IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., KAIRO, J.A., And MGONYA, J.A.)

CIVIL APPEAL NO. 96 OF 2023

MANTRA TANZANIA LIMITED .....APPELLANT

VERSUS

JOAQUIM P. BONAVENTURE.....RESPONDENT

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

(Maghimbi, J.)

dated the 24th day of March, 2022

in

Consolidated Labour Revision Nos. 137 & 151 of 2017

.....

JUDGMENT OF THE COURT

3rd May & 28th November, 2024

KAIRO, J.A.:

The appellant and the respondent lodged an appeal and a cross appeal respectively, seeking to challenge the decision of the High Court of Tanzania, Labour Division at Dar es Salaam (the High Court) in consolidated Labour Revisions Nos. 137 & 151 of 2017 dated 24th March, 2022. The parties in the said applications, had sought the High court to revise and set aside the award issued by the Commission for Mediation and Arbitration (the CMA) at Dar es salaam in Labour Dispute No. CMA/DAR/ILA/R.860/13 which the CMA partly allowed the respondent's claim for unfair termination.

At the hearing of the appeal, the appellant enjoyed the legal services of Mr. Audax Kahendaguza Vedasto, learned counsel, while on the other hand, the respondent entered appearance in his personal capacity.

To understand what gave rise to this appeal, we find it apposite to recap, albeit briefly, the background of the dispute as discerned from the record of appeal.

The respondent (employee) was recruited in Mwanza by the appellant (employer) on 15th June, 2007 as Finance and Administration Manager at a gross monthly salary of USD. 3,500 together with other fringe benefits. Among his duties were to manage the appellant's accounts and finances in general, payroll and tax processes. All went well until 30th November, 2013 when his employment contract was terminated for misappropriation of the appellant's funds. His termination resulted from the decision of the Disciplinary Committee (the Committee) of the appellant in which the respondent was found guilty of two disciplinary offences out of four charged against him, both of which revolved around misappropriation of his employer's funds.

After the disciplinary hearing, the Committee was satisfied that, the respondent had issued instruction to MS. Network Freight Forwarders (NFF) to process and pay TZS. 4,205,353.00 as an import duty for his private motor vehicle without the employer's authorization. It found further that, the respondent also took TZS. 1,400,000.00 from the appellant's fund

and used it to pay Insurance Premium for his private motor vehicle without prior authorization from the appellant. His appeal to the Managing Director also proved futile as the termination was confirmed on 3rd December, 2013.

Aggrieved, the respondent referred the complaint to the CMA for unfair termination, thus prayed for an order of reinstatement and payment of all employment entitlements and benefits.

The CMA's decision was to the effect that, the appellant had reasonable cause to terminate the respondent, but went astray procedurally as the respondent was not given sufficient notice to attend the hearing before the Committee to answer the charges levelled against him. As a result, the CMA awarded the respondent terminal benefits at the tune of TZS. 908,148,563.00 being compensation, repatriation expenses and subsistence allowance.

Both parties were unhappy with the outcome and preferred revision applications before the High Court. The appellant, through Revision No. 137 of 2017, was challenging the CMA's findings that the termination was procedurally unfair and the quantum of the award, whilst the respondent, vide Revision No. 151 of 2017, challenged the decision of the CMA which found that, the termination was substantively fair. The two revisions were consolidated and heard jointly.

Having heard both parties, the High Court ruled out that, the termination was both substantively and procedurally unfair and proceeded to award a total of TZS. 412,780,000.00 being 12 months' salaries for unfair termination, one-month salary in lieu of notice, repatriation allowance and subsistence expenses. It is noteworthy that, the High Court determined all the matters but did not consider the respondent's prayer for reinstatement to his employment.

Again, the parties were disgruntled with the High Court decision and lodged an appeal and a cross appeal to the Court. The Court in its decision made a finding that, the High Court strayed into an error for failure to consider the respondent's prayer for reinstatement. The Court thus, proceeded to quash the High Court's decision and remitted the case file to the High Court for it to render its decision after considering the reliefs sought by the respondent. Meanwhile, the appellant filed Application No. 385/01 of 2020 seeking the Court to revise its decision in Civil Appeal No. 145 of 2016 but the same was dismissed for want of merit, and the case file was reverted to the High Court as ordered.

Having seized the case file and after considering the evidence on record, the High Court maintained that, the termination was unfair, both substantially and procedurally. In its findings, the High Court ruled out that, the respondent's use of the appellant's money to pay the import duty and insurance premium for his private motor vehicle was justified because

it was the appellant's company practice to provide the amount which is latter refunded. Besides, that was the first offence to be committed by the respondent. It therefore went ahead to award **one**; one month salary in lieu of notice equivalent to TZS. 11,311,359.00 being the last salary amount before termination, **two;** compensation equivalent to 36 months' salary amounting to TZS. 407,208,924.00, **three;** subsistence allowance of TZS. 200,000.00 per day to be calculated from the termination date to the date of repatriation, and **four;** repatriation costs of USD 950.00.

Once again, both parties were displeased by the said decision, hence, this appeal before us. In their attempts to reverse it, the appellant lodged her appeal on 14th February, 2023 comprising of 18 grounds after abandoning the 8th ground as follows:-

1. *That the High Court Labour Division erred in law for holding to the effect that misappropriation of the employer's funds is a kind of offence that does not justify termination of the offender at first commission;*
2. *Having found that the evidence showed that the Respondent misappropriated the Appellant's funds, the Honourable High Court erred in law to hold that the Appellant acted unfairly in law to inflict a punishment of termination of the Respondent employment with it.*

3. *That the High Court erred in law by failing to evaluate the evidence and in consequence of that error, to hold that there was a proof that diversion of money for own use at the work place of the Appellant in the manner it was done by the Respondent was a common and justified practice.*

4. *That the High Court erred in law by holding to the effect that there was any law in this country or even elsewhere in the world which justifies an employee, and a finance manager of an institution, to take money of the employer without authority of the employer and return it when he feels, so long as he does not take a long time with it.*

5. *That the High Court erred in law by holding to the effect that there was any law in this country or even elsewhere in the world which justifies an employee, and a finance manager of an institution, to take money of the employer without authority of the employer and return it when he feels, so long as he does not take a long time with it.*

6. *That the High Court erred in law by failing to evaluate the evidence on the Respondent's diversion of the funds of the Appellant and on*

that error, coming out with a conclusion that the diversion was with intent to refund.

7. *That the High Court erred in law holding to the effect that sickness of a person seven months after he committed the offence of misappropriation of the employer's funds is a circumstance illegalizing the punishment of termination on such diversion.*

8. *That, having found the respondent was guilty of theft of funds of the appellant, the High Court erred not to order the refund of the funds stolen.*

9. *That the High Court erred in iaw by failing to analyse the evidence and all the materials on record as a result of which it held erroneously that the notice by the Appellant to the Respondent to attend a disciplinary hearing and defend himself against the disciplinary charges levelled on him was less than 48 hours.*

10. *That the High Court erred in law by holding to the effect that there is an absolute and rigid legal requirement for every employee to be given 48 hours to prepare his/her defence.*

11. *That the High Court erred in law by failing to evaluate evidence and to see that the Respondent in his position and in the circumstances of the present case was given a*

sufficient time under the law to prepare for his defence even if it may be held that the time given was less than 48 hours.

12. *That the High Court erred in law by upholding the decision of the CMA by granting the reliefs, to wit repatriation and subsistance expenses which were not pleaded and or prayed in the document that initiated the complaint- CMA Form No. 1.*

13. *The High Court erred in law by upholding the decision of the CMA which granted the reliefs which were lodged out of time without the Respondent seeking and granted condonation.*

14. *That the High Court erred in law by ordering the Appellant to pay the Respondent compensation and also by subjecting the appellant to pay subsistence expenses to the Respondent for all of the days of delay while there was no any request or claim for repatriation assistance lodged by the Respondent to the Appellant.*

15. *That the High Court erred in law by holding to the effect that the law imposes an absolute and rigid duty on the employer to repatriate an employee to his place of recruitment even when the employee does not want to go back there or does not want any support of the employer in*

the resettlement or even after acquiring and owing a home/house at the place of work.

16. *That the High Court erred in law by construing the law to the effect that it compels an employee to go back to the place of recruitment after termination.*

17. *That the High Court erred by assuming the jurisdiction, and by not faulting the CMA for assuming, jurisdiction to receive, hear and determine a claim of repatriation and subsistence claims which the Respondent never presented to the Appellant who had the original jurisdiction being an employer.*

18. *That the High Court failed to analyse evidence and, on that failure, holding that the monthly salary of the Respondent was TZS 11,311,359.00*

19. *That the High Court erred in law and in fact by giving compensation of a total of 36 months to the employee who the Court found guilty of diverting his employer's funds only on the humanitarian grounds.*

Similarly, the respondent had his cross appeal lodged on 10th March having 4 grounds of appeal as follows:

1. *That the Trial Judge erred in law and acted illegally by failing to grant relief of reinstatement*

as sought by the Respondent before the CMA even after holding that the Respondent's termination of employment was substantively and procedurally unfair thereby failing to consider that, the respondent will lose substantial amount of benefits, among others; share options and housing benefits, to mention but a few. The relief of compensation was awarded illegally and contrary to Section 40 (1) (a) and 40 (2) and 40 (3) of the Employment and Labour Relations Act, No. 6 of 2004.

2. *That the trial Judge erred in law for awarding a compensation of thirty-six months (36) only to the Respondent instead of reinstatement without regard to the fact that the Appellant was required to pay twelve (12) months wages in addition to the wages due and other benefits if the Appellant refuses to reinstate the Respondent as per Sections 40 (2) and 40 (3) of the Employment and Labour Relations Act, No. 6 of 2004.*

3. *That the Trial Judge erred in law and acted illegally by reducing the rate of subsistence allowance to TZS 200,000/= per day contrary to the applicable daily rate of the respondent of TZS 435,052 as per calculation formula provided under the prevailing law.*

4. *That the Trial Judge erred in law by failing to award the Respondent statutory payments by the date of termination including his housing, allowance and salary from 13th November 2013 to the date of termination plus other legal entitlements as per Section 44 (1) of the Employment and Labour Relations Act, No. 6 of 2004.*

Both parties filed their written submissions for and against the appeals and the cross appeal in terms of rule 106 (7) of the Tanzania Court of Appeal Rules, (the Rules), together with their lists of authorities which they adopted as part of their oral submissions during the hearing of the matter.

When invited to amplify the grounds of appeal, Mr. Vedasto informed the Court the manner to be used in amplifying the grounds of appeal that; the 1st and 2nd grounds shall be argued together; the 3rd, 4th and 5th grounds to be discussed collectively while the 6th, 7th, 9th shall be argued separately; the 10th and 11th grounds will be discussed together, followed by the 15th, 16th, and 17th grounds to be discussed jointly. The 12th 13th 18th and 19th shall be discussed separately. The 8th ground, as stated above, was abandoned.

Before proceeding with the parties' submissions, we wish to state at the outset that, we have noted some of the complaints in the grounds of

appeal are not points of law, thus, contrary to the requirements of section 57 of the Labour Institution Act, Cap 300 (the LIA) as they call upon us to re-evaluate the evidence. The observation was also raised by the respondent in his written submission in reply, though he did not go further to point out which grounds were offensive to the stated legal requirement. During his oral submission, we engaged Mr. Vedasto on the concern and inquired from him if the 3rd, 6th, 7th, 11th and 18th grounds of appeal were not offensive to section 57 of LIA.

Reacting to the raised issue, Mr. Vedasto was of the view that, failure to analyse evidence adduced, as was the case with the pointed-out grounds of appeal, raise a point of law as well. He referred us to our previous decision in **Patrick Magologozi Mongella vs The Board of Trustees of the Public Service Social Security Fund**, Civil Application No. 342/18 of 2019 [2022] TZCA 216 (22 April 2022) TANZLII. He therefore contended that, they are not offensive to section 57 of the LIA.

It is a settled law in terms of section 57 of the LIA that, appeals from the High Court Labour Division to the Court is restricted to points of law and not fact. The said provision stipulates as follows:-

> *"Any party to the proceedings in Labour Court may appeal against the decision of the High Court to the Court of Appeal on points of law only"*

The Court, when interpreting the above cited provision, in **Jongo Mwikola vs Geita Gold Mining Limited,** Civil Appeal No. 344 of 2020 [2024] TZCA 125 (23 February 2024) TANZLII observed as follows:-

> *"What is gathered from the above cited provision of law is that, the appeal against a decision of the High Court (Labour Division) automatically lies on points of law only. This stance was emphasized in the cases of* ***Ladius S. Ngemela vs The Treasury Registrar And Another,*** *Civil Appeal No. 66 of 2022,* ***Gloria Thompson Mwamnyange vs Precission Air Tanzania Limited,*** *Civil Appeal No. 55 of 2021...(all unreported). It follows, therefore, that where the appeal to this Court from the High Court is brought on matters of facts, the Court would not have a mandate to entertain them"*

Guided by the above authorities, we are of the view that, the 3rd, 6th, 7th, 11th and 18th grounds invite the Court to determine issues of facts, as in such grounds, re-assessment of evidence is unavoidable. We have gone through the case of **Patrick Magologozi Mongella** (supra) cited by Mr. Vedasto and found that the case is distinguishable as the Court therein ruled out that, the application was misconceived and struck it out after finding out that, the applicant therein resorted to the filing of the application for revision to circumvent the said requirement. We thus,

decline the invitation to determine the 3rd, 6th, 7th, 11th and 18th grounds of appeal.

It is our observation that, the remaining grounds of appeal and all of the grounds in the cross appeal essentially raise the following complaints/issues: **one,** that, whether the termination was fair substantially; **two**, that, whether termination was fair procedurally; **three,** the propriety of the resultant remedies awarded.

For easy follow-up, we have clustered the 1st, 2nd, 4th, 5th grounds in the memorandum of appeal together with the 1st and 2nd grounds in the cross appeal to address the first complaint/issue; the 9th and 10th grounds in the memorandum of appeal address the second complaint, and the 12th, 13th, 14th, 15th, 16th and 19th in the memorandum of appeal together with the 3rd and 4th grounds in the cross appeal shall address the third complaint. We further wish to put it clear that, we shall address each complaint/issue immediately after the arguments by the parties to avoid repetitions.

As alluded to above, the main issue as regards the first complaint is centered on substantive fairness whereby the appellant faulted the High Court for failure to rule out that, misappropriation of employer's fund is a misconduct warranting termination. On the other hand, the respondent faulted the High Court for its failure to order his reinstatement without loss of benefits after finding that the termination was substantively and

procedurally unfair.

It was the argument of Mr. Vedasto that, it was improper for the High Court to rule out that, the employer had no valid reason to terminate the respondent after the appellant had clearly established that the respondent misappropriated the employer's money he was charged/entrusted with. Yet, the High Court proceeded to rule out that the reason for termination was substantively unfair reasoning that there was no convincing evidence to prove that the misconduct was serious to make continued employment intolerable. He faulted the High Court reasoning that, the employer's action was a common practice at the workplace and thus, cannot justify termination at its first commission.

It was Mr. Vedasto's further argument that, the misconduct was not a matter of evidence, but a matter of law. He referred the Court to The Employment and Labour Relations (Code of Good Practice) GN. 42 of 2007 (the Code) which lists the penalties of some of the offences according to their gravity.

He went on to submit that, unauthorized possession of employer's property, fraud or misappropriation of organization funds attracts termination penalty. To back up his argument, he cited the cases of **Paschal Bandiho vs AICC**, Civil Appeal No. 4 of 2024 and **Dew Drop Co. LTD vs Ibrahim Simwanza**, Civil Appeal No. 244 of 2020 (both unreported). He further downplayed the High Court reasoning that,

misappropriation of employment funds with intention to refund is justified and was a common practice at the employer's workplace. He argued that, since there was no prior approval, the action amounts to inexcusable misconduct which is not expected to be conducted by the respondent who was a Finance and Administration Manager entrusted with the management of the appellant's money. The learned counsel thus prayed the Court to find that, the termination was with valid reason. He cited the case of **National Microfinance Bank (NMB) vs David Bernard Haule** (2014) LCCD No. 48 to fortify his arguments.

In response, the respondent refuted the appellant's submission arguing that, the High Court correctly interpreted rule 12 (1) of the Code to arrive at the conclusion that, the termination was without valid reason. His clarification was two folds: **one,** that there was neither regulation nor Human Resource policy that supports the appellant's contention to the effect that, the use of employer's fund required her prior approval, as such, the alleged misconduct had no basis. **Two**, that it was a common practice for senior managers to utilize the employer's fund for their private use and the funds would later be recovered from their salaries upon submitting the relevant invoices. According to him, the practice was verified by one, Nicholaus Masabu (PW2), the appellant's marketing officer who also gave an example of another employer he named as Hassan Mwaipopo who did exactly the same but was neither charged nor terminated. He contended

that, the omission to take similar measures depicts that, the employer was inconsistent and imposing the penalty discriminatorily which he argued to be contrary to Rule 21 (i) and (iv) of the Code. According to the respondent, the employer's approval and authorization is required in the circumstances where there is an outlay of funds like an advance against salary and not when booking for service as was the case in this matter where the utilization of funds will be in future. He concluded that, the alleged misconduct therefore is unfounded.

Distinguishing the cited cases by Mr. Vedasto, the respondent stated that, all of them were referring to cases where the employees have guiding rules or regulations in place, while there is none in the matter at hand. Thus, there is nothing to fault the High Court in its decision on that aspect.

Arguing his cross appeal in connection to the issue in question, the respondent also faulted the High Court for failure to order for his reinstatement after finding that the termination was unfair both, substantively and procedurally. He contended that, it was a misdirection on the part of the High Court to consider the time lapsed since termination took place, and further to speculate that by that time, his position would have already been filled, as the basis of not awarding reinstatement while there was no proof to that effect. He went on to argue that, the refusal to so order contravened Rule 32 (1) and (2) of GN. No. 67/2007. To back up his argument, he referred us to our previous case of **Victor W. Meena &**

Another vs Arusha Technical College, Civil Appeal No. 515 of 2020 (unreported). He insisted that, the High Court findings called for reinstatement order and if the appellant could not do so, then she was required to abide by the conditions stipulated under section 40 (3) of the Employment and Labour Relation Act, Cap 360 (the ELRA). To wind up, he submitted that, the High Court failure to order for his reinstatement if not reversed, would result into loss of his benefits including among others, share option and housing benefits. He thus prayed the Court to uphold the High Court's findings that termination was both substantially and procedurally unfair and order for his reinstatement without loss of remuneration.

Replying to the respondent's submissions in relation to the cross appeal, Mr. Vedasto argued that, pursuant to Rule 32 (2) (c) of GN. No. 67/2007, the High Court was correct to consider the time lapse since termination of the respondent and the availability of the position held by the respondent before termination. He argued that, a similar stance was taken in the case of **Kasalile & Others vs Institute of Social Work,** Civil Appeal No. 145 of 2016 [2018] TZCA 364 (4th April 2018) TANZLII into which compensation was awarded instead of reinstatement following the lapse of 8 years, while in the case at hand, ten years has lapsed from the date of termination, to date. He pleaded with the Court to uphold the High Court's decision as far as reinstatement of the respondent is concerned in

the circumstances. According to him, the respondent was not even entitled to the compensation of thirty-six (36) months awarded by the High Court while his misconduct was proved.

Having considered the rival argument of the parties, the issue for our determination is whether or not the termination was without valid reason and hence substantially unfair.

According to the record of appeal, there is no dispute that on 4th February, 2013, the respondent authorized the payment of TZS 1,400,000.00 being insurance premiums for his private motor vehicle without the prior approval of the appellant. There is no dispute either that, on 4th March, 2013, the respondent had instructed NFF through an email to process and pay the appellant's funds amounting to TZS.4,205,353.00 as importation costs of his private motor vehicle without prior approval of the appellant. The allegations were also found established by the High Court in its judgment at page 788 of the record of appeal when it re-analysed the evidence. We let the relevant excerpt speak for itself:-

> *"This Article if reflected under section 39 of the ELRA which imposes a duty on the employer to prove that the termination was fair. On that note, it is pertinent to see what evidence was adduced during arbitration and whether it established, on balance or probabilities, that the termination was substantively fair. DW1 was a Senior Manager,*

Administration System and he testified that the employee was terminated for reason of paying insurance premium for his private vehicle Subaru out of company funds. The payments were done for import duties through National Freight Forwarders (NFF) to an insurance broker called AON. The company became aware because Mantra did not have such a car. The payments were done in March, 2018 while the disciplinary hearing was in November, 2018 and until that time the employee had not refunded the money. DW2 was the Vice President of the employee company and also confirmed that the employee was terminated due to misappropriation of company funds.

I have noted that the evidence of the employer was not shaken by that of the applicant, neither in cross examination nor in the applicant's testimony. Actually, looking at the applicant's testimony, the employee admitted to have made the authorization*, only on defence that the practice was normal at the workplace. Apart from that, his remaining evidence was more based on the procedural irregularities of his termination but it did not talk much of the substance."*

[Emphasis added]

Flowing from the quoted excerpt, it was proved on the balance of probability that, the respondent instructed NFF to use the appellant's money to pay for the importation costs of his private motor vehicle without prior authorization which we think was improper and does not exhibit good conduct on the part of the respondent. It was the argument of the appellant that, prior authorization was required before using the employer's fund for personal use. The respondent's position was to the contrary and his defence was two folds: **first**, that there was neither Human Resource policy nor any regulation from the appellant on employee related expenses as regards their private usage; and **second;** that it was a common practice in the appellant's organisation.

Regarding the first argument, the question therefore is whether the practice is legally acceptable in the absence of any Human Resource written regulation to that effect, and without mincing words, our response is in the negative and we shall explain: Rule 12 (2) of the Code provides for two types of the misconducts; **one,** those which if committed by an employee for the first time would not justify termination, **two;** those which are so serious that they make a continued employment relationship intolerable. The second type which have also been referred to as gross misconduct, attract termination regardless of how many times the employee has committed them. However, there is no definition of gross misconducts in our labour statutes. The term serious or gross misconduct

may be implied from the provisions of Rule 12 (3) of the Code into which various forms of such misconducts have been listed, among them, is gross dishonest.

Again, the Code, under the General Part titled- "*offences which may constitute serious misconduct and leading to termination of employee",* in item 9 and 10 under the list therein has termed offences *of theft or unauthorised possession of the employer's property, fraud or misappropriation of organization funds* to constitute serious misconduct. Considering that, the respondent was a person entrusted with the appellant's finance being the Head of Finance and Administration, his action has breached the trust in our view, thus, rendering their relationship, as employer and employee, intolerable.

Though, the respondent has argued that, an approval was only required in the circumstances where there was an outlay of the funds and not in service booking as it was in the case at hand, we still maintain that, a prior approval was necessary considering that the said service booking resulted into the utilisation of the employer's fund.

On the second defence, it was the assertion of the respondent that, the utilization of employer's fund for private purposes was common practise of the Senior Managers who later refunded it upon receipt of their salaries. The argument was supported by PW2 who also gave an example of another employer who used the appellant's funds as well but went scot-

free. However, we have noted that, PW2 was not in Managerial Cadre and thus, he could not have experienced such a practice. It means therefore that, the practice he was testifying on, was just a hearsay which cannot be relied on. But further to that, we think, PW2 has an interest to serve, having been retrenched by the appellant.

In his submission, the respondent has also rebutted the assertion that he misappropriated the appellant's fund arguing that nowhere has it been proved by the appellant. Suffice it to state that, the assertion is unfounded as it was the High Court's finding at page 789 as quoted above to which he did not appeal against. As such, his denial at this stage is just an afterthought which we are not prepared to entertain.

We are also aware that, the High Court in its decision reasoned that, the termination was unfair as the respondent had the intention of refunding the money. However, it is our finding that the practice is legally not tenable as above analysed. Moreover, we are of the view that the record does not support the said intention as the booking of the service was done in March, 2013 yet, until November, 2013, when the disciplinary hearing process commenced, there was no such refund.

We are further aware that the High Court also reasoned that, the respondent's sickness derailed the refund, but the record of appeal is clear that, he became sick in September, 2013. As such, we find no connection

of his sickness and the delay to refund the appellant's fund. With much respect, the reasoning is not convincing.

Basing on the above analysis, we are convinced that, the respondent's action of using his employer's funds without seeking her prior authorization, constituted gross misconduct in the circumstance of this matter. We thus find merit on the 1st and 2nd grounds of appeal and we hold that, the termination was with valid reason.

In the wake of the Court's findings in the 1st and 2nd grounds of appeal, we think, discussing the 1st and 2nd grounds in the cross appeal is superfluous as far as substantive fairness of termination is concerned. However, the aspect of resultant remedies awarded to the respondent shall be discussed later when analysing the 3rd issue regarding remedies.

We now revert to the 2nd issue as to whether the termination was procedurally unfair. The appellant rebutted the High Court finding that, the respondent was given less than 48 hours to prepare for his defence and enter appearance before the Disciplinary Committee, thus contravened rule 13 (3) of the Code. Amplifying, Mr. Vedasto submitted that, the respondent was given the notice of hearing on 4th November, 2013 requiring him to attend the disciplinary hearing on 6th November, 2013 and the respondent accordingly signed as an acknowledgement of receipt of the same. He referred the Court to exhibit D2 at page 198 of the record of appeal, for verification. He submitted that, though the second page of exhibit D2 at

page 199 of the record of appeal shows that the appellant was issued with the notice on 6th November, 2013 to attend the hearing on the same date, but that was a mistake as the respondent acknowledged to have been issued with the notice of hearing on 4th November, 2013 by signing.

He also contended that, the record of appeal at page 203 reveals that, the respondent prepared his defence on 5th November, 2013, (exhibit D3) which further confirms that, the respondent was served with the notice on 4th November, 2013, otherwise he could not have prepared his defence before being issued with a statement of complaint admitted as exhibit D3 appearing at pages 200-203 of the record of appeal.

It was his further argument that, exhibit D3 would have assisted the High Court to clear all doubts as to whether the respondent received the notice of hearing on 4th or 6th November, 2013.

Mr. Vedasto went on to argue that, in actual fact, the hearing took place on 7th November, 2013 after being adjourned for a day on 6th November, 2013, adding that, the adjournment was confirmed by the respondent at page 164 of the record of appeal. It was his conclusion that, the respondent got 3 days to prepare for his defence against the charges levelled against him.

The learned counsel also submitted that, a right to appeal was explained and further the respondent was given the opportunity to adduce more evidence to support his case if he wished following the decision of

the Disciplinary Committee on 12th November, 2013 (exhibit D5), whereby he was required to appeal within five days from the date of the decision (see page 234 of the record of appeal). He charged that, the respondent accordingly exercised the said right and further given the opportunity to adduce more evidence to support his case if he wished.

He added that, the respondent accordingly exercised the appeal right and supplied additional evidence which was also considered by the High Court. He referred us to page 243 of the record of appeal for verification. The learned counsel, in winding up, argued that, even if notice given was of less than 48 hours, that error was cured on appeal as he was given 5 days more to adduce more evidence to support his case. He cited the case of **Deus Wambura vs. Mtibwa Estate Ltd**, (2014) LCCD 1120 to fortify his arguments.

In response, the respondent emphatically submitted that, the notice to attend hearing before the Committee was issued on 6th November, 2013 and the hearing was scheduled to proceed on the same date on 6th November, 2013. He referred the Court to page 199 of the record of appeal for verification. He further submitted that, due to the said irregularly, the notification was withdrawn and he was informed to attend the hearing on 7th November, 2013 instead. He referred us to page 164 of the record of appeal to back up his arguments. The respondent contended further that, the appellant was heavily relying on the document at page

198 -199 to back-up his argument, but he intentionally omitted to mention the document appearing at page 196 which had no charges attached therein, arguing that the notification was defective. He insisted that, he was not availed enough time to prepare for hearing as required by the law. According to him, the notice was issued on 6th November, 2013 requiring him to attend the hearing on 7th November, 2013. To verify his argument, he referred the Court to exhibit D2 appearing at page 196 of the record of appeal and he was not given any charge. He contended that, the appellant contravened rule 13 (2) and (3) of the Code and prayed the Court to dismiss grounds number 9 and 10 of the appeal for lack of merit.

After hearing the parties' arguments, the issue for our determination is whether or not the respondent was given less than 48 hours' notice to appear before the Committee for hearing. In short, the appellant's position is that, the respondent was given more than the minimum time of 48 hours provided in rule 13 (3) of the Code. On the other hand, the respondent's argument is that, he was not afforded enough time to prepare himself for hearing, as such, rule 13 (3) of the Code was contravened.

In determining this controversy, we find it apposite to reproduce the notice in controversy appearing at page 198 (exhibit D2):-

> ***"MANTRA TANZANIA LIMITED***
>
> ***DF4: NOTIFICATION TO ATTEND DISCIPLINARY HEARING***

Alleged offender/a person complained against: Joaquim Bonaventure

***Department**: Finance **Job Title**: Finance and Administration Manager*

Summary of the allegation/complaints: Misappropriation of Company funds, in that:

1. *On 4th March, 2013 you instructed Network Freight Forwarders to process importation duties relating to a Subaru Forester, not imported by, for or on behalf of Mantra Tanzania Pty Ltd ("the Company") without prior authorisation. The costs incurred by the Company amounted to TZS. 4,205,353.00 To date, the Company has no record of these funds being reimbursed to the Company.*
2. *On 1st February, 2013 a cheque for the amount of US$5,000 was made out to you with the understanding that it would be paid over to Network Freight Forwarders to replenish the Company's cash float. Network Freight Forwarders have no record of these funds being received.*
3. *On 6th June, 2013 a cheque amounting to US$1,000 was issued to you and presented to Stanbic Bank Tanzania Ltd. The cash received from Stanbic Bank Tanzania Ltd was to be paid over to Network Freight Forwarders have no record of these funds being received.*

4. *On 4th February, 2013 you authorised, without Company knowledge, the payment of Tsh 1,400,000 relating to insurance premiums to AON Tanzania Limited for a Mitsubishi Truck, registration number T236 APE, a vehicle that is not registered as a company vehicle.*

Hearing date: ***6th November, 2013*** *Time: 10:00*
Venue: ***MANTRA OFFICES BOARD LOAN*** *(MANTRA B)*
Notice is hereby given to all the parties involved to attend the above stipulated disciplinary hearing in their capacities. Please inform your witnesses and representatives to attend if any.
Signed ***Date 4th November, 2013***
REMARKS*:*

a. *YOU ARE ENTITLED TO BE REPRESENTED BY A PERSON OF YOUR CHOICE FROM THE WORKPLACE AT WHICH YOU ARE EMPLOYED.*
b. *SHOULD YOU FAIL TO PRESENT YOURSELF AT THE MEETING, THE HEARING MAY BE HELD IN YOUR ABSENCE WITHOUT FURTHER NOTICE TO YOURSELF AND ACTION TAKEN ACCORDINGLY*
c. *YOU ARE ALLOWED TO CALL WITNESSES IF YOU SO WISH AND MANAGEMENT SHOULD BE NOTIFIED 24 HOURS PRIOR TO THE HEARING.*
d. *YOU ARE ENTITLED TO AN INTERPRETER SHOULD YOU REQUIRE ONE. THE COMPANY WILL PROVIDE SUCH AN INTERPRETER.*

e. *YOU ARE ENTITLED TO CALL AND CROSS-EXAMINE WITNESS.*

f. *YOU ARE ENTITLED TO STATE YOUR CASE, AND SHOULD YOU BE FOUND GUILTY TO PLEAD FACTORS IN MITIGATION OF SANCTION.*

g. *YOU ARE ENTITLED TO APPEAL TO A HIGHER AUTHORITY IN TERMS OF THE COMPANY'S DISCIPLINARY AND APPEAL PROCEDURE SHOULD YOU WISH.*

NOTIFICATION ISSUED BY

***Initials & Surname**: Signed **Designation**: Senior HR Officer*

*Signature: **Signed** Date: **06/11/2013***

ACKNOWLEDGEMENT OF RECEIPT BY EMPLOYEE

*1, **JOAQUIM BONAVETURE hereby acknowledge receipt of the notification to attend this Disciplinary hearing issued to me on this day of 4th November 2013.** I further acknowledge that the content of this Notification has been read and explained to me*

***SIGNATURE**"*

[Emphasis added]

The above reproduced notice displays that, the notice was signed on 4th November, 2013 by the officer of the appellant. It further shows that, the same was issued by one. J. Mrengo, Senior Human Resource Officer on 6th November, 2013 to the employee (respondent) who acknowledged receipt

of the notification to attend the disciplinary hearing on 4th November, 2013 by signing the document.

Though, the content of the document suggests two distinct dates (4th and 6th of November 2013) of notification, but logically, issuance of the document was to proceed its receipt acknowledgement. In our view, it is weird that, the notice was received by the respondent on 4/11/2013 before the same was issued by the appellant to the respondent.

When reading further the record of appeal, we observed that, the respondent prepared his written defense on 5th November, 2015 (exhibit D3 appearing at pages 200-203 of the record of appeal). In our view, it is against logic and common sense that the respondent would have prepared the defence before being issued with the statement of the complaints/charge levelled against him. We have also laboured to go through exhibit D3 and noted that, the respondent was responding to the employer's complaints raised in exhibit D2 above. We are aware that the respondent has insisted to have been issued with the notice on 6th November, 2013, as indicated under issuance part, but the facts shown above, confirmed that, he was issued with the notice on 4th November, 2013 contrary to what he asserted and verified by the High Court which we find to be an error, with much respect. We think, the argument by Mr. Vedasto that the indicated date of 6th November, 2013 as an issuance date was just a slip of the pen, sounds convincing.

We have further noted that, the disciplinary hearing took place on 7th November, 2013 after being adjourned for a day. This can be verified by the termination letter (exhibit D1) and the respondent's answer when cross examined appearing at pages 194 and 165 respectively of the record of appeal. In our further scrutiny we noted that, the notice issued on 6th November, 2013 notifying the respondent to appear for disciplinary hearing on 7th November, 2013 and which was referred by the respondent (page 196 of the record) was the one issued following the adjournment of the hearing previously scheduled to take place on 6th November, 2013. This explains why it had no statements of complaints/charges against the respondent as the same were already availed to the respondent in the previous notice appearing at page 198. We thus find the respondent's arguments of not being issued with the charges unfounded.

Having found that the notice of the hearing was issued to the respondent on 4th November, 2013 and disciplinary hearing conducted on 7th November, 2013, we are firm that, the respondent had more than 48 hours required under Rule 13 (3) of the Code. Thus, the 9th and 10th grounds of appeal are meritorious. Consequently, the termination was procedurally fair as well. In that accord, the prayer by respondent to be reinstated can not be entertained.

The 3rd issue, as alluded to, revolve around the complaints by both parties as regards the remedies awarded by the High Court. Going by the 12th, 13th, 14th, 15th, and 16th grounds of appeal, the appellant complaints concern the following aspects: **one;** that the granted repatriation costs and subsistence allowance were lodged out of time without condonation, besides, they were neither pleaded nor prayed in CMA Form No. 1, **two;** that the subsistence allowance was granted without there being a request or claim for repatriation assistance by the respondent, **three;** that it was an error to construe the law that it compels an employee to go back to the place of recruitment after termination.

We have gone through the record of appeal and particularly CMA Form No. 1 and observed that, the relief which the respondent prayed therein were **one;** reinstatement, **two;** payments of benefits, and **three;** all other legal benefits including allowances etc. Considering the observation and the parties' rival arguments, our determination on this complaint is two folds: **First**; Whether or not the phrase "*all other legal benefits including allowance*" encompasses repatriation costs as well as the subsistence allowance. **Secondly**, whether or not the said reliefs are statutory, as such, they are consequential under section 43 of the ELRA upon termination of employment.

In our view, the granted reliefs are legally payable regardless of whether the same were prayed by the employee or not. In other words,

once termination of an employee is effected, the obligation to repatriate him/her to the place of recruitment arises. For ease of reference, we wish to recapitulate section 43 of het ELRA hereunder:

> *"43- (1) Where an employee's contract of employment is terminated at a place other than where the employee was recruited, the employer shall either:-*
>
> *(a) transport the employee and his personal effects to the place of recruitment,*
>
> *(b) pay for the transportation of the employee to the place of recruitment or*
>
> *(c) pay the employee an allowance for transportation to the place of recruitment in accordance with subsection (2) and daily subsistence expenses during the period, if any, between the date of termination of the contract and the date of transporting the employee and his family to the place of recruitment.*
>
> *(2) An allowance prescribed under subsection (1) (c) shall be equal to at least a bus fare to the bus station nearest to the place of recruitment.*
>
> *(3) For the purposes of this section, "recruit" means the solicitation of any employee for employment by the employer or the employer's agent."*

From the cited provision, we gather that, the employer is obligated to repatriate the employee and his/her personal effects to the place of recruitment immediately upon termination of his/her service. However, should the repatriation be delayed, paragraph (c) of section 43 (1) comes

into play by requiring the employer to provide the terminated employee with daily subsistence expenses until so repatriated. In **Gasper Peter vs Mtwara Urban Water Supply Authority (MTUWASA),** Civil Appeal No. 35 of 2017 [2019] TZCA 28 (28 February 2019) TANZLII, the Court in an akin situation observed as follows:

> *"As correctly observed by CMA and the High Court, under section 43 (1) of the ELRA, upon termination of employment, an employee is entitled to inter alia, subsistence allowance during the period between termination of his employment and the date of payment of costs of his transportation to the place of recruitment."*

In other words, repatriation and subsistence allowance are intertwined reliefs. [See: **Bahari Oilfields Service FPZ Ltd vs Peter Wilson**, Civil Appeal No. 157 of 2020 [2021] TZCA 250 (11 June 2021 TANZLII.

On the argument that, the appellant was required to request or apply to the employer to be repatriated, suffice to state that repatriating a terminated employee to the place of his recruitment has no strings attached. It is paid to the employee regardless of whether one decides to go back to his recruitment place or not. In this regard therefore, the conditions stated by Mr. Vedasto in the 14th, 15th and 16th grounds of appeal with respect are a misconception of section 43 (1) (c) of the ELRA. On the account of the above analysis, the 12th, 13th, 14th, 15th and 16th

ground shave no basis, we dismiss them. [See **Bahari Oilfields Service FPZ Ltd** (supra), **Security Group (T) Limited vs Steven Gerson Kizinga** *(As administrator of the estate of the late Maslaka A. Setebe)* Consolidated Civil Appeal No. 386 of 2020 & 50 of 2021 [2024] TZCA 107 (23 February 2024) and **Gasper Peter vs Mtwara Urban Water Supply Authority (MTUWASA)** (supra). In the same vein, the complaint by the appellant that the CMA and the High Court assumed jurisdiction they did not have to determine the claims of repatriation and subsistence, is again a misconception. We dismiss it. Basing on the law and authorities above, the cited cases by Mr. Vedasto are irrelevant to the issues under discussion.

In the matter at hand, the respondent was not repatriated or paid repatriation costs to Mwanza where he was recruited since he was terminated on 30th November, 2013. The High Court, in its judgement, has ordered the appellant to pay the respondent, repatriation expenses amounting to USD 9,500 and subsistence allowance from the date of termination to the date when he will be repatriated to Mwanza at the rate of TZS 200,000.00 per day Mr. Vedasto faulted the award of the said reliefs for the reasons that the request was time barred and further that, repatriation requires the employer to be moved. However, as above analysed, we have found both reasons unfounded.

The respondent on his part faulted the High Court for reducing the rate of subsistence allowance to TZS 200,000.00 per day while according

to him, the applicable daily rate for him was TZS 435,052.00 as per calculation formula provided under the prevailing law.

Basing on authorities above, it is clear that the respondent is entitled to be repatriated to Mwanza together with his personal effects and paid subsistence allowance. The questions are, in what rate and for what duration?

The position of the law is that, that the same should be calculated as provided in Regulation 16 (1) of the Employment and Labour Relations (General) Regulations, GN. No. 47 of 2017 (the Regulations). The said Regulation states as hereunder:

> *"16 (1):-The subsistence expenses provided for under section 43 (1) (c) of the Act shall be quantified to daily basic wage or as may be from time to time be determined by the relevant Board.*

We are aware that, the Regulation was not in operation yet when the dispute ensued in 2013. However, similar stands were taken in our various decisions including the case of **Paul Yustus Nchia vs National Executive Secretary of Chama cha Mapinduzi**, Civil Appeal No. 85 of 2005/ (unreported) and **Gasper Peter vs Mtwara Urban Water Supply Authority (MTUWASA)** (supra). The stated stance explains why the principle was subsequently incorporated into the provision above cited. On

that account, the High Court reduction of the daily subsistence allowance to TZS. 200,000.00 is, with profound respect, incorrect.

Another aspect for determination is the duration within which the subsistence allowance is to be paid.

We are further mindful that the High Court has awarded subsistence allowance for the whole period from termination until when the respondent will be repatriated to which we do not subscribe to, for the following reasons; **first** and foremost, we are mindful to the primary objectives of the ELRA under section 3 (a), one being to promote economic development through economic efficiency, productivity and social justice. **Second**; section 43 (1) of ELRA does not have condition of tying an employee to the place of his employment for the whole period until the date of his repatriation and we hasten to add that, the employee is expected to mitigate his adversaries/foes while waiting to be repatriated. **Third;** the respondent was not working for the appellant for the whole period he was terminated, thus awarding him for the whole period is to make him reap what he did not sow, and **fourth;** which is pertinent to note, the Court in this case has made a finding that, the respondent's termination was both substantively and procedurally fair. As such, the award of subsistence allowance for the whole period since his termination in the year 2013 to the date when he will be repatriated in our view, will amount to allow him to benefit from his own wrongs, which we think is improper.

Having all the above factors in consideration, together with section 37 of the Labour Institution Act No. 7/2004, we are of the view that, the subsistence allowance for 24 months will meet the demand of justice in this case. This is not the first time the Court revises the duration of paying the subsistence allowance. In **Kenya Kazi Security vs Kirobotoni & 71 Others**, Civil Appeal No. 234 of 2021[2024] TZCA 821 (23 August 2024), the Court upheld the payment of subsistence allowance of six months only though the duration the employees stayed without being repatriated was longer than that. The Court in reaching at the said decision observed that the wording of the section does not have a condition of tying an employee to the place of his employment for the whole period until he is transported by the employer. We observed the same in the case of **Gasper Peter vs Mtwara Urban Water Supply Authority (MTUWASA) (supra)** and we still maintain that the observation is valid.

On the basis of the above discussion, the Court has found that, the respondent is entitled to the following statutory benefits:-

i) One month salary in lieu of notice
ii) Annual leave pays due, for the leave not taken by the employer as per section 44 (1) (b) and (c) of the ELRA.
ii) Repatriation costs as per see 43 (1), and (2). For avoidance of doubt, the subsistence allowance payable is for the duration of 24 months only.

In fine, the appeal and cross appeal are partly allowed to extent above discussed. This being a labour matter, we make no order as to costs.

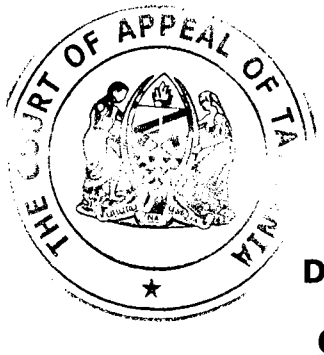
DATED at **DAR ES SALAAM** this 19th day of November, 2024.

S. A. LILA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

Judgment delivered 28th day of November, 2024 in the presence of Mr. Joseph Rugambwa, learned Counsel for the Appellant and the Respondent present in person is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL