the faulty locking device and that he did not cross-check if the said device was replaced. In the premises, she held that the termination was substantively fair thereby vacating the CMA's finding to the contrary. On the process employed for the termination, she upheld the arbitrator's finding that the termination was procedurally unfair for the breach of Rule 13 (3) of the Rules.

Coming to reliefs, the learned Judge, at page 319 of the record of appeal, vacated the arbitrator's award to the appellant of reinstatement without loss of remuneration because reinstatement had not been prayed for in the CMA Form No. 1. Instead, she ordered the respondent to pay the appellant 12 months' salaries as compensation under section 40 (1) (c) of the Employment and Labour Relations Act, Cap. 366 R.E. 2019 ("the ELRA"). The respondent was further ordered to avail the appellant with a certificate of service and other terminal benefits, that is, annual leave pay, notice pay due and repatriation allowance.

In this appeal, challenging the above decision of the High Court, the appellant has cited seven grounds of grievance as follows:

1. *That the learned Judge erred in law in holding that there was clear evidence on record that the appellant was the responsible person for making sure that the malfunctioning padlock was replaced on time but he failed to discharge such responsibility.*
2. *That the learned Judge erred in law and fact in holding that the appellant himself had admitted to have committed the offence charged during the disciplinary hearing, hence not entitled to the fruits of Hon. Chuwa's arbitral award dated 7/12/2015.*
3. *That the learned Judge grossly erred in law by failing to make a finding that the appellant was charged with a distinct offence and terminated with another offence.*

4. *That the learned Judge erred in law in failing to address on the authenticity/admissibility of Exh. TBL-1 (investigation report) which was prepared and sent by DW2 through email and which was a subject of the appellant's charges and his subsequent disciplinary hearing.*
5. *That the learned Judge erred in law to allow the introduction of exhibits which were not part of the Commission for Mediation and Arbitration proceedings and wrongly held that misconduct of negligence was proved.*
6. *That the learned Judge erred in law in disregarding or ignoring the appellant's submissions in its decision.*
7. *That the learned Judge erred in law and in fact in holding that the Honourable Arbitrator erred in granting reinstatement without considering the [appellant's] prayers in his CMA Form No. 1.*

At the hearing of the appeal before us, the appellant was advocated for by Mr. Elisaria Jastiel Mosha, learned counsel, while the respondent had the services of Mr. Rahim Mbwambo, also learned counsel. In their respective oral arguments, the learned counsel highlighted their written submissions for or against the appeal along with the list of authorities filed.

We have examined the record of appeal and considered the written submissions for and against the appeal. In determining the appeal, we propose to begin with the fourth and fifth grounds sequentially. Next, we will deal with the first, second and sixth grounds conjointly and then

consider the third ground. Finally, we will round off with the seventh ground.

As indicated earlier, the fourth ground assails the authenticity and reliability of the investigative report (Exhibit TBL-1) which formed the basis of the disciplinary proceedings against the appellant. We hinted earlier that the arbitrator discounted the report for being not only unauthentic but also implausible as it was not made by an independent investigator. The report was found to be made upon hearsay so far as it claimed that the locking devices at the scene were tampered with.

In his lengthy submission on the ground under consideration, Mr. Mosha essentially faulted the learned Judge for not determining the admissibility, authenticity and reliability of the report in terms of section 18 of the Electronic Transactions Act, 2015 (Act No. 13 of 2015). We understood him to be urging us to uphold the arbitrator's position that the report was unauthentic, implausible and unreliable. For the respondent, Mr. Mbwambo's argument was threefold: one, that the report was not the basis for formulation of the charges and the subsequent disciplinary proceedings against the appellant. Two, that the learned Judge did not consider the report and determine its propriety and cogency. Three, that besides the

report there was other cogent evidence on record establishing the offence of negligence against the appellant.

At the outset, we wish to express our agreement with both learned counsel that nowhere in her judgment did the learned Judge consider and determine the authenticity and reliability of the investigative report. This implies that the arbitrator's position discounting the report was not vacated. With respect, however, we do not agree with Mr. Mbwambo's contention that the report was not the basis for formulation of the charges and the subsequent disciplinary proceedings against the appellant. The evidence is so plain that following the issue of the report on 4th April, 2012, the same day the charges were formulated against the appellant mirroring the essence of the allegations against him as documented in the report. Having said that, now we deal with the admissibility, authenticity and reliability of the report.

The appellant's claim that the report, being an email as asserted by DW2, could only be admissible if it met the requirement of section 18 of the Electronic Transactions Act, 2015 is clearly an afterthought. It was never raised before the CMA when the document was tendered in evidence for the arbitrator to determine if the document complied with the rules of authentication under the said section. Nor was it brought to the attention

of the High Court. Since the appellant did not object to its admissibility at the time it was tendered, as shown at page 112 of the record of appeal, we find no basis to entertain this belated grievance.

As regards "authenticity of the report", it was contended that the report was unauthentic because it was not made on official headed paper, that it lacked the signature of its maker and that it lacked the official stamp of KK Security on whose behalf DW2 submitted the report to the respondent. We think that this contention is clearly misconceived. Since the maker of the report and the person for whom it was intended did not disown it, the appellant's challenge against its authenticity is inconsequential. It is significant that when DW2 was cross-examined on this aspect, he maintained that the report was genuine and that he sent it to the respondent by email.

On the contention that the report was implausible because it was not made by an independent fact-finder, we would, at first, express our understanding of the appellant's fears that DW2, being an official of KK Security in charge of his company's operations at the respondent's facilities, might have had an apparent conflict of interest in the matter. However, in our view DW2 allayed all the fears in cross-examination, shown at page 121 of the record of appeal, as he testified that he made the report on

behalf of KK Security in the normal course of business as the contract for services between his company and the respondent required the company to conduct investigation for its client and provide advice when required to do so. It is within reason to expect KK Security to explain to its client as to how the stealing occurred despite the use of high security locking devices and an alarm system. At any rate, although two of its officials had been arrested and investigated for the stealing along with five other persons, KK Security was itself not brought to book.

The final contention that the report was based on hearsay is equally of no moment. For the report apart from detailing the information received from a Mul-T-Loc specialist that the two locking devices found at the scene and later presented for examination were completely modified, it states that "the locks easily appear to have been tampered with." It means the alleged modification was visible upon examination of the locks. That said, the fourth ground of appeal lacks merit.

We now deal with the fifth ground. It faults the learned Judge for allowing the introduction of exhibits which were not part of the CMA's proceedings and that she consequently, based on such objectionable documentary exhibits, held wrongly that misconduct of negligence was proved.

It was Mr. Mosha's submission on the fifth ground that the learned Judge erroneously took into account what was contained in "Exhibit A-3" that the appellant admitted to have asked a subordinate to remove the faulty locking device and that he did not cross-check if the said device was replaced. He claimed that since the said exhibit was neither tendered nor received in the evidence before the CMA it should not have been relied upon by the learned Judge in determining the revision before her. To bolster his submission he cited the case of **AAR Insurance (T) Ltd. v. Beatus Kisusi**, Civil Appeal No. 67 of 2015 (unreported) for the proposition that it is the court, not the parties, which will have to apply the law governing the admissibility of exhibits.

The complaint at hand need not detain us. It was fully answered by Mr. Mbwambo that the learned Judge wrongly cited in her judgment Exhibit A-3 as the source of the proof that the appellant admitted to have asked a subordinate to remove the faulty locking device and that he did not cross-check if the said device was replaced. The correct source of that evidence, according to Mr. Mbwambo, is Exhibit TBL-4, which represents the minutes of the disciplinary hearing against the appellant duly signed by Chairperson of the Disciplinary Committee and the appellant. Having looked at said exhibit, shown at pages 84 and 85 of the record of appeal, we endorse Mr.

Mbwambo's submission. The learned Judge appears to have innocuously referred to Exhibit TBL-4 as Exhibit A-3 but that was far cry from introducing a new exhibit into the evidence as alleged by the appellant. The learned Judge rightly cited a portion of that exhibit, at page 84 of the record, showing the "summary of evidence" at the disciplinary hearing thus:

> *"The employee admitted at the hearing that he did not verify to (sic) the warehouse if the removed padiock was replaced, even on the day of incidence the new padlock was not seen."*

In the premises, we find no fault in the approach and reasoning taken by the learned Judge. We thus dismiss the fifth ground of appeal.

Next, we deal with the first, second and sixth grounds of appeal whose common thread is the question whether the alleged negligence was established against the appellant.

Submitting for the appellant, Mr. Mosha contended that there was no proof that the appellant was responsible for ensuring that the malfunctioning locking device was replaced in time and that he failed to do so. He added that even after the faulty lock was removed and before a replacement was fixed, the warehouse remained securely locked by the

two remaining locks, one under the control of the respondent and the other under KK Security's control and that stealing was impossible without the keyholders from the respondent and KK Security conspiring to do so. Furthermore, he argued that the appellant had a positive performance appraisal two weeks after the stealing but the learned Judge ignored the appraisal. Finally, the learned counsel was resolute that the learned Judge erroneously acted on Exhibit A-3 as proof that the appellant admitted to have neglected cross-checking if the defective lock was replaced or not. He contended that the said Exhibit A-3 was non-existent.

Mr. Mbwambo, on the other hand, disagreed with his learned friend. He contended that negligence was sufficiently established by the appellant's own admission at the disciplinary hearing as shown by Exhibit TBL-4. He argued further that the appellant's statement of defence dated 4th April, 2012 (Exhibit TBL-2) at pages 42 to 46 of the record of appeal contains further incriminating evidence. Moreover, he claimed that the appellant owned up his negligent conduct in his testimony before the CMA as shown at pages 143, 144, 149 and 150 of the record of appeal.

It is undisputed that according to the applicable security protocol at the material time, the warehouse in dispute had to be securely locked by using three Mul-T-Loc locking devices two of which were controlled by the

respondent's officials and the other one was under the care and control of KK Security's staff. Both the appellant and DW2 stated, in essence, that the protocol aimed at ensuring complete security system at the warehouse. It is also without dispute that the appellant was the supervisor of the warehouse in issue, a fact which he also admitted in cross-examination at pages 143 and 144 of the record of appeal. It was also common ground that the appellant removed the allegedly faulty locking device on 25th February, 2012 with the view to replacing it. What was hotly contested was whether the appellant had authority to do so and whether a replacement was fixed on 27th February, 2012.

We noted earlier that the appellant was recorded at the disciplinary hearing, as shown by Exhibit TBL-4, to have admitted that he did not double-check whether a replacement was fixed and also conceded that the alleged replacement was not found at the scene after the stealing had occurred. DW2's testimony and the investigative report (Exhibit TBL-1) show that no replacement lock was found at the scene after the stealing. We recall that the appellant claimed to have kept his immediate supervisor, DW1, abreast of the matter but we wonder why DW1 was never cross-examined on that aspect. In fact, DW1 gave scathing evidence against the appellant, blaming him for a negligent act that led to the stealing from the

warehouse. The appellant cited the statement of his assistant, Mr. Gambi, at pages 37 and 38 of the record of appeal, as proof that a new lock was fixed on 27th February, 2012. We have seen that statement but Mr. Gambi was not called to testify on the matter. Our view of the matter is, therefore, that the appellant acted on his own, that he did not report the matter to his immediate supervisor, that the removal of the lock was unauthorized and that no replacement locking device was fixed.

We recall that the appellant contended that even in the absence of the replacement lock the warehouse was securely locked by the two remaining devices, one under the control of the respondent and the other under KK Security's care and control, and, therefore, stealing would have been impossible without the keyholders from the respondent and KK Security contriving to do so. That might have been so. However, we think that the removal of the lock without authorization was a serious breach of the security protocol and that it undermined the level of security for the warehouse. It gives credence to the claim in the investigative report that all the three locks were tampered with at an earlier stage in preparation for the stealing. Accordingly, we find no merit in the first, second and sixth grounds of appeal.

It is contended in the third ground of grievance that the appellant was charged with one offence but his termination was wrongly founded upon another offence.

In his submission on the above ground, Mr. Mosha referred us to Exhibit TBL-2, at pages 71 and 72 of the record of appeal, which he called "Memo/Charge." He claimed that the said document charged the appellant with *negligence*, on the first count, and *collusion to commit theft*, on the second count. However, when the appellant was called for the disciplinary hearing, he was served with "notice of hearing" (also marked as Exhibit TBL-4), at pages 80 to 83 of the record of appeal, for the charge of *negligence*, on the first count, and *causing financial loss to the employer amounting to TZS. 65,003,940.00*, on the second count. He submitted that apart from the mismatch between the two documents, the letter of termination (Exhibit TBL-5), at page 86 of the record of appeal, only cites *negligence* as the offence the appellant was found to have committed. None of the offences of *collusion to commit theft* and *causing financial loss to the employer amounting to TZS. 65,003,940.00* was mentioned. The learned counsel contended that the offence of *causing financial loss to the employer amounting to TZS. 65,003,940.00* was belatedly and wrongly introduced as it was not part of the original charge.

For the respondent, Mr. Mbwambo countered that Exhibit TBL-2 was not a charge but a letter requiring the appellant to give a statement in defence regarding the alleged sugar theft at the warehouse. After his statement was received, charges preferred against him were presented in Exhibit TBL-4, which also constituted "notice of hearing" for the disciplinary proceedings. Referring to the letter of termination (Exhibit TBL-5), Mr. Mbwambo submitted that there was nothing disquieting as the appellant's termination was stated to be based on the offence of negligence of which he was convicted after a disciplinary hearing.

Having examined the exhibits referred to by the learned counsel, we are in agreement with Mr. Mbwambo that the charges against the appellant were preferred vide Exhibit TBL-4, not Exhibit TBL-3. The charges concerned *negligence*, on the first count, and *causing financial loss to the employer amounting to TZS. 65,003,940.00*, on the second count. The letter of termination (Exhibit TBL-5) clearly indicates, at page 86 of the record of appeal, that the appellant was convicted of the charged offence of negligence. There was no mention of the outcome on the other count but that omission, in our view, is inconsequential. For clarity, we extract the relevant part of the said letter thus:

"After analyzing the charges and evidence provided by the complainant, the Disciplinary Committee in consequence decided and directed that you be terminated from service with effect from the date of the hearing for contravening **Item 3 of the Schedule of Serious Offences listed in the Employment and Labour Relations (Code of Good Practice) Rules, 2007 (G.N. No. 42 of 2007 and Clause 11(iv) of the Tanzania Breweries Limited Managing Conduct and Relationships at Work Place (Code of Good Practice) that the offences (sic) of negligence in performing levelled against you.**"[Emphasis added]

It should be noted that Item 3 of Serious Offences in the Schedule mentioned above constituting serious misconduct leading to termination of an employee is stated as *"habitual, substantial or wilful negligence in the performance of work."* The same misconduct is pigeon-holed under Rule 12 (3) (d) as *gross negligence*. In the premises, we hold that the appellant was convicted of negligence, which was the offence he faced on the first count. His complaint in the third ground of appeal is, therefore, without any substance. We dismiss it.

Finally, we deal with the seventh ground which assails the learned Judge's decision to set aside the arbitrator's award to the appellant for reinstatement without loss of remuneration on the ground that it was not pleaded in the CMA Form No. 1.

We think it would be helpful to flesh out the learned Judge's reasoning for her decision, as shown at page 319 of the record of appeal:

> "... ***I find that the arbitrator erred in granting reinstatement without [considering] the respondent's prayers in his CMA Form No. 1.*** *Therefore, the award of reinstatement without loss of remuneration is hereby quashed and set aside. However, following the finding of this court that the respondent's termination was* ***substantively fair but procedurally unfair this court is hereby ordering the applicant to pay the respondent compensation of 12 months' salaries under section 40 (1) (c) of the ELRA, and also to avail him with certificate of service.*** *In addition, the respondent is entitled to claim of terminal benefits such as leave, notice and repatriation allowance if he was not paid."* [Emphasis added]

It is manifest from the above passage that the learned Judge vacated the CMA's award of reinstatement without loss of remuneration on two grounds: one, that the reinstatement was not prayed for; and two, that the termination having been adjudged substantively fair but only procedurally unfair, reinstatement was undeserved and thus the appellant was entitled

to reduced compensation, which the learned Judge set at 12 months' salaries in terms of section 40 (1) (c) of the ELRA.

To be sure, the CMA Form No. 1 referred to above is the referral form previously prescribed by the Employment and Labour Relations (Forms) Rules, 2007, G.N. 65 of 2007 under section 86 (1) of the ELRA for instituting a dispute before the CMA. Currently, the form is prescribed by the Employment and Labour Relations (General) Regulations, 2017, G.N. 45 of 2017. In the instant case, it is without dispute that the appellant prayed in his referral form, as shown at pages 9 and 10 of the record of appeal, for the following reliefs:

> *"1. Compensation under s. 40 (1) (c) of the ELRA equivalent to two years' salaries.*
>
> *2. Compensation under s. 40 (2) of the ELRA for unpaid salaries and other benefits from the date of termination to payment.*
>
> *3. Payment of TShs. 50,000,000.00 as damages for injury of my reputation, character and carrier (sic).*
>
> *4. Compensation under s. 40 (2) of the ELRA of TShs. 10,000,000.00 as legal fees to my advocate.*
>
> *5. A clean certificate of service under s. 44 (2) of the ELRA.*
>
> *6. Repatriation costs of 3,000 kgs (sic) for Dar es Salaam to Bukoba at TShs. 6,000,000.00.*

N.B. Reinstatement would be cumbersome because of intolerable behaviour shown the company's personnel."

While the appellant had acknowledged in the referral form that his reinstatement would be cumbersome and, on that reason, he left it out in his prayers, he changed his tack in his opening statement before the arbitrator, shown at pages 19 to 24, by praying for it along with new or enhanced claims for subsistence allowance and reparation for wrongful termination and defamation in the sum of TZS. 100,000,000.00.

In his submission, Mr. Mosha cited the decision of **Frederick J. Chacha v. Stemo Security Co. Ltd.,** Labour Revision No. 92 of 2011 (unreported) rendered by the High Court, Labour Division (Wambura, J.) for the proposition that an arbitrator can consider and grant reliefs not prayed for in the referral form but arrived at based on issues framed following the mediator's certificate and disclosed by the parties in their opening statements. Conversely, Mr. Mbwambo argued that the arbitrator should not have granted a relief which the appellant had not prayed for in the referral form.

The issue before us is whether or not the award of twelve months' remuneration by the learned Judge instead of reinstatement without loss of remuneration was justified.

The determination of remedies for unfair termination is governed by section 40 (1) of the ELRA, which provides as follows:

> ***40.**-(1) If an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer –*
>
> *(a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or*
> *(b) to re-engage the employee on any terms that the arbitrator or Court may decide; or*
> *(c) to pay compensation to the employee of not less than twelve months remuneration."*

The above provision vests in an arbitrator or the High Court, Labour Division the discretion to determine the appropriate remedy to be granted following a finding of unfair termination against the employer. Certainly, the such discretion must be exercised judiciously, not capriciously. Generally, where the termination is adjudged unfair on procedural grounds only, an arbitrator or the High Court, Labour Division will award compensation under section 40 (1) (c) of the ELRA as opposed reinstatement or re-engagement under section 40 (1) (a) and (b) respectively of the ELRA. But if the termination is held to be both

substantively and procedurally unfair, it will be fitting to order reinstatement without loss of remuneration unless there are justifiable grounds for not doing so in terms of Rule 32 (2) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007, G.N. 67 of 2007 ("the Guidelines Rules").

In the instant case, we find no basis to interfere with the learned Judge's award. First and foremost, she was justified to vacate the order for reinstatement on the ground that it was not prayed for in the referral form. It is settled that generally an arbitrator or the High Court, Labour Division has no jurisdiction to grant a relief which is not prayed for in the referral form, the said form being understood synonymously with a plaint – see **Security Group (T) Ltd. v. Samson Yakobo & Ten Others**, Civil Appeal No. 76 of 2016; and **Dew Drop Co. Ltd v. Ibrahim Simwanza**, Civil Appeal No. 244 of 2020 (both unreported). We read the decision of the High Court, Labour Division in **Frederick J. Chacha** (*supra*), relied upon by the appellant, but obviously it is not binding on us. We are aware that the same court (Aboud, J.) in **SDV Transami (T) Limited v. Faustine L. Mugwe**, Revision No. 227 of 2016 (unreported) took a different view, of which we approve. That in exercising his discretion under section 40 (1) of the ELRA, the arbitrator must confine himself to the prayers made in the

referral form. In the instant case, the appellant should not have been allowed to depart from the referral form and introduce new or markedly enhanced reliefs in his opening statement. However, we hasten to say that terminal benefits and a certificate of service pursuant to section 44 (1) and (2) of the ELRA can be made, subject to proof, even if they had not been claimed in the referral form. For, they constitute non-discretionary statutory entitlements.

Likewise, we endorse the learned Judge's holding that the order for reinstatement was additionally erroneous on the ground that the said relief was unmerited following the termination being held substantively fair but unfair on procedural grounds only.

Finally, apart from the appellant's shifting positions in the referral form and his opening statement on the aforesaid relief, he acknowledged in his testimony, at page 141 of the record of appeal, that the circumstances surrounding his termination were such that a continued employment relationship would be intolerable. This makes us wonder why he yet again pressed for reinstatement. Indeed, Rule 32 (2) (a) of the Guidelines Rules enjoins the arbitrator not to order reinstatement or re-engagement where the employee does not wish to be reinstated or re-engaged. Based on the law and the appellant's own admission,

reinstatement was clearly inapposite even if the termination had been held to be substantively and procedurally unfair. That said, the seventh ground of appeal fails.

In the final analysis, we hold that the appeal is unmerited. We dismiss it in its entirety.

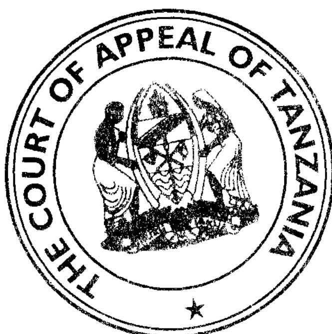
DATED at **DAR ES SALAAM** this 8th day of October, 2021

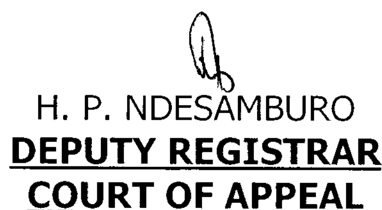
G. A. M. NDIKA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 12th day of October 2021, in the presence of Mr. Elisaria Jastiel Mosha, learned counsel for the Appellant and Mr. Ndanu Emmanuel, learned counsel for the Respondent, is hereby certified as a true copy of the original.





H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL