IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 60 OF 2023

(Arising from an Award issued on 31/01/2023by Hon. Abdallah. M, arbitrator, in Labour dispute No. CMA/DSM/ILA/334/19/197/2022 at Ilala)

NATIONAL BANK OF COMMERCE LIMITED ..... APPLICANT

VERSUS

ROSELYN KAKOLO..... RESPONDENT

JUDGMENT

Date of last Order: 17/05/2023
Date of Judgment: 31/05/2023

B. E. K. Mganga, J.

Brief facts of this application are that on 14th October 1986, National Bank of Commerce Limited, the applicant employed Roselyn Kakolo, the respondent for unspecified period of employment as officer for card support. The parties enjoyed their employment relationship up to 27th March 2019 when applicant terminated employment of the respondent allegedly due to absence from work for more than five days without permission.

Aggrieved with termination of her employment, on 17th April 2019, respondent filed Labour dispute before the Commission for Mediation and Arbitration henceforth CMA claiming to be paid TZS 44,882,604/= being 24 months salary compensation and severance pay and be issued with a certificate of Service. In the Referral Form (CMA F1) on fairness of procedure of termination, respondent indicated that applicant did not follow procedures. On fairness of reason, respondent indicated that applicant had no valid reason for termination.

On 31st January 2023, Hon. Abdallah, M, having heard evidence and submissions of the parties issued an award that respondent was absent from work for more than five days as she was sick and that she had permission from her line manager hence there was no valid reason for termination. The arbitrator found also that procedure for termination was not followed because applicant served respondent a notice to attend disciplinary hearing through Post Officer and conducted the disciplinary hearing within three days in absence of the respondent contrary to Rule 9 of the Labour Institutions (Mediation and Arbitration) Rules, GN. No. 64 of 2007 that presumes that service by Post Office is complete after seven days from the date of posting. Based on those

findings, the arbitrator concluded that termination was both substantive and procedurally unfair and awarded respondent to be paid (i) TZS 47,518,934.88 being salary compensation for 24 months, (ii) TZS 1,979,955.62 being one month in lieu of notice, (iii) TZS 843,281.98 being 12 days leave pay, (iv) TZS 5,330,649.746 being severance pay all amounting to TZS 55,672,822.226. The arbitrator found that respondent had an outstanding a loan of TZS 25,013,424/= with the applicant. She therefore deducted the said amount from the amount awarded and concluded that respondent will be paid TZS 30,659,398.226.

Applicant was aggrieved with the said award hence she filed this application for revision. In the affidavit sworn by Gladness Mugisha in support of the Notice of Application, applicant raised four issues for determination by this court namely: -

1. *Whether the Arbitrator correctly considered the legal effect of being absent from work for more than five working days.*
2. *Whether the Arbitrator correctly considered the legal effect of the validity of a sick exemption from duty (ED) which fell outside the charged days of absence which led to termination of employment.*
3. *Whether the Arbitrator was correct in his findings that termination of employment is unfair.*

4. *Whether the Arbitrator considered the legality and reasonableness of the amount awarded as compensation which went above the statutory minimum.*

The respondent resisted the application by filing both the Notice of Opposition and the Counter Affidavit.

When the application was called on for hearing, Ms. Comfort Opuku, learned counsel appeared and argued for and on behalf of the applicant while Ms. Lige James appeared and argued for and on behalf of the respondent.

Submitting in support of the 1st issue of the application, Ms. Opuku argued that, arbitrator failed to consider the legal effect of absenteeism of the employee for five days without permission. Counsel submitted that, respondent was absent from work for 11 working days from 04th March 2019 to 18th March 2019 without permission. She added that, respondent was charged for absenteeism and referred the court to the notice to attend disciplinary hearing (exhibit D4). She went on that, in terms of item 9(1) of the Guidelines to the Employment and Labour Relations (Coder of Good Practice) Rules, GN. No. 42 of 2007, absenteeism is a serious misconduct warranting termination of employment. She submitted further that, according to the National Bank of Commerce Limited Disciplinary Capability and Grievance Standard

(Exhibit D3), applicant had good or valid reason to terminate employment of the respondent. In concluding her submissions on the first issue, Ms. Opuku learned counsel for the applicant submitted that, much as employees need protection from work, the same also need to be extended to the employer otherwise business will be affected by none-attendance at work by employees who, at the end will demand salary for which they have not worked for.

Submitting on the 2nd issue, counsel for the applicant argued that, exempt from duty(ED) (Exhibit P3) tendered by the respondent shows that exemption from work started from 18th March 2019, the date respondent was served with the notice to attend disciplinary hearing. She added that, exhibit P3 does not include absence prior to 18th March 2019. She went on that, there was no permission from the applicant for days respondent was absent from work. She submitted further that, the notice to attend disciplinary hearing (exhibit D4) was sent to the respondent through a registered post on 19th March 2019.

On the 3rd issue, counsel for the applicant submitted that, the arbitrator erred in holding that termination of employment of the respondent was unfair. Counsel submitted further that, Section 37 of

the Employment and Labour Relations Act [Cap. 366 R.E. 2019] provides that, for termination to be unfair, there must be no reason or procedures must not be adhered to. She went on that, applicant had a valid reason to terminate employment of the respondent based on absenteeism. She cited the case of *Amina Ramadhani v. Staywell Apartment Limited*, Revision No. 461 of 2016, HC (unreported), *Resort World Limited v. Natalia M. Senga*, Revision No. 154 of 2020, HC (unreported) to support her submissions that absenteeism for more than five days without permission is a fair reason of termination of employment of an employee.

On procedural fairness, Ms. Opuku submitted that, applicant adhered to the procedures provided under Rule 13 of GN. No. 42 of 2007(supra). Counsel submitted further that, applicant served respondent with a notice to attend the disciplinary hearing; that the disciplinary hearing was conducted and the outcome thereof was termination of employment of the respondent. She went on that, the notice to attend disciplinary hearing was sent through a registered post but respondent claimed to have not received it. She added that, applicant used the address that was in the particular form that was

signed and filled by the respondent at the time of recruitment because there was no change of her address. She argued that, disciplinary hearing proceeded in absence of the respondent because she not did not enter appearance on the hearing date. When probed by the court as whether procedure of serving the respondent was adhered to, Ms. Opuku, counsel for the applicant readily conceded and submitted that, there was irregularity on serving respondent with the notice to attend the disciplinary hearing. She further submitted that, the notice to attend disciplinary hearing was sent on 19th March 2019 and hearing took place on 21st March 2019. She added that, applicant was supposed to give respondent seven (7) days but respondent was given only two days to prepare and appear in the disciplinary hearing. In concluding that termination was fair, counsel for the applicant cited the case of *National Microfinance Bank PLC V. Christian Nicholas Gideon,* Revision No. 336 of 2020, HC (unreported) to support her submissions that, in deciding whether termination was fair or not, the Court should consider the reason and procedures. She was quick to add that, where termination is unfair for want of procedures only, the remedy cannot be the same.

Arguing the 4th issue, counsel for the applicant submitted that, arbitrator erred to calculate payment respondent was entitled to using TZS 1,979,955.62 as monthly salary because that was not monthly salary of the respondent. Counsel for the applicant argued salary slip (exhibit P5) shows that basic salary of the respondent was TZS 1,726,254/= and not TZS 1,979,955.62. Counsel for the respondent submitted further that, arbitrator erred to include bonus, arrears and house allowance in calculating amount payable to the respondent because bonus change from time to time. Counsel for the applicant concluded that, arbitrator awarded respondent to be paid TZS 47,518,934.84 being 24 months salary compensation not based on respondent's basic salary.

In winding up her submissions, counsel for the applicant submitted that, since applicant had a valid reason but procedures were not adhered to, then, the arbitrator was supposed to award respondent below that amount. She cited the case of *Felician Rutwaza v. World Vision Tanzania*, Civil Appeal No. 213 of 2019, CAT (unreported) to support her submissions. Learned counsel for the applicant concluded

her submissions by praying that the application be allowed and that the award be revised.

In opposing the application, Ms. James learned counsel for the respondent submitted on the 1st issue that, respondent reported that she was sick as evidenced by an email (exhibit D1(A) written by the line Manager(DW1). Counsel for the respondent submitted further that, DW1 testified that respondent was sick which is why she did not attend at work on the alleged dates. She added that, even in the disciplinary hearing (exhibit D5) that was conducted in the absence of the respondent, DW1 testified that he knew that respondent was sick. She went on that, the report that respondent was sick was supposed to be sent to the line Manager (DW1) or Human Resource as it was testified by DW2. She concluded that applicant knew that respondent was sick and that arbitrator cannot be faulted when she held that there was no valid reason for termination. In short, counsel for the respondent submitted that termination was unfair.

Arguing the 2nd issue, Ms. James submitted that, arbitrator considered validity of the said exemption from duty(ED). She cited the case of *Lugandu Magida v. Gwanchele Gibaka & Another*, Land

Appeal No. 50 of 2020, HC (unreported) to support her submissions that ED is not a proof of sickness because sometimes a person can be sick but not issued with ED. Counsel for the respondent went on that, once an information has been sent to the employer like in the application at hand where respondent was attending treatment before a traditional healer, it was a proof that she was sick. She added that, in exhibit D1(A), DW1 stated that he was informed by the respondent that she was attending treatment before the traditional healer. Counsel for the respondent submitted further that, based on advice of DW1, on 18th March 2019, respondent went to hospital and was issued with ED that falls out of the charged dates. Ms. James argued that, the award was not only based on the said ED and that validity of the said ED was not questioned at CMA.

On the 3rd issue, counsel for the respondent submitted that termination was both procedural and substantially unfair because Respondent notified applicant her absence from work. Counsel submitted further that, sickness is a justifiable reason for absence from work and cited the case of *Cyprian John Mushi v. TPB Bank PLC*, Land Appeal No. 305 of 2021, HC (unreported) to support her

submissions. She further cited the case of *JC. Gear Exprocom AB (T) Ltd v. Jumbe Karala & Another*, Revision No. 04 of 2019, HC (unreported) wherein it was held that the court must consider whether, employee was absent from work, whether there was no permission and whether procedures were followed.

On procedural fairness, Ms. James submitted that procedures were not adhered to. She submitted further that in *Karala's case* (supra) it was held that the employer was supposed to issue a show cause notice wherein she was supposed to be notified that failure to give justifiable reason for her absence from work, disciplinary proceedings will be conducted. She submitted further that, applicant was supposed to serve respondent with show cause containing accusation of absenteeism with a practicable notice of not less than 7 days'. She added that, the said notice was supposed to be sent to the known address of the respondent. Counsel for the respondent submitted further that, respondent testified that she changed her address and name when she was transferred from Bukoba to Dar es Salaam and that applicant was aware of that respondent's address is Dar es Salaam and not Bukoba. Ms. James submitted further that, the

line Manager was communicating with respondent, yet, applicant sent the notice to attend disciplinary hearing to Bukoba without giving respondent reasonable time to respond or to attend hearing. She submitted further that, Rule 9 of GN. No. 64 of 2007(supra) provides that a document sent through postal address is presumed to have reached the addressee within seven (7) days but applicant conducted hearing two days after posting the disciplinary hearing before lapse of the said seven days hence depriving respondent right to be heard. She cited the case of *Mantra Tanzania Ltd v. Joaquim P. Bonaventure*, Revision No. 137 and 151 of 2017, HC (unreported) to bolster her submissions that respondent was denied her right to be heard. Counsel for the respondent submitted further that, *Amina's case* cited by Counsel for the applicant is distinguishable because, in that case, neither reason for absence nor report was communicated to the employer.

On the relief granted, counsel for the respondent submitted that, respondent's salary was TZS 1,979,955.62 as shown in the salary slip (exhibit P5) and that there was no any other evidence adduced by the applicant to contradict exhibit P5. She submitted further that, in terms

of Section 40(1)(c) of Cap. 366 R.E. 2019(supra), respondent was correctly awarded because, remuneration is defined under Section 4 of Cap. 366 R.E (supra) to include all money payable including bonus, allowances etc. She added that, the amount awarded includes leave, severance and notice.

Counsel for the respondent submitted that, ***Rutwaza's case*** (supra) is distinguishable because, in the application at hand, termination was both substantively and procedurally unfair. She went on that, the award of 24 months was properly awarded to the respondent and cited the case of ***Veneranda Maro & Another v. Arusha International Conference Centre,*** Civil Appeal No. 322 of 2020, CAT (unreported) to support her submissions that there are no circumstances that can led the court to interfere with the CMA award. Counsel for the respondent concluded that, arbitrator exercised her discretion properly and prayed that the application be dismissed.

In rejoinder, Ms. Opuku, learned counsel for the applicant submitted that, respondent was supposed to communicate to Human Resource in formal communication such as ED. She submitted further that, exhibit D1 shows that DW1 was advising respondent to send ED to

the Human Resources. She added that, the issue is whether, respondent communicated to the applicant that she was sick and not whether she was sick. She added that, in ***Nataria's case*** (supra) it was held that, communication must be formal. Counsel for the applicant submitted further that, exhibit D1(A) shows that respondent was using alternative drugs but does not show that she was attending to the traditional healer. Counsel for the applicant strongly maintained that respondent did not notify applicant for her absenteeism hence valid reason for termination.

On calculation of the award to include bonus, counsel for the applicant submitted that, that was wrong because bonus vary from time to time sometimes not awarded depending on performance of the employee. On the amount of monthly salary, counsel for the applicant submitted that the same was reflected in termination letter (exhibit D6).

I have examined evidence of the parties in the CMA record and considered submissions made by both counsel in this application and wish to thank them for their research. From submissions and evidence of the parties, the main issues are whether, respondent was absent from work for more than five days without report for the applicant to

justify termination of her employment and what relief(s) are the parties entitled to.

In justifying termination of employment of the respondent for absenteeism, Steve Frank Kangoma(DW1), the line manager of the respondent, testified that in 2019 respondent was absent for two weeks. DW1 testified further that, he tried to contact respondent over the phone but the latter was not picking up her phone. That respondent having failed to pick up her phone, he(DW1) sent sms and respondent replied that she is sick attending treatment not in hospital. DW1 stated further that he advised respondent to attend at hospital so that she can be issued with ED. That, after 3 days, he reminded respondent to forward ED but she replied by SMS that she had no intention of returning to office and that DW1 should proceed with his own business. DW1 testified further that he communicated with HR who advised that disciplinary proceedings should be conducted. While under cross examination, DW1 stated that he was aware that respondent was sick. Giving evidence under re-examination, DW1 stated that he was aware that respondent was sick before the incidence of absenteeism because she once brought ED and it was advised that she should be given light

duties and that respondent was given light duties that does not involve walking.

On his part, Sweetbert Michael Mapolu(DW2) like DW1 testified that respondent was absent for 11 days from 4th March 2019 to 18th March 2019 and that he called respondent but she was not picking up her phone. That, due to that failure, he directed Jamila Mbaraka to locate the respondent including going at respondent's home and inform her to report at work. He testified further that according to Jamila Mbaraka, respondent did not cooperate. DW2 testified further that respondent was supposed to seek permission from line manager or from HR department as per Disciplinary Capability and Grievance Standard (exh. D3). While on cross examination, DW2 testified that Jamila Mbaraka didn't know home of the respondent. Testifying under re-examination, DW2 stated that respondent was supposed to report in writing to her line manager and supply documents from doctor that she was sick.

In her evidence, Roselyn Odilo Kakolo(PW1), the respondent, testified that since 2017 she fell sick especially her left leg and that she was attending treatment at Muhimbili National Hospital and Burhani

hospital and that at all time, she was reporting to her line manager. She tendered medical reports as exhibit P2. She testified further that, she attended her last treatment at Navy hospital Kigamboni and reported to line manager and was issued 7 days ED(exhibit P3). That, after the said 7 days, she reported to her line manager who refused to accept the letter on ground she was absent and directed her to report to HR. In her evidence, PW1 stated that, at the time she was sick, she was going in office to seek permission from line manager and was sending ED. She testified further that, on 27th March 2019 she reported to HR but she was informed that she has been terminated and required to go home and come back after 7 days to collect her termination letter. That, after 7 days, she went to collect the letter but she was informed that she should wait for other 7 days to be served with termination letter and that finally she was served with termination letter on 8th April 2019. PW1 maintained in her evidence that she communicated with line manager over the phone that she was sick.

While under cross examination, PW1 stated that, from 04th March 2019 to 18th March 2019, she was on treatment and reported over the phone that she was sick. She admitted that exhibit P3 that gave her 7

days up to 26th March 2019 was issued on 18th March 2019. She maintained that from 4th March 2019 to 18th March 2019 she was communicating with line manager. She admitted further that she knows the Disciplinary Capability and Grievance Standard (exhibit D3)

I have considered evidence of DW1 and DW2 on behalf of the applicant and that of PW1 and exhibits tendered, and in my view, there was no justification for termination of employment of the respondent on ground of absenteeism. I am of that view because, while both DW1 and DW2 testified that respondent was not picking up her phone, that evidence is highly contradicted by an email dated 15th March 2019 and attachment thereto (exhibit D1) that was tendered by DW1 and Disciplinary hearing report (exhibit D5) that was tendered by DW2 such that their evidence cannot be reconciled because both exhibit D1 and D5 shows that they spoke over the phone. In the email (exhibit D1), DW1 stated and I quote in part:-

> *"… Grace; Roselyn* ***has been on and off due to her illness****. She has been treated from knee cap problems for a long time now. For the last two weeks (4th March 14th March she has not reported to work.* ***I spoke to her again on Monday 11th March*** *to send the ED but she said she was just using alternative drugs hence it was not easy to get an ED. Today I sent her a text from my phone 0765210062 after she was not reachable. I reported the matter to* ***Mwanaisha who called her and promised she***

would send someone to submit the ED. At 09.17 she called me using her number 0754394251 but the conversation were (sic) not audible enough so I told her to send an sms to understand what she was saying*. At 9.28 in the (sic) she texted me and said she does not wish to return to the office. This revelation shocked me and I spoke to Mwanaisha who suggested we should get help from HR BP. (I have attached the sms)*

Kindly look into this matter and advise.

Regards." (Emphasis is mine)

Again, the attachment that is part of exhibit D1 reads:-

"Roselyn Kakolo

Bado niko hospital nitatuma

Pole sna. Umelazwa?

Ahsante, sikulazwa kuna dawa

Nimepewa ya kupaka na huko Muhimbili

Narudi tena kesho mchana kwa Dr wa

Mifupa

Today

Roselyn,

Unahitajika kazini. Au ulete ED

Vinginevyo itabidi nireport absebtee(sic)

Naomba majibu

Nimetafakari sana mpka sasa mimi

Siwezi kurudi kazini, wewe report ili

isije kusumbua."

The disciplinary hearing report (exhibit D5) that was tendered by DW2 reads in part: -

"*STATEMENT BY MANAGEMENT REPRESENTATIVE (INITIATOR)*

- *Najua kwamba Roselyn ana matatizo ya mguu sehemu ya goti, Hivyo huwa anapata matibabu Muhimbili na hospitali zingine.*
- *Wiki ya tarehe 04/03/2019 sikumuona kuja ofisini.*
- ***Nilimpigia simu Katika wiki hiyo kumuulizia hali yake, akaniambia bado anaumwa lakini anatumia dawa mbadala.***
- *Nikamshauri aende hospitali amweleze daktari kwa nia ya kupata mapumziko na iwe documented.*
- *Alihaidi kujitahidi kufanya hivyo.*
- ***Wiki iliyofuata hakuja ofisini pia, nikampigia simu na aliniambia bado anaumwa.***
- *Nikamshauri kitu kilekile alete ED.*
- ***Baada ya kutomuona siku inayofuata, nilimshirikisha Mwanaisha na yeye aliongea nae ili aweze kwenda kwa daktari ili apate ED. Aliahidi kumtuma mtu alete.***
- ***Baada ya muda alinipigia simu na kusema kuwa hataweza kuleta ED kwa sababu hawezi kuipata.***
- *Nikamshauri atume SMS ikibainisha hicho alichokisema na alifanya hivyo. Hii ilikua tarehe 15/03/2019.*
- *Baada ya hapo nilimshirikisha Mwanaisha na akanishauri tulipeleke HR ili watushauri Katika nini cha kufanya.*
- *Niliandika email na kuongea na Grace. Niliambatanisha na nakala ya SMS ambazo nilikua nawasiliana nae. Hadi kufikia tarehe 15/03/2019 alifikisha idadi ya siku kumi (10) bila kufika kazini.*

Mpaka leo siku ya kikao ambayo ni tarehe 21/03/20… hakuwahi kuripoti au kufika kazini."

From the fore going, it is my conclusion that applicant knew that respondent was sick for long time and that on the dates under consideration, she reported over the phone that she was sick and was

on medical treatment. Therefore, termination was unfair for want of reason. It is my view that, ***Nataria's case*** (supra) is not applicable in the circumstances of the application at hand because respondent reported to her line manager hence applicant was well aware that she was sick as quoted hereinabove. It is my view that evidence of both DW1 and DW2 corroborated evidence of the respondent(PW1) that she was sick and that she reported to the applicant. In my view, even in absence of the exemption from duty (ED) forms, respondent proved her case at balance of probabilities.

It was submitted by the parties that respondent was using traditional medicine which is why she did not manage to get exemption from duty forms. With due respect to both counsel, there is no evidence to support submissions that respondent was using traditional medicine. I am of that view because, in the sms (part of exhibit D1 quoted hereinabove) respondent indicated that she was given medicine at Muhimbili National Hospital and was required to see the doctor on the day after those communications. I should also point that evidence by DW1 that respondent sent him sms stating that she no longer wish to go back in office is not supported by other evidence. What respondent

stated in the said sms (part of exhibit D1 quoted above) is that at that time she could not got to office and that DW1 may report that she is not in office. The sms that respondent that she cannot go back in office cannot be read in isolation of other sms especially the one in which she told DW1 that she was scheduled to see the doctor at Muhimbili on the next days. In my view, respondent was confronted with two issues at that time namely to attend at hospital to serve her life or attend at office. Any reasonable person in that circumstances, would have acted as respondent did. In my view, respondent cannot, in that circumstances, have meant that she no longer wanted to go back at office after her health has improved.

It was testified by DW2 that according to Disciplinary Capability and Grievance standard (exh. D3), respondent was supposed to report to her line manager or HR in writing. With due respect, I have read exhibit D3 and did not managed to find any clause requiring an employee who is sick or absent from office to report in writing. The said exhibit shows that an employee is required to report to the line manager or HR without stating how that report should be done. In my view, if applicant wanted to make it mandatory for her employees to

report their absence in writing, she could expressly have so stated in exhibit D3. In my view, requirement to report in writing cannot be by implication. Even if we assume that applicant's employees were supposed to report their absence in writing, the question is, was that procedure well known to all employees including the respondent? The follow up question is, was that requirement used constantly and for how long? In the application at hand, neither DW1 nor DW2 gave evidence to clear those issues hence there is no evidence to prove that respondent was supposed to report in writing.

Evidence that respondent was sick since 2017 and that applicant was aware is supported by the medical progress report from Muhimbili National hospital dated 20th April 2018(exhibitP2). In fact, exhibit P2 reads in part: -

> *"…Rose has been complaining of left knee pains especially on walking stairs and squatting for a long time. She has degenerative changes. She will consequently need a knee replacement surgery.*
>
> ***It is for now recommended to be on light duty for two months.***
>
> *Sgd.*
> *Dr. K.S. Nungu-MD, MMed[Orthop] Phd*
> *Consultant Orthopaedic surgeon*
> *Muhimbili Orthopaedic Institute."*

I should point out that exhibit P2 was received by the applicant on 23rd April 2018 and was dully stamped and endorsed. In fact, there are several reports parts of exhibit P2 that shows that respondent was attending treatment at hospital on different dates. As testified by PW1, that on 18th March 2019 she attended at Navy hospital at Kigamboni and was issued with 7 days ED as per exhibit P3.

The arbitrator is being criticized by the applicant that she wrongly considered exemption from duty(ED) that were falling outside the time alleged respondent was absent to hold that applicant was sick. With due respect, even without the said ED (exhibit P3 inclusive), exhibits D1 and D5 together with evidence of both DW1 and PW1 proved that respondent was sick and that applicant was well aware. For the foregoing, I hold that termination was unfair substantively.

It was correctly, in my view, conceded by counsel for the applicant that termination was unfair because respondent was not served with the notice to show cause or notice to attend the disciplinary hearing as a result the disciplinary hearing was conducted in her absence. It was testified by DW2 that on 19th March 2019, applicant sent the notice to attend the disciplinary hearing (exhibit D4) to the

place of recruitment of the respondent namely Bukoba requiring her to attend the disciplinary hearing on 21st March 2019. In my view, applicant did so just to ensure that respondent cannot attend. I am of that view because, according to DW1 and DW2, they had direct communication with respondent over the phone and that respondent was working in Dar es Salaam, the reason and logic of sending exhibit D4 to Bukoba by post cannot be explained and in fact it was not explained. I entirely agree with submissions by Ms. James, learned counsel for the respondent that applicant sent the notice to attend disciplinary hearing to Bukoba without giving respondent reasonable time to respond or to attend the hearing. In terms of Rule 9 of GN. No. 64 of 2007(supra), documents sent by registered post is presumed to have reached the addressee within 7 days after posting. I also agree that by giving respondent only two days to attend disciplinary hearing, applicant deprived respondent right to be heard. See the case of. See for example the case of ***Abbas Sherally & Another vs Abdul S. H. M. Fazalboy***, Civil Application No. 33 of 2002, ***Danny Shasha vs Samson Masoro & Others*** (Civil Appeal 298 of 2020) [2021] TZCA 653, ***Margwe error & Others vs Moshi Bahalulu*** (Civil Appeal 111

of 2014) [2015] TZCA 282, *Tabu Ramadhani Mattaka vs Fauzia Haruni Saidi Mgaya* (Civil Appeal 456 of 2020) [2022] TZCA 84, *Alpitour World Hotels & Resorts S.P.A. & Others vs Kiwengwa Ltd* (Civil Application 3 of 2012) [2012] TZCA 138, *North Mara Gold Mine Limited vs Isaac Sultan* (Civil Appeal 458 of 2020) [2021] TZCA 755 and *MANTRAC Tanzania Limited vs Raymond Costa* (Civil Appeal 90 of 2018) [2022] TZCA 75 and *Mary Mchome Mbwambo & Amos Mbwambo vs Mbeya Cement Company Ltd* (Civil Appeal No. 161 of 2019) [2022] TZCA 179 to mention but a few. In the cited cases, the Court of Appeal cited and quoted its earlier decision in the ***Fazalboy case*** (supra) that: -

> *"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."*

For the foregoing, I hold that termination was also unfair procedurally.

It was submitted by counsel for the applicant that where termination is unfair for want of procedures only, the remedy cannot be

the same. I agree with that submission as the correct position of the law as it was held in ***Rutwaza, case***(supra). Since I have held that termination was both substantively and procedurally, ***Rutwaza, case***(supra) cited by counsel for the applicant is not applicable in the circumstances of the application at hand as it was correctly submitted by counsel for the respondent.

It was submitted by counsel for the applicant that salary of the respondent was TZS 1,726,254/= and not TZS 1,979,955.62 that was used by the arbitrator to calculate the amount payable to the respondent. It was further submitted by counsel for the applicant that arbitrator was supposed to use salary reflected in the termination letter (exhibit P6). With due respect to counsel for the applicant. Evidence of the respondent (PW1) that her monthly salary was TZS 1,979,855.82 was not shaken. In fact, applicant did not cross examine respondent on that aspect when she tendered salary slip (exhibit P5) to prove that her monthly salary is TZS 1,979,855.82. In fact, matters not cross examined are deemed to have been admitted to be true. See the case of ***Cyprian Athanas Kibogoyo vs. Republic***, Criminal Appeal No. 88 of 1992, CAT(unreported), ***Alex Wilfred vs Republic*** (Criminal Appeal No. 44

of 2015) [2016] TZCA 579 and *John Shini vs Republic* (Criminal Appeal No. 573 of 2016) [2020] TZCA 1747 to mention but a few. In ***Shini's case*** (supra) the Court of Appeal held *inter-alia*: -

> *"It is trite law that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted and will be estopped from asking the court to disbelieve what the witness said, as the silence is tantamount to accepting its truth."*

Since applicant did not cross examine respondent(PW1) on the amount that she was receiving as monthly salary even after tendering the salary slip (exhibit P5), then, she cannot now be heard arguing that respondent's salary was not that much. Guided by the above cited Court of Appeal decisions, I find that the complaint by the applicant has no merit and dismiss it.

It was submitted on behalf of the applicant that arbitrator erred to include bonus, arrears and house allowance in calculating amount payable to the respondent. It is my view that there is no merit in that complaint. I am of that view because section 4 of cap. 366 R.E. 2019(supra) defined remuneration as follows: -

> *"remuneration" means the total value of all payment, in money or in kind, made or owing to an employee arising from the employment of that employee"*

Based on that definition, it is clear in my mind that all what was reflected in the salary slip (exhibit P5) were payable to the respondent and arose from her employment relationship with the applicant. In my view, the said bonus and allowances, as it was submitted by counsel for the respondent, were correctly, in my view, awarded to the respondent in terms of section 40(1)(c) of Cap. 366 R.E. 2019(supra). In short the arbitrator cannot be faulted.

For the foregoing I hereby uphold the CMA award and dismiss this application for want of merit.

Dated in Dar es Salaam on this 31st May 2023.

B. E. K. Mganga
JUDGE

Judgment delivered on this 31st May 2023 in chambers in the presence of Comfort Opuku, Advocate for the Applicant and Lige James and Denis Kahana, Advocates for the respondent.

B. E. K. Mganga
JUDGE