IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 428 OF 2022

(Arising from an award issued on 11/11/2022 by Hon. Lucian Chrisantus Chacha, Arbitrator in labour dispute No. CMA/DSM/KIN/349/21/134/21 at Kinondoni)

STRATEGIS INSURANCE (T) LIMITED .... APPLICANT

VERSUS

DEOGRATIAS MASSENGA .... RESPONDENT

JUDGMENT

Date of last order: 02/03/2023
Date of Judgment: 17/3/2023

B. E. K. Mganga, J.

Brief facts of this application are that, on 17th September 2018, Strategis Insurance (T) Limited, the herein applicant employed Deogratias Massenga, the herein respondent for unspecified period as Assistant Underwiting Manager. The two worked together until on 30th June 2021 when applicant suspended the respondent from work and finally terminated his employment on 30th August 2021 allegedly, due to gross misconduct namely fraud. Aggrieved with termination of his employment, respondent filed Labour dispute No. CMA/DSM/KIN/349/21/134/21 before the Commission for Mediation and Arbitration (CMA) at Kinondoni. In the Referral Form(CMA F1), respondent indicated that he was claiming (i) to be reinstated without loss of remuneration, to be paid (ii) TZS 273,000,000/= being salary compensation for 78 months, and (iii) TZS 2,625,000/= being severance pay. He further indicated that there was no reason for termination and that applicant did not adhere to procedures for termination.

On 10th November 2021, Hon. Lucia Chrisantus Chacha, Arbitrator, having heard evidence of both sides, issued an award in favour of the respondent that termination was unfair both substantively and procedurally. Based on those findings, the Arbitrator awarded respondent to be paid (i) TZS 279,125,000/= being salary compensation for 79 months' for unfair termination and damages for tort, (ii) TZS 2,625,000/= being severance pay all amounting to TZS 281,750,000/= and be issued with a certificate of service.

Applicant was aggrieved with the award hence this application for revision. In the affidavit of Joyce Kulwah Mison, in support of the application, applicant raised eight(8) grounds namely:-

1. *That the Honourable Arbitrator immensely erred in law to deliver an award which was not grounded on evidence adduced at trial.*

2. *That the Honourable Arbitrator erred in law and facts in deciding that there was no valid reason for termination of the respondent while there was enough evidence on record which proved fair reason for termination of the respondent on the required standard.*
3. *That the Honourable Arbitrator erred in law and facts by failure to note that there was an attempt fraud which constitutes serious misconducts which justified termination of the respondent.*
4. *That the Honourable Arbitrator erred in law and facts by failure to note that based on evidence on record applicant had valid reason to terminate the complainant as it was clearly proved.*
5. *That the Honourable Arbitrator erred in law and facts by awarding excessive compensation without justifiable grounds.*
6. *That the Honourable Arbitrator erred in law and facts by indicating disputed facts as undisputed.*
7. *That the Honourable Arbitrator erred in law and facts by awarding general damages which were not pleaded.*
8. *That the Honourable Arbitrator erred in law and facts in introducing a new cause of action on tort which was not pleaded and used the same to justify an award of 79 months' salary as compensation for unfair termination and tort.*

In opposing the application, respondent filed the Notice of Opposition and the counter affidavit sworn by Charles Mathias, advocate.

When the application was called on for hearing, Mr. Evody Mushi, learned Advocate appeared and argued for and on behalf of the applicant while Mr. Charles Mathias Kisoka, learned Advocate appeared and argued for and on behalf of the respondent.

In arguing the application, Mr. Mushi opted to argue the 1st and 2nd grounds together, 3rd and 4th together and the rest grounds separately.

Arguing the 1st and 2nd grounds, counsel for the applicant submitted that the award is not grounded on evidence adduced by the parties. He submitted that, at the time of admission of exhibits, there was no objection but, while the witness was testifying, the arbitrator was commenting on those exhibits without affording parties right to respond to the comments. He added that, comments are only in relation to exhibits tendered by the applicant, an indication that the arbitrator was biased. He went on that, in the award, the arbitrator did not discredit or comment on the said exhibits. Counsel for the applicant strongly submitted that the arbitrator discredited some of the exhibits in the proceedings without putting it to the attention of the parties and did not give them right to respond. He added that the arbitrator was supposed to discredit exhibits in the award and not in the proceedings. He submitted further that, the arbitrator used a different pen in the same proceedings hence raising suspicion that proceedings were doctored and that proceedings were not properly recorded and prayed that proceedings be nullified.

Arguing the 3rd and 4th grounds, counsel for the applicant submitted that evidence of DW1 and DW2 and exhibits tendered on behalf of the applicant proved on balance of probability that termination was fair.

On the 5th ground, counsel for the applicant submitted that section 40 of the Employment and Labour Relations Act[Cap. 366 R.E. 2019] gives the arbitrator discretion to award compensation not less than 12 months, reinstatement, or re-engagement. He added that, that discretion was supposed to be exercised judiciously. Counsel submitted that respondent testified that he was not ready to be reinstated or re-engaged. He went on that Arbitrator did not give reason in awarding respondent more than 12 months. He argued that Rule 32 of Labour Institutions (Mediation and Arbitration Guidelines) GN. No. 67 of 2007 provides matters to be considered by the arbitrator in awarding compensation. Counsel for the applicant submitted that, in CMA F1, respondent claimed to be paid 78 months and not 79 months' and that arbitrator used a wrong criteria in awarding compensation to the respondent. He argued that arbitrator did not mention injuries respondent suffered and that there was no evidence adduced proving that respondent failed to secure employment because he was put in the public notice through exhibit P11. He concluded that arbitrator erred to hold that unfair termination resulted into tort.

On the 6th ground, Mr. Mushi submitted that in the award the arbitrator stated many facts allegedly that were admitted by the parties but evidence does not show that they were admitted.

On the 7th ground, counsel for the applicant submitted that in CMA F1, respondent did not plead that he was claiming to be paid general damages. He added that in CMA F1, respondent indicated that the dispute was relating to unfair termination, as a result, applicant adduced her evidence first. He went on that; it was impossible for the applicant to adduce evidence relating to general damages that was not pleaded. Mr. Mushi submitted further that; respondent was duty bound to prove allegations of tort by giving evidence before applicant adducing her evidence. He went on that, exhibit P11 merely informed the general public that respondent is no longer her employee because there is nothing stated in exhibit P11 showing reasons for termination or anything amounting to tort.

Submitting on the 8th ground, counsel for the applicant submitted that, in the award, arbitrator introduced a new cause of action on tort which was not pleaded and used it to justify the award of 79 months to the respondent. He went on that, the main reason for awarding 79 months compensation to the respondent was tort and unfair termination. He strongly reiterated his submissions that, in CMA F1, there was no tort because the issues that were framed related only to unfair termination. He argued that, since there was no issue relating to tort, it was not proper for the arbitrator to base compensation on tort to award the respondent. He argued further that, the arbitrator was supposed to base compensation on remedies available for unfair termination because respondent did not adduce evidence relating to tort. Counsel submitted that, the arbitrator used the Guardian Newspaper (exhibit P11) that was not tendered and was not among the documents filed by the respondents to be relied upon as exhibit. Counsel submitted further that; the said exhibit was not tendered during examination in chief but the arbitrator indicated that it was tendered during cross examination while it was not. In winding up his submissions, counsel for the applicant prayed that the application be allowed and order trial de novo.

Responding to submissions made on behalf of the applicant on the 2nd ground, Mr. Kisoka, learned counsel for the respondent submitted that all evidence was evaluated properly. He submitted that, investigation report was not availed to the respondent contrary to Rule 13(1) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007. Counsel for the respondent submitted further that, it was not possible for the respondent to prepare his defence because the whole issue centered on the alleged email and investigation report. He went on that; respondent was denied right to representation contrary to Rule 13 of GN. No. 42 of 2007(supra).

In the 3rd and 4th grounds, counsel for the respondent submitted that, leave application form(exhibit P5), shows that on 25th June 2021 the date it was alleged that respondent committed the alleged misconduct, respondent was on leave. He went on that, the policy (exhibit D2) allegedly sent by the respondent has no signature of the respondent. He submitted further that, the name appearing on the alleged receipt (exhibit D4), is that of Omary. He argued that the person who issued it is Omary and not the respondent. He added that, Omary was not called by the applicant to testify. Counsel for the respondent contended that there is no proof that the two exhibits were sent by the respondent. Mr. Kisoka learned counsel for the respondent submitted further that, both DW1 and DW2 in their evidence testified that before going on leave, an employee must handover the computer to the IT personnel and that respondent testified that he left the computer to the IT personnel. He added that, IT personnel was not called as a witness. He concluded that there was no valid reason for termination.

On the 1st and 5th grounds, counsel for the respondent submitted that, there was justification for the award and compensation. He submitted further that, the reason for the said compensation is that applicant failed to prove reasons for termination. Counsel for the respondent submitted that applicant failed to prove that on 25th June 2021 respondent sent an email containing a forged policy and receipt. Counsel for the respondent reiterated his submissions that, on the material date, respondent was on leave and added that the alleged email was not tendered. Counsel for the respondent submitted further that, the disciplinary charge did not disclose the name of the recipient of the alleged email.

Counsel for the respondent submitted that, Section 40(1) of Cap. 366 RE. 2019 (supra) gives arbitrator discretion to compensate employee not less than 12 months but there is no maximum. He cited the case of ***Veneranda Maro & Another v. Arusha International Conference***

Centre, Civil Appeal No. 322 of 2020 (CAT) and submit that, in the said case, the Court of Appeal directed the legislators to prescribe the maximum amount to be awarded but the government has not implemented that directive. Mr. Kisoka submitted further that, when there is substantive unfairness, the amount of compensation should be higher. He cited the case of ***North Mara Gold Mine Ltd v. Khalid Abdallah Salum***, Labour Revision No. 25 of 2019 HC (unreported) to support his submissions.

On the 6th ground, counsel for the respondent submitted that the arbitrator extracted undisputed facts from evidence of the parties. Therefore, arbitrator cannot be criticized.

On the 7th ground, counsel for the respondent conceded that, in CMA F1 respondent did not plead general damages. He submitted further that respondent was paid one month salary as tort damages.

On the 8th ground, counsel for the respondent conceded that in CMA F1 respondent indicated that the dispute is on unfair termination only. He submitted further that, in CMA F1, respondent prayed to be paid 78 months' salary compensation but Arbitrator awarded one month salary as damage to make a total of 79 months salaries. Counsel for the respondent submitted that during examination in chief, respondent tendered exhibit

P11 that shows that applicant photographed respondent with malicious content. He added that, that affected respondent economically and denied him opportunity to be employed. Mr. Kissoka submitted that; it is not enough defence for the applicant to state that the said photograph in exhibit P11 was a notice to the general Public while it has affected professional carrier of the respondent. He however, conceded that there was no issue framed by the parties relating to tort but he maintained that evidence that was adduced by the respondent relating to tort is exhibit P11 which was admitted during examination in chief. He added that, the said exhibit was also in the list of documents filed by the respondent to be relied upon during hearing. It was submissions of Mr. Kisoka learned counsel for the respondent that unfair termination resulted into tort. He therefore prayed that the application be dismissed for want of merit.

In rejoinder, Mr. Mushi, learned counsel for the applicant submitted that evidence was adduced in relation to how the alleged misconduct was committed and referred the court to exhibit D3 and a trace report (exhibit D6) which shows that the said forged documents were authored by the respondent. He added that, CCTV footage shows the respondent printing the forged documents. He strongly submitted that; this is the evidence the arbitrator commented on in the proceedings without affording parties right. Counsel for the applicant reiterated his submissions in chief that exhibit P11 was not tendered during examination in chief.

Mr. Mushi learned counsel for the applicant submitted further that, in ***Veneranda Maro's case*** (supra), the Court of Appeal held that the Judge has power to reduce the amount awarded if there was no reason for that award and implored the court to reduce that amount. He also argued that in the award, the arbitrator did not state the nature of tort.

I have examined evidence adduced by the parties in the CMA record and considered submissions by both counsel made in this application and find that in the Referral Form(CMA F1) respondent indicated that the nature of the dispute was termination. I have carefully examined the said CMA F1 and find that respondent indicated that the dispute also related to tort. I have also found that respondent did not claim for damages as correctly submitted by counsel for the applicant and conceded by counsel for the respondent. Therefore, since the CMA F1 is a pleading, the parties and the arbitrator were bound by those pleadings and they were not allowed to depart therefrom. In fact, there is a plethora of case law to that position. See ***George Shambwe v. AG and Another*** [1996] TLR 334,

The Registered Trustees of Islamic Propagation Centre (Ipc) v. The Registered Trustees of Thaaqib Islamic Centre (Tic)*, Civil Appeal No. 2 of 2020** ,CAT (unreported), ***Yara Tanzania Limited V. Ikuwo General Enterprises Ltd, Civil Appeal No. 309 of 2019,CAT, ***NBC Limited & Another vs Bruno Vitus Swalo***, Civil Appeal No. 331 of 2019 [2021] TZCA 122, ***Barclays Bank (T) Ltd vs. Jacob Muro,*** Civil Appeal No. 357 of 2019 (unreported) and in ***Astepro Investment Co. Ltd v. Jawinga Company Limited*, Civil Appeal No. 8 of 2015,** CAT (unreported). In the ***IPC's case,*** supra, the Court of Appeal held that: -

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties".

In ***Yara Tanzania Limited case*** (supra) the Court of Appeal quoted its earlier decision in ***Barclays Bank T. Ltd vs Jacob Muro,*** Civil Appeal No. 357 of 2019 [2020] TZCA 1875 that:-

*"We feel compelled, at this point, to restate the time-honored principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored- See **James Funke Ngwagilo v. Attorney General** [2004]T.L.R. 161. See also **Lawrence Surumbu Tara v. Hon.Attorney General and 2 Others,** Civil Appeal No.56 of 2012; and **Charles Richard Kombe t/a Building v. Evarani Mtungi and 3 Others**, Civil Appeal No. 38 of 2012 (both unreported)".*

Since parties and the arbitrator were bound by pleadings in the CMA F1, and since in CMA F1 respondent did not claim to be paid damages, it was an error on part of the arbitrator to include damages in the award.

It was submitted by counsel for the applicant that the issues that were framed related only to unfair termination. With due respect to counsel for the applicant, I have read the CMA record and find that on 27th January 2022, Mr. Evody, counsel for the applicant and Charles, counsel for the respondent drafted three issues before the arbitrator. Issues that were drafted are(i) whether there was valid reason for termination, (ii) whether procedures for termination were adhered to and (iii) to what relief(s) the parties are entitled to including compensation if there was tort. From the foregoing, submissions by counsel for the applicant cannot be valid. Notwithstanding, since general damages were not pleaded in the CMA F1, I hold as hereinabove that the same were erroneously included in the award.

Having so held, the main issue is whether termination of the respondent was fair or not and what relief(s) are the parties entitled to.

On fairness of termination, without further ado, I hold that there was no valid reason for termination of the respondent. My conclusion is supported by evidence adduced by Nirmal Sheth (DW1) and Joyce Kulwa Maison (DW2) the only witnesses who testified on behalf of the applicant and Deogratias Massenga(PW1), the respondent as discussed hereunder.

While testifying in chief, Nirmal Sheth(DW1) stated that on 25th June 2021, respondent was terminated because he issued a forged receipt No. 3544 (exhibit D4) to Paladin Power Assets Limited, applicant's client. It was further testified by DW1 that the said receipt was printed from the computer of the respondent and further that the screen server report(exhibit D6) shows the respondent talking to Paladin and that, CCTV footage (exhibit D8) shows respondent printing the said receipt. He testified also that respondent was on leave from 19th June 2021 to 29th June 2021.

While under cross examination, DW1 testified that applicant knew that respondent committed fraud after she had received an email from her customer but he did not know the whereabouts of the said email and further that he did not tender the said email. DW1 testified further that, the receipt was issued by Omary and not the respondent and further that the said Omary was not called before the disciplinary hearing and was not before the commission. DW1 testified further that, amongst all emails, there is none showing that the receipt was sent by the respondent. It was evidence of DW1 that while on leave, respondent cannot access his email or do anything relating to office. He admitted that the Management can log in the computer used by the employee or use employees' email.

In her evidence in chief, Joyce Kulwa Maison (DW2) testified that when on leave, employees surrender their computers. She testified further that, exhibit D4 was signed by Omary and that the said Omary is unknown. Giving evidence under cross examination, DW2 testified that the alleged forged receipt was issued on the date respondent was on leave.

On the other hand, Deogratias Massenga(PW1), testified that, on 25th June 2021 he was on leave. PW1 testified further that he was on leave from 19th June 2021 to 28th June 2021 as evidenced by Leave application form(exhibit P5). While under cross examination, PW1 testified that, while on leave he was unable to access his email and also unable to perform office duties including but not limited to communicate with applicant's clients. While under re-examination, PW1 testified that while on leave, applicant can log in and use respondent's email to direct another email to perform duties that were performed by him(PW1).

From the evidence of the parties, it is clear that, on the alleged date, respondent was on leave. It is also clear that, while on leave, respondent was unable to access his email or transact anything relating to his official duties. It is also clear that, while on leave, an employee surrenders office computer to the applicant. But there was no evidence adduced by the applicant showing that respondent did not surrender his computer in order to conclude that he was accessible to the said computer. Even if it could have been testified that he did not surrender the computer, applicant was supposed to prove how respondent accessed his email and send the alleged email. More so, it was evidence of both DW1 and DW2 that the alleged receipt was issued by Omary and not the respondent. As pointed hereinabove, the said Omari was not called as a witness. It is my view that, evidence by DW1 allegedly showing that the receipt under consideration was printed from the computer of the respondent and that the CCTV footage showed respondent printing or talking to Palladin is an embellishment laden with lies. That evidence cannot be believed. In short, there is no evidence against the respondent. I therefore hold that, there was no valid reason for termination.

On procedural fairness, it is clear from evidence that, on 30th June 2021, respondent was served with suspension letter (exhibit P1) that did not disclose the issue of the alleged forgery. Evidence shows further that respondent was served with the second suspension letter (exhibit P3) on 13th July 2021 with allegations that he issued receipt No. 3544 valued at USD 75,000 to a clearing and forwarding Agent. It is my view that, from the start, applicant suspended the respondent 30th June 2021 without informing him clearly reasons for the said suspension. Evidence is clear also that, during the disciplinary hearing, respondent prayed to be accompanied by Nicholaus Ois, his immediate supervisor, but that prayer was rejected as clearly reflected in the disciplinary hearing minutes(exhibit P6). Evidence further shows that respondent prayed to be supplied with investigation report but he was not supplied with. With all these, I hold that termination was also procedurally unfair.

Before I deal with the relief the parties are entitled to, I find it necessary that I should dispose other issues raised by the applicant. I am of that view because some of the issues may have impact on the amount awarded.

It was submitted by counsel for the applicant that the arbitrator commented on applicant's exhibits in the proceedings without affording the parties right to submit thereon. Based on that, counsel for the applicant prayed that proceedings be nullified and order trial *de novo*. I have considered that submission and examined the CMA record and find, as correctly submitted by counsel for the applicant, that arbitrator made comments in the proceedings relating to weight of exhibits tendered by the applicant. It is my view that the comment the arbitrators made, did not affect admissibility of the exhibit that would have required the parties to make submissions thereon. In my view, the arbitrator was in hurry and did not wait to assess weight to be attached to those exhibits at the time of composing the award. That notwithstanding, in my view, did not prejudice the parties though it is not a practice to be encouraged.

I have examined the comments, exhibits referred to, by counsel for the applicant, and considered evidence of the parties in entirety, and find as I have held hereinabove, that, applicant had no valid reason for termination. Those exhibits did not prove the alleged misconduct. More so, those exhibits do not support what was testified by both DW1 and DW2 in relation to possibility of the respondent to have forged the receipt in question. With those findings, I am of the view that, in the circumstances of this application, applicant is praying proceedings be nullified and order trial *de novo* to fill the gaps in her evidence. That is not acceptable. It was held by the Court of Appeal in the case of ***Vicent Clemence & Another vs Republic*** (Criminal Appeal 277 of 2019) [2020] TZCA 1916 and ***Matheo Ngua & Others vs D.P.P*** (Criminal Appeal 452 of 2017) [2020] TZCA 153 that retrial cannot be ordered for a party to fill the gaps in evidence. I, therefore, reject the prayer by counsel for the applicant to nullify CMA proceedings and order trial de novo because that will only help applicant to fill gaps in her evidence.

It was submitted by counsel for the applicant that the Guardian Newspaper (exhibit P11) was not tendered and was not among the documents filed by the respondents to be relied upon as exhibit, but the arbitrator considered it in awarding the respondent. I have, painstakingly, read the handwritten proceedings in the CMA file and find that it was tendered without objection on 22nd September 2022. Therefore, the complaint by counsel for the applicant relating to the said exhibit has no merit.

It was submitted by counsel for the applicant that arbitrator did not correctly exercise his discretion on awarding 79 months' salary compensation to the respondent for basing the award on tort. On the other hand, counsel for the respondent conceded that in the CMA F1, respondent prayed to be awarded 78 months' salaries as compensation but the arbitrator added one month based on tort to make a total of 79 months'. As pointed hereinabove, in CMA F1 respondent pleaded tort. In the award, in awarding the respondent, arbitrator stated:-

> " *Kwa sababu hizo basi mlalamikiwa amlipe mlalamikaji kiasi cha Tshs 279,125,000/= (sic) ambayo ni sawa na mishahara ya miezi 79 ikiwa ni fidia ya kuachishwa kazi bila kuwepo kwa sababu za msingi pamoja na madhara(tort) ambayo yalitokana na kitendo cha mlalamikiwa kumtangaza mlalamikaji katika gazeti na kupelekea mlalamikaji kukosa kazi kwa pale mlalamikiwa alipokuwa akiendelea kueleza juu ya kutangazwa kwa mlalamikaji na fraud hivyo mlalamikaji kukosa ajira hadi leo kwa mujibu wa kielelezo P 11 ikiwa ni kumtangaza gazetini na kila mlalamikaji akienda kutafuta kazi anaulizwa kwa nini alitangazwa gazetini".*

The quoted paragraph can be translated in English that, for the foregoing, respondent should pay the complainant a total of TZS 279,125,000/= that is equivalent to salaries for 79 months' being compensation for unfair termination and damages for tort resulting from the acts of the respondent(the herein applicant) to publish the applicant (the herein respondent) in the newspaper(exhibit P11) that respondent committed fraud, as a result, respondent was denied new employment. In every application for new employment, Respondent is asked to explain as to why he was published in the newspaper.

It is clear from the above quoted paragraph that the award of TZS 279,125,000/= included also general damages but the arbitrator did not specifically state which amount was payable as compensation for unfair termination or as general damages. It is my view that, submissions by counsel for the respondent that the respondent was awarded to be paid one month salary as general damages is unsupported by the quoted paragraph of the award. In my view, the arbitrator was supposed to specify the amount awarded as compensation for unfair termination and for general damages. As pointed hereinabove, respondent did not plead for general damages in the CMA F1 hence both the respondent and the arbitrator were bound by that pleading. See ***IPC's case*** and ***Maro's case*** (supra). I therefore hold that the arbitrator erroneously included general damages in the award though did not specifically state the amount.

In his evidence, respondent(PW1) testified both in chief and under cross examination that he has failed to secure new job because every insurance company is aware that he was terminated due to fraud. Though it was not stated the names of the employers who has turned down his application based on the publication in exhibit P11 or the number of applications he has made, that evidence remained unshaken. It is my view that, the arbitrator was entitled to consider that evidence in her award.

It was correctly submitted by counsel for the applicant that, in assessing the amount to be awarded, arbitrator was supposed to consider the provision of Rule 32 of Labour Institutions (Mediation and Arbitration Guidelines)Rules, GN. No. 67 of 2007(supra). The said Rule requires the arbitrator to consider *inter-alia* the extent to which termination was unfair. I have held hereinabove that termination was unfair because there was no scintilla of evidence proving the alleged misconduct of fraud. I have further held that termination was unfair procedurally by denying respondent right to be assisted by his fellow employee, failure to avail respondent with the investigation report contrary to the provisions of Rule 13(1) and(3) of GN. No. 42 of 2007(supra). It is my view that the extent of unfairness in this application was high hence a need to carefully consider the amount respondent is entitled to. In the case of ***Veneranda Maro & Another vs Arusha International Conference Center*** (Civil Appeal 322 of 2020) [2022] TZCA 37 as correctly submitted by counsel for the respondent, the Court of Appeal urged both the Executive and the Legislature to set a clear guide on what constitutes an equitable and just compensation due to absence of the maximum amount that can be awarded. But the same is yet to be done. Notwithstanding, I am guided by the aforementioned Court of Appeal decision and the provisions of section 52(1)(b) of the Labour Institutions Act[Cap. 300 R.E. 2019] that requires the court to consider the need to maintain and expand the level of employment in the country. In my view, if the amount awarded to the employee for unfair termination is too high, may cause the employer to collapse or be unable to run business leading to economic difficulty and finally redundancy of more employees. In my view, that will not be in line to the dictate and wisdom of the Parliament in enacting section 52(1)(b) of Cap. 300 R.E. 2019 (supra) and Rule 32 of GN. No. 67 of 2007(supra). For the foregoing, I hereby order that respondent be paid TZS 133,000,000/= being salary compensation for 38 months' only. I hereby set aside the award of compensation of TZS 279,125,000/=. I also confirm that respondent is entitled to be paid TZS

2,625,000/= as Severance pay. In total therefore respondent will be paid TZS 135,625,000/=only.

All said and done, I hereby allow the application to the extent explained hereinabove.

Dated in Dar es Salaam on this 17th March 2023.

B. E. K. Mganga
JUDGE

Judgment delivered on this 17th March 2023 in chambers in the presence of Evody Mushi, Advocate, for the Applicant but in the absence of the Respondent.

B. E. K. Mganga
JUDGE