

TANZANIA / JUDGMENT

christina bosco mrema vs national bank of commerce ltd 2022 tzhcld 1083 21 november 2022

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM LABOUR DISPUTE
NO. 01 OF 2022 CHRISTINA BOSCO MREMA COMPLAINANT VERSUS
NATIONAL BANK OF COMMERCE LIMITED RESPONDENT

JUDGMENT

Date of last order: 04/02/2022 Date of Judgment: 21/11/2022 B. E. K. Mganga, J. Facts of this dispute are that, on 11 th June 1985, the National Bank of Commerce, hereinafter referred to as NBC, the herein respondent, employed Christina Bosco Mrema, the herein complainant, to the post of Assistant Personal Officer. During her employment carrier with the respondent, complainant was promoted to various positions including Human Resources Officer grade II, Human Officer Grade I and in 1990, she was promoted to Senior Manpower Management Officer Grade II. In 2000, NBC was privatized, as a result, some of her employees were retrenched, but complainant was not. After privatization, structure of the respondent changed, as a result, title of the complainant changed to 1 Clerk Grade BB. In 2009 complainant was promoted to Officer with Grade CC working in Guarantee Department with duty of preparing guarantees. On 16th June 2006, a Voluntary Agreement between the Tanzania Union of Industrial and Commercial Workers (TUICO) representing employees of NBC on one hand, and NBC, on the other was signed. On 29th June 2006, the said Voluntary Agreement was registered before the Industrial Court as Collective Bargain No. 3 of 2006 per the order of Mwipopo, J (as he then was). Among other things, the said Voluntary Agreement provided for retirement award, medical benefits, sick leave, retrenchment process and packages thereof, and duration of the Voluntary Agreement. In 2013, while working with NBC, vision of the complaint started to be impaired, as a result, she was referred by NBC to Muhimbili National Hospital for checkup. From that time, complainant used to attend at Muhimbili National Hospital for treatment. In 2015, Muhimbili National Hospital after being asked by NBC, issued a report that complainant has lost vision and that there is no possibility of recovering during her entire life. Based on those findings, on 26th March 2015, NBC wrote a letter to the complainant informing her that her vision problem has reached a 2 point which does not allow her to continue with work and that she will retire on 31st March 2015 on medical grounds.

Complainant was served with the said letter on 31st March 2015 namely the date NBC mentioned that complainant will retirement on medical grounds. Based on that letter, complainant retired on the same date on medical grounds. Upon retirement, NBC paid the complainant One Hundred Thousand Tanzanian Shillings (TZS 100,000/=) only as retirement award. Complainant was aggrieved with the said retirement award, as a result, she filed this dispute claiming to be paid (i) TZS 19,608,576 being retirement benefit, (ii) TZS 47,059,583.12 being payment of accident insurance due to loss of sight and (iii) TZS 105, 886,312.02 being compensation for loss of expected earnings for the remaining period of her employment before attaining compulsory retirement age. It was alleged by the complainant that she was entitled to be paid retirement award based on clause 14 and 15 of the Voluntary Agreement. In her statement of complaint, complainant complained that NBC refused to pay her retirement award and statutory benefits contrary to what is provided for, under the Voluntary Agreement. The complainant complained further that NBC did not abide by the Voluntary Agreement 3 entered on 16th June 2006 and that NBC breached the terms of the said Voluntary Agreement. On the other hand, NBC filed a response to the statement of complaint stating that the said Voluntary Agreement was effective for four years only commencing on 16th June 2006 and that, at the time of retirement of the complainant, namely on 31 st March 2015, the said Voluntary Agreement was not in force, hence complainant was not entitled payment based on the said Voluntary Agreement. NBC disputed further the allegation that she did not abide by the aforementioned Voluntary Agreement. It was further stated by NBC in the response to the statement of complaint that, complainant is not entitled to the reliefs claimed because the same does not arise from the Voluntary Agreement. It was therefore contested by NBC that, there was no breach of the Voluntary Agreement. Despite the foregoing, it was undisputed by NBC that there was no new Agreement concluded by the Tanzania Industrial and Commercial Workers(TUICO) on behalf of NBC employees on one hand, and NBC on the other, after signing the Voluntary Agreement on 16 th June 2006, which could have made the Voluntary Agreement entered on 16 th June 2006 to be inoperative. It was also undisputed by NBC that complainant 4 got vision disability before her retirement on medical grounds at the time she was her employee. Both parties appeared before the mediator(Deputy Registrar) but mediation failed, as a result, on 13th May 2022, they signed a non- settlement order in terms of Rule 10(4) of the Labour Court Rules, GN.No. 106 of 2007. Due to failure of mediation, three issues were drafted for determination by this court. The issues that were drafter are:-

1. Whether, on retirement on medical ground, the complainant was paid according to the Voluntary Agreement of 16th June 2006.
2. Whether the respondent was justified to pay the complainant TZS 100,000/= as retirement award, and
3. What are the relief(s) each party is entitled to. In the bid to prove her case, Christina Bosco Mrema, the complainant testified as PW1 and called Alquin Senga(PW2) and closed her case. On the other hand, NBC called Sweetbert Marco Mapolu(DW1) and Julius Magai Manyerere(DW2) to disapprove the claim by the complainant. In her evidence, Christina Bosco Mrema(PW1) testified that on 11 th June 1985 she entered into employment

relationship with NBC for unspecified period and that her initial post was Assistant Personal Officer and later was promoted to Human Resources Officer Grade II initially called as Manpower Management Officer, Human Resources 5 Officer Grade I, then, in 1990 she was promoted to Senior Manpower Management Officer Grade II. PW1 testified that, while working with NBC, a decision was reached by the government to privatize NBC and that due to privatization, structures changed, as a result, her position changed to Clerk Grade BB. PW1 testified further that, in 2009 she was promoted to Officer with Grade CC and that her duties were to prepare guarantees in the guarantee Department. PW1 testified further that, in 2013 while still working with NBC, her vision started to be impaired but continued to work while attending treatment at Muhimbili National Hospital. Due to that impairment, on 24th September 2014, NBC wrote a letter(exhibit P1) to Muhimbili National Hospital praying doctors to examine her vision capacity. It was evidence of PW1 that she went at Muhimbili National Hospital where she was examined and a report issued to the effect that she had lost her vision totally. She went on that, despite that report, she continued to work because NBC asked her to do so in order to orient one Yusuph Mndolwa to perform duties she was performing prior losing her site because she was the only person who had knowledge of preparing local and foreign guarantee. PW1 went on that, on 9th March 2015, Muhimbili National Hospital issued a report(exhibit P3) that there is no available 6 cure for her condition and that her vision cannot be improved by any medical device or surgery and advise referred her to the Tanzanian Blind Society. PW1 testified further that, on 31st March 2015 NBC she was served with a retirement notice(exhibit P2) from NBC and retired on the same date on medical grounds. It was further evidence of PW1 that, before retirement on medical grounds, her monthly salary in 2015 was one million three hundred and seven thousand two hundred thirty-eight Tanzania shillings forty-two cents (TZS 1,307,238.42) only and tendered salary slip(exhibit P4) dated 31st March 2015 to prove that amount. It was evidence of PW1 that, upon retirement on medical grounds, she was paid severance allowance, fare, and transport costs for her luggage to her place of domicile namely, Ikuti Village, Rungwe District within Mbeya Region and that she was paid TZS 270/= per kilometer per tone. PW1 testified further that, she was paid one hundred thousand (TZS 100,000/=) as retirement award and that the said money was credited in her bank account 11100000678 maintained at Corporate Branch in the name of Christina Bosco Mrema after she had retired on medical grounds. PW1 testified further that, her terminal benefits were governed by the Voluntary Agreement dated 16 th June 2006 (exhibit P5). She testified 7 that at the time of signing exhibit P5, her vision was not yet impaired because impairment started in 2011. She went on that, the said Voluntary Agreement provides that employees who worked with NBC up to 2006 will be paid half of salaries for the whole period worked. She testified that she started to work with NBC for 30 years and that NBC was supposed to calculate her retirement benefits based on that period i.e., half of monthly salary times thirty (30) years she worked. PW1 testified further that, she was paid retirement award of one hundred thousand Tanzanian shillings (TZS 100,000/=) only and that she does not know the base of payment of the said amount while exhibit P5 had a different mode of calculation of her retirement award. PW1 testified that clause 15 of exhibit P5 shows that the said Voluntary Agreement

was in force on the date of her retirement on medical grounds because there was neither amendment of the said exhibit P5 nor new Voluntary Agreement and that NBC was supposed to base calculations of her retirement award on exhibit P5. It was evidence of PW1 that, before her retirement on medical grounds, NBC had health insurance and that, according to that policy, an employee who got permanent disability and consequently terminated, NBC was paying that employee three years monthly salaries. She went on that, that was according to the insurance policy NBC entered on behalf of her employees. In her evidence, PW1 also testified that, she was claiming TZS 19,608,576/= for the thirty years as retirement award i.e., half salary times thirty years she worked with NBC and TZS 47,059,583.12 payment of three years due to permanent disabilities and TZS 105,886,312.02 being loss of expected earnings all calculations based on her monthly salary of TZS 1,307,238.42 While under cross examination, PW1 maintained that she got vision impairment while in office and that the same was caused by (i) the use of computers that had no glass to reduce light and (ii) office condition, because light was striking directly in her eyes sometimes she was forced to close windows. She recalled that, while in office, she was diagnosed to have diabetes but maintained that diabetes was not the cause for her to lose vision because that can be treated at CCBRT. She testified further that, office set up at NBC accelerated her to lost sight because sunlight was directly hitting on the computer and her eyes. She did not recall the exact date when she started to attend eye clinic at Muhimbili National Hospital but maintained that it was in 2013. She admitted that Muhimbili National Hospital stated that loss of her sight was due to retina pigmentosa. She maintained that she was claiming to be paid TZS 19,608,576/= based on the Voluntary Agreement calculated on half of her salary per month times number of years worked for NBC and that TZS 47,059,583.12 as payment of accident insurance based on permanent disability, calculations based on NBC policy that, a person who gets permanent disability must be paid one year salary times three. Still under cross examination, PW1 testified that she did not tender the said policy but maintained that it is in possession of NBC. She testified further that; she has also claimed to be paid TZS 105,886,312.02 as compensation for seven (7) years as loss of expected earnings because she was expected to retire upon attainment of 60 years but retired at the age of 54 years. In re-examination, PW1 testified that her eyes were okay at the time of recruitment and that the employer was supposed to take care of her health during her employment. She testified further that she was once Senior Manpower Management Officer hence aware of the policy she was talking about because the said policy is in custodian of Human Resources Department. In supporting evidence of PW1, Alquin Senga (PW2) testified that he knows PW1 as an ex-employee of NBC and that, he happened to know the relationship between PW1 and NBC because he (PW2) was the 10 Deputy General Secretary of TUICO and leader of the Bargaining Committee at NBC. PW2 testified that, between 2001 and 2006 there was negotiation relating to Collective Bargain Agreement on behalf of the employees of NBC. That, after negotiation, a Collective Bargain Agreement was entered and registered before the Industrial Court of Tanzania on 29th June 2006 before Mwapopo, J (as he then was) as Collective Bargain Agreement No. 3 of 2006. PW2 added that, he signed on the said Voluntary Agreement (exh.P5) by initials on each page and in the last

page he appended his signature at his name. PW2 testified further that, according to exhibit P5, NBC employees were entitled to lumpsum payment namely, half monthly salary for the whole period up to June 2005. PW2 testified further that, on medical benefits (exhibit P5) provided that NBC employees will enjoy medical service through medical provider but should not be below the ones the employees were getting prior entering into the Collective Bargain Agreement and that the same was noncontributory by the employee. PW2 went on that, during discussions before signing the Collective Bargain Agreement, NBC brought an agreement she had entered with Medix and then momentum and that NBC insured all employees and that rights of employees were 11 protected. PW2 added that on rate of payment based on disability was put because they found that it is the doctor who can make findings on the degree of disability. While under cross examination, PW2 maintained that he signed exhibit P5 as the Deputy Secretary General of TUICO. He testified further that, NBC employees were supposed to get medical treatment without contributing their funds and that NBC was required to continue to improve medical benefits for her employees. PW2 testified further that, duration of the agreement was four years after signing and registration before the Court and that the agreement was in force until entering in force of a new agreement. He went on that; he was not aware as to when another agreement was entered. On retirement package, PW2 testified that it was agreed that NBC employees should be paid half of monthly salary times the period the employee worked and that the same cannot be altered during the 1 st two years. He added that it was agreed that the agreement will be operative until coming into force of a new agreement and that the voluntary agreement may be renewed or varied upon mutual agreement of the parties. He testified that in the agreement parties put four (4) years to ensure that at that time, privatization will be complete. 12 While under re-examination, PW2 maintained that at the time of signing exhibit P5, he was Deputy General Secretary but negotiation started when he was Assistant General Secretary. He concluded that he retired from TUICO since 2009. In disapproving the claim by the complainant, in his evidence in chief, DW1 testified that he started to work with the NBC in March 2015 after being employed as Relations Manager. DW1 testified that, complainant was an employee of NBC and retired on 31 st March 2015 on medical grounds after NBC had received a report from Muhimbili National Hospital(exhibit P2) to the effect that her vision has been impaired. DW1 testified further the said report(exhibit P2) came into his possession because he was dealing with treatments of employees and that he also participated in initial consultation with PW1 before she was retired on medical grounds. DW1 went on that it was advised in exhibit P2 that Christina Bosco Mrema (Pw1) should attend at special unit for persons with impaired vision. In his testimony, DW1 tendered a medical report (exh.D1) showing that (PW1) was a diabetic. DW1 went on to testify that, he issued exhibit D1 to PW1 in 2015 so that the latter can submit it to her Doctor at Muhimbili National Hospital to facilitate her credit life insurance cover. 13 DW1 also testified that, according to clause 14 of the Voluntary Agreement(exhibit P5), retirement award was once off payment i.e., lump sum payment to NBC employees from 2000 up to 30 th June 2005. He testified further that, NBC employees were entitled to be paid 50% of their salaries for the period worked up to 30th June 2005 and calculations were made based on salary of 30 th

June 2005. He went on that, PW1 was also beneficiary of exhibit P5 because she was employed by NBC in May 1985. DW1 added that, since the agreement shows that an employee was supposed to be paid up to 30th June 2005, complainant(PW1) had worked with NBC for 20 years and as of 30 th June 2005 salary of PW1 was TZS 603,586/= per month. According to the agreement, PW1 was supposed to be paid TZS 6,035,860/= prior deduction of tax and that net income after deduction of tax(P.A.Y.E) is TZS 4,287,602/= in accordance with the Voluntary Agreement and that the same was paid to PW1 on 01st December 2005 in Bank Account No. 011100000678 in the name of Christina Bosco Mrema, maintained at NBC. DW1 testified further that at the time of retirement, PW1 was paid

- (i) one month salary, (ii) retirement award of TZS 100,000/= only. DW1 testified further that retirement award of TZS 100,000/= was a token 14 amount as handshake payable to all NBC employees. In his evidence, DW1 admitted that he did not tender proof that PW1 was paid TZS 4,287,602/=. DW1 testified further that, PW1 is not entitled for insurance cover because that policy was not existing and that the claim for TZS 105,886,312.02 as compensation for expected earning has no base because PW1 retired on medical grounds hence she is not entitled. While under cross examination, DW1 testified that his employment with NBC started on 03rd March 2015 and that NBC have a policy relating to retirement on medical grounds and that the said policy is clear that the employee must have a medical report from a certified medical practitioner. He admitted that he had no evidence showing that in 2005 salary of the complainant was TZS 603,586/=. He went on that, in the Voluntary Agreement (exhibit P5) the word "Retirement award" was used in similarity to the retirement letter exhibit P2. DW1 testified further that, implementation of exhibit P5 was before its signing due to existence of memorandum of understanding between TUICO and NBC to facilitate payments to employees while registration of the said agreement was in progress. Upon further cross examination, DW1 admitted that clause 15 of exhibit P5 shows that its implementation was after signing. DW1 testified further that, exhibit P5 had a duration of 15 four (4) years and that it continued to be operative until signing and entering into force a new agreement. DW1 admitted that at the time of retirement of PW1 there was no any other Voluntary Agreement between the parties and that a new agreement was signed in 2017. DW1 maintained that he is the custodian of agreements between NBC and her employees and that he participated in negotiations and agreements between NBC and her employees. He testified that NBC paid retirement package of PW1 based on Human Resources Management Policy. When cross examined on exhibit D1, DW1 admitted that said report is dated 30th November 2016 and that there is no proof that the said exhibit passed in his hands or that he is the one who gave it to PW1. Despite that, DW1 testified maintained that he issued exhibit D1 so that insurer can pay the loan on behalf of PW1 and that PW1 should not pay the said loan herself. DW1 admitted that PW1 was not paid by insurer based on the medical report. While under re-examination, DW1 testified that retirement award as per voluntary agreement was payable on 30th June 2005. He went on that, he received exhibit D1 from thePW1 with the aim of processing payment of her loan based on insurance policy and maintained that NBC submitted exhibit D1 to the insurer. He admitted that, at the time of 16

signing exhibit P5 he was not present but that he is the custodian of these agreements. He went on that; he cannot recall the policy that was operative at the time of retirement of PW1 but NBC used Human Resources Management Policy to pay PW1. He testified further that retirement award on exhibit P5 was payable to PW1 and was paid on 01st December 2005 and that the said retirement award has no relationship with retirement of an employee. he added that retirement award on notice of retirement (exhibit P2) is payable to employees who retires as handshake. In his evidence, Julius Magai Manyerere (DW2), testified that he was an employee of NBC since 1988 and that he retired on 05th March 2020 as Bank Officer. DW2 testified that, prior his retirement, he was dealing with payment as quality assurance, controlling payments to ensure that they were accurately made. He also testified that, he was the Chairperson of TUICO-NBC Headquarters since 2004 up to 2020 and Chairperson of the negotiation team of TUICO and NBC. That, his duties as TUICO Chairperson at NBC Branch were to safeguard rights of TUICO members and NBC employees by representing them in the negotiation between TUICO and the employer. DW2 testified that, he signed exhibit P5 because he was a member of the committee between TUICO and 17 NBC on the voluntary agreement. DW2 testified further that, in 1997 NBC was privatized from NBC to NBC (1997) Ltd, NMB and NHC (National Holding Company) and that employees were supposed to be paid their benefits from the date of employment to 1997 but that was not done because payment was only done to employees who were retrenched. He added that due to that, employees of NBC forwarded their claims to ABSA who bought NBC, as a result, on 3 rd November 2005 a Memorandum of understanding(M.O.U) was signed to enable employees to be paid. DW2 testified that salary that was used to calculate amount payable was of June 2005 and that employees were paid 50% for those who were eligible. DW2 went on that, on 16 th June 2006 a Voluntary Agreement (exhibit P5) was signed incorporating some matters agreed in the M.O.U. It was evidence of DW2 further that, after signing M.O.U, employees were paid retirement award in December

2005. He testified further that, Clause 14 of exhibit P5 relates to retirement award for employees who were not paid at the time of privatization of NBC. He maintained that NBC employees were paid in 2005 after signing M.O.U. and that exhibit P5 was signed for record purpose only and incorporated terms of the M.O.U. DW2 testified further that, after payment that was done in 2005, TUICO and NBC issued a 18 statement that, those who were not paid or not fully paid, should contact TUICO or NBC Management. He added that, they did not receive any complaint relating to nonpayment or partial payment. Testifying on duration of the Voluntary Agreement, DW2 stated that Clause 15 provides that duration of the voluntary agreement was four (4) years and that it continued to operate until a new agreement is signed. He also testified that, exhibit P5 was registered in Court for implementation and admitted that exhibit P5 was in force up to 2017 when it expired after signing a new agreement. DW2 added that, NBC employees continued to benefit from exhibit P5 depending on each clause e.g., Health care, salary etc. DW2 candidly testified that only Clause 14 was not in operation because payment was done once in December 2005 hence PW1 cannot be paid retirement award. When testifying under cross

examination, DW2 maintained that exhibit P5 remained in existence and was signed after payment just for record purposes only. He testified further that he was informed by NBC specifically Mr. Sabi, the Managing Director of NBC that PW1 is claiming retirement award. He went on that, payment relating to retirement award was paid prior signing voluntary agreement (exhibit P5) on 16 th 19 June 2006 and that parties signed exhibit P5 for record purposes only because employees were paid prior signing. On further cross examination, DW2 admitted that in exhibit P5, there is no clause showing that retirement award was paid prior signing or that some clauses have been executed and that the whole agreement is for record purpose. He admitted further that Clause 15 of exhibit P5 provides that the agreement will be effective after signing namely on 16th June 2006. DW2 admitted further that, retirement means when an employee's employment comes to an end either by age according to law after attaining 60 years, at 55 years as optional or on medical grounds. He testified further that, he was not sure whether, at the time of negotiation of exhibit P5 and the time of privatization, some employees retired either on compulsory, voluntary or on medical grounds. He went on that, money of the employees who were eligible to be paid retirement benefit was deposited in a suspense account that is to say, an account that keeps money until the time the said money is be needed. He went on that, money that was paid to the employees were from the Government and NBC and were deposited in suspense account. DW2 testified further that, he cannot recall the account number nor the date money was deposited in suspense account but can only remember 20 that employees were paid in December 2005. DW2 maintained that all employees were paid on a single day and the suspense account was closed. Testifying on further cross examination, DW2 admitted that in 2005 he was not verifying payments because he was in another department namely, internal operations that deals with receiving and sending money outside the country but was transferred to the payment section in 2016 to verify all payments that are being done at NBC. When asked whether, PW1 received information sent through emails by Management of NBC that she can claim retirement benefit in December 2005, DW2 conceded that he had no proof and that he had no access to the PW1's emails. In the same evidence, DW2 changed and testified that in November 2005, they called all NBC employees who were in Dar es Salaam at ALNTANZIL hall near Fire area and held a meeting notifying them about negotiations and payment of retirement award and that it was on Saturday at 14:00 hrs after working hours. In further cross examination, he admitted that he has no minutes of the said meeting. DW2 went on that, NBC employees who were supposed to be paid salary, notice of termination of employment, transport cost to place of domicile are those who left in 1997 after privatization. He added that 21 employees who remained with NBC made negotiation also to be paid salary, notice and transport to place of domicile but after negotiation were paid in accordance with the M.O.U which is whole incorporated in the voluntary agreement exhibit P5. DW2 admitted under cross examination that, in 2020 at the time of his retirement, himself and 134 others, after negotiation, were paid special package in addition to what is provided under the law. He hesitated to disclose and in fact, he did not disclose, the criteria or base of the said special package and how calculation were made. He testified further that, the voluntary agreement that was signed in 2017 has

no retirement award but made improvements on the rest of the clauses of exhibit P5 and added three days of paternity leave. In re-examination, DW2 testified that, the M.O.U provided that immediately after signing, payment should be made. He added that Clause 14 that relates to retirement award covered all employees who were in Office up to 30th June 2005 and maintained that all employees were notified through emails. I have sufficiently narrated evidence of the parties and now it is my duty to determine the issues framed. For obvious reason, I will start with the 1st issue namely, whether on retirement on medical grounds, 22 the complainant was paid according to the Voluntary Agreement of 16 th June 2006. But before I decide this issue, I have found it imperative that the most crucial issue is relating to duration of the period in which the Voluntary Agreement(exhibit P5) was in force. I am of that view because, it was a contention between the two sides as to when the said Voluntary Agreement ceased to apply. The issue that appeared to be an initial contention between the parties is whether the Voluntary Agreement was operative at the time of retirement of PW1 in 2015 or it ceased to apply in 2005 and whether PW1 was paid retirement award in 2005 or not. I should point that there is no dispute that complainant(PW1) retired on medical grounds. It is clear that, under Rule 15 and 19 of the Employment and Labour Relations (Code Good Practice) Rules, GN. No. 42 of 2017, incapacity namely ill-health is a fair reason for termination of employment. On the other hand, Rule 21 of GN. No. 42 of 2007(supra) and Guideline 7 of the Guideline for Disciplinary, Incapacity and Incompatibility Policy and Procedures issued under GN. No.42 of 2007(supra) provides procedures to be followed when an employer desire to terminate employment of an employee based on incapacity(ill- health). 23 Rule 19(1)(a),(b),(c),(d) and (e) of GN. No. 42 of 2007(supra) provides that when an employer considers terminating employment of an employee on medical grounds, shall consider whether, illness is permanent or not, and further consider the ability to accommodate the incapability and existence of any compensation or pension. If incapacity was caused by work-related illness, the employer is required to consider the ability to accommodate the employee. It is undisputed that a registered medical practitioner recommended that disability of PW1 was permanent hence Rule 19(3) of GN. No. 42 of 2007(supra) was complied with, as a result, NBC retired PW1 on medical grounds. But, in terms of Rule 19(9),(11),(12) and (14) of GN. No. 42 of 2007(supra), the employer namely, NBC was mandatorily required to secure possible alternative employment for PW1 or adopt duties or work circumstances to accommodate her disability. It was testified by PW1 that she continued to work while orienting one Yusuph Mndolwa. That evidence was not challenged by NBC. That means PW1 had capacity to be accommodated in employment by NBC instead of being terminated or retired on medical grounds. More so, evidence by PW1 that work environment accelerated or contributed to her disability was not challenged. It is my view that NBC was supposed to comply with the 24 abovementioned provisions including but not limited to securing alternative position to suit disability of the complainant. Since that was not done, it was not proved that NBC had a fair reason for termination or retiring the complainant on medical grounds. It is undisputed that PW1 has permanent vision disability. For that disability to be a fair reason for termination of employment or retirement on medical

grounds, NBC was supposed to comply with the entire provisions of Rule 19 of GN. No. 42 of 2007 but she didn't. Notwithstanding the foregoing, NBC, was required to comply with the provisions of Rule 21 of GN. No. 42 of 2007(supra) that requires consultation with the employee being represented by a fellow employee or trade union, hold a meeting, and discuss and outlines reasons for termination, consider proposal by the employee and communicate the outcome with reasons thereof in writing. See also Guideline 7(1), (2),(3) and (4) of the Guidelines issued under GN.No.42 of 2007(supra). That procedure is intended to have a joint problem solving. That procedure was not adhered to because soon after getting the report (exhibit P3) that vision disability of PW1 is permanent, respondent served complainant with notice of retirement(exhibit P2) and terminated employment or retired the complainant on medical grounds of the date 25 she (NBC) served to retirement notice to the complainant. That is unexplainable and beyond imagination. It was as if NBC had tried to stay with the complainant which she served her with retirement notice on the date planned to be her retirement date and retired on the same date. Without mincing words, what was done by the employer namely NBC was procedurally unfair and contrary to the law. Termination of employment on medical grounds is a valid reason for termination of employee's employment under the International Labour Convention (ILO) No.158. I have read Article 6(1) and (2) and Article 1 both of the Termination of Employment Convention, 1982 (No. 158) and find that it requires a medical certification to be issued for an employee to be terminated on medical grounds. In exhibit P5 parties indicated that a certification by Medical Board will be required similar to the provision of Article 6(1) and (2) and Article 1 both of the Termination of Employment Convention, 1982 (No. 158). Unfortunately, in the application at hand, there is no certification of the Medical Board as pointed hereinabove. In my view, Parties were bound by their agreement that a certification by the Medical Board was a prerequisite condition for termination or retirement on medical grounds. It has been held several times by this court and the Court of Appeal that, it is a cardinal principal of law that parties are bound by their agreement and that, in absence of ambiguities, the court must enforce what parties agreed and respect their intention unless it is contrary to public interest and security. See the case of Simon Kichele Chacha vs Aveline M. Kilawe, Civil Appeal No. 160 of 2018 [2021] TZCA 43, Kilanya General Suppliers Ltd & Another vs CRDB Bank Ltd & Others , Civil Appeal No. 1 of 2018 [2021] TZCA 3529. In Kilawe's case (supra) it was held by the Court of Appeal that:- "It is settled law that parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract. That is, there should be a sanctity of the contract as lucidly stated in Abualy Alibhai Azizi v. Bhatia Brothers Ltd [2000] T.L.R 288 at page 289 thus:- "The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement " I am of that view because the Notice of retirement on medical ground (exhibit P2) dated 26th March 2015 is loud and reads in part:- " RE: NOTICE OF RETIREMENT ON MEDICAL GROUNDS We are writing in reference to letter Reference No. MNH/OPH/PT/VOL.IV/125 dated 09.03.2015 from the Executive Director, Muhimbili

National Hospital, Department of Ophthalmology, Dar es Salaam being report on your health status. 27 Based on the recommendation from the above report, your vision problem has reached a point which does not allow you to continue with work; that being the case, it is recommended that you be retired on medical grounds. We are therefore writing to communicate that management has considered the medical specialist report recommendation to retire you on medical grounds. Following this consideration, management has made its decision which we are communicating to you now, to retire you the services of the Bank on medical grounds with effect from 31st March, 2015..." On the other hand, clause 5.4, 5.4.1, 5.4.2 and 5.4.3 of the Voluntary Agreement(exhibit P5) provides procedures on how an employee's employment can be terminated on incapacity associated with medical grounds. These clauses read as follows:- "5.4 Sick leave: 5.4.1 Employees shall be entitled to full wages and related benefits for the first three months' of sick leave. 5.4.2 For the second three(3) months' of sick leave employee shall be entitled to half wages. 5.4.3 after six months' of sick leave an employee may be terminated due to incapacity, provided such incapacity is so certified by the Medical Board." In the application at hand, no evidence was led by the respondent to the effect that the Medical Board certified that complainant is incapable of doing work and that she should be terminated(retired on medical grounds). In retiring the complainant, respondent relied on a letter with reference No. MNH/OPH/PT/VOL.IV/125 dated 9th March 28 2015 (exhibit P3) written by Dr. Suzan on behalf of the Executive Director of Muhimbili National Hospital. In the said letter the author wrote:- RE: CHRISTINA BOSCO MREMA 54 YRS OLD(F) REG ... Kindly refer to the heading, the above named patient is been(sic) attended in our hospital with complains of poor vision. The patient first attended eye clinic in January 2013 and found to have loss of vision on her left eye and reduced vision on her right eye which was not able to improve with glasses. Visual Acuity on the right eye was 6/12 and hand movement of the left eye. Diagnosis of the retinitis pigmentosa was made and patient was asked to come for follow up every year in order to monitor her disease progress. In September 2014 her visual acuity was 1 meter finger count on the right eye and hand movement on the left eye. Fundus photography was done and showed central pigmentation of the macular region of both eyes which is consistence with central retinitis pigmentosa. On 5 March 2015 patient was again seen with power vision of finger count near and still hand movement on the left eye not improving with refraction or low vision devices. We then concluded to refer the patient to Tanzania Society of Blindness for visual rehabilitation because there is no available cure for her condition and her vision cannot be improved by any medical device or surgery. Thank you Dr. Suzan... For Executive Director. SGD" I have decided to withhold registration number in the heading of the abovementioned letter purposely with a view of not to disclose it to the public without prior permission of the patient. I am mindful 29 that the said number can lead to disclosure of vital important relating to health conditions of the complainant. Now back to the dispute at hand, from the quoted letter from Muhimbili National Hospital, two things are clear namely, one; it was not recommended by doctors at Muhimbili National Hospital that complainant(PW1) be terminated(retired) on medical grounds unlike to what

respondent wrote in the notice of retirement on medical grounds (exhibit P2) that it was recommended that PW1 should retire on medical grounds and two; there is no certification by the Medical Board that complainant(PW1) should retire on medical grounds. In my view, exhibit P2 did not comply with the requirement of certification by Medical Board as provided under clause 5.4.3 of the Voluntary Agreement(exhibit P5). In other words, exhibit P3 being written by a single doctor without indication that it was a decision of the Medical Board, cannot amount to the decision of the Medical Board. Exhibit P3 contains findings of a single doctor and there is no recommendation that complainant should be retired on medical grounds. That said, I hold that exhibit P2 did not comply with the Voluntary Agreement(exhibit P5) that was registered before this court on 29th June 2006 that required a certificate of by Medical Board for an employee's employment to be terminated on 30 medical grounds. From where I am standing, the author of exhibit P3 cannot by any means, be regarded as Medical Board envisaged in the Voluntary Agreement (exhibit P5). It was evidence of both PW1 and PW2 that the Voluntary Agreement was operative in 2015 they year PW1 retired on medical grounds. On the other hand, DW1 admitted while under cross examination that exhibit P5 had a duration of four (4) years and that it continued to be operative until entering on a new agreement and that a new agreement was signed in 2017. On his part, like DW1, while under cross examination, DW2 admitted that exhibit P5 was operative until signing of the new agreement in 2017. It was evidence of DW2 under cross examination that NBC employees continued to benefit from the provisions of exhibit P5 depending on each clause e.g., Health care, salary etc and that the new agreement anticipated in exhibit P5 relates to rights of employees depending on years passed and economic condition that may require improvement to the old agreement. With that evidence, I confidently hold that at the time of retirement of the complainant(PW1) on medical grounds, the Voluntary agreement(exhibit P5) was in force. My conclusion is fortified by the provisions of clause 15 of the said Voluntary Agreement (exhibit P5) which provides as follows:- 31 "15 Duration of Voluntary Agreement The Voluntary Agreement will be effective for four (4) years from the date of signing by both parties and registration as an Award of the Industrial Court. The Agreement may be amended or varied or renewed for a specified period, by mutual agreement. The Agreement, or a renewed one, shall not cease to operate until a new voluntary or collective agreement has been put in place notwithstanding that it has expired. Once registered, the retrenchment compensation package cannot be altered in the first 2 years. The duration of the recognition and collective bargaining agreement annexed hereto will run concurrent with the Voluntary Agreement". Since there is no dispute that complainant retired in 2015 on medical grounds and that, at that time there was no other agreement apart from exhibit P5, and further that, a new agreement was entered in 2017, I hold that the said Voluntary Agreement was operative. On whether complainant was paid retirement award in 2005 or not, remains also a contentious issue. PW1 testified that she was not paid retirement award in 2005 but DW1 and DW2 testified that she was paid. Admittedly, this issue has exercised my mind at length. It was evidence of DW1 in chief that complainant was paid TZS 4,287,602 on 01st December 2005 through bank Account No. 011100000678 in the name of

Christina Bosco Mrema, maintained at NBC and that the said payment was in accordance with the Voluntary Agreement at the time when PW1 was still working with NBC. DW1 testified that the said 32 amount was paid after calculation that was made based on TZS 603,586/= monthly salary of the complainant. But, while under cross examination, DW1 admitted that he had no evidence showing that in 2005 monthly salary of the PW1 was TZS 603,586/=. That alone, in my view, makes evidence of DW1 not worth to be believed. If he has no evidence that complainant's salary was TZS 603,586/=: then, all claims that complainant was paid TZS 4,287,602/= is unsupported. I should point that, in 2005, DW1 was not an employee of the NBC, the respondent hence, cannot claim to have knowledge as to the amount that was paid to the complaint without tendering documents in support thereof. DW1 was employed by the respondent on 31st March 2015 the year employment of the complainant was terminated on medical grounds hence his claim that complainant was paid TZS 4,287,602/= as retirement award in December 2005 and that the same was in accordance with the Voluntary Agreement(exhibit P5) is embellished with lies. More so, while testifying in chief, DW1 stated that complainant was paid retirement award in accordance with exhibit P5 but while under cross examination, he testified that NBC employees were paid retirement package based on Human Resources Management Policy but he cannot recall which policy. 33 On his part, DW2 testified that Clause 14 of exhibit P5 relates to retirement award for employees who were not paid at the time of privatization of NBC and that the said clause 14 was not operative at the time of retirement of the complainant on medical grounds because retirement award was done once in December 2005 hence complainant cannot be paid retirement award. I have carefully examined evidence of DW2 and find that, like DW1, his evidence is questionable on that aspect. In his evidence, while under cross examination, DW2 admitted that in 2005 he was working at in internal operations department that deals with receiving and sending money outside the country but in 2016 he was transferred to payment section to verify all payments that are being done by NBC. In my view, DW2 cannot tell what happened or whether payment was done or not, because he was not in that section hence not privy to the alleged payment. More so, no support therefore was tendered showing that NBC employees including PW1 were paid retirement award in accordance with exhibit P5. In short, NBC, the respondent has failed to bring credible witnesses to prove that complainant was paid retirement award in accordance with the Voluntary Agreement (exhibit P5). It is my view further that, if at all NBC employees were paid, then, there was no need of keeping money in the 34 suspense account for the same to be paid to eligible employees until the time the said money was needed. It is my further view, as correctly admitted by DW2 in his evidence, that retirement means an employee's employment has comes to an end either by age according to the law after attaining 60 years, at 55 years as optional or on medical grounds. With that in mind, cannot be said that complainant(PW1) retired prior the year 2015. It is my settled view that complainant(PW1) did not retire prior 2015 otherwise she cannot retire twice. Since PW1 did not retire prior the year 2015, then, no retirement award could have been paid to her. As pointed hereinabove, DW2 admitted under cross examination that in 2020 at the time of his retirement, himself and 135 others, after negotiation with the respondent,

were paid special package in addition to what is provided under the law. As noted herein above, he was hesitant and did not answer the question relating to the base of the said special package and calculations thereof. It should be recalled that DW2 retired in 2020 but he did not state whether calculations were made based on the Voluntary Agreement signed in 2017. Against, both DW1 and DW2 did not testify that the new Voluntary Agreement signed in 2017 was duly registered in Court as required by Clause 15 or it has been done away with registration. More so, the alleged New Voluntary Agreement was not tendered or annexed to the response filed by the respondent for the court to believe that it does exist. In my view, in absence of solid evidence to that effect, and due to demeanor of DW2, I am of the view that the said new Voluntary Agreement is imaginary than real. On the claim that complainant was notified claim for retirement award and that in December 2005 a meeting was held notifying NBC employees about the retirement award, DW2 conceded that he had no proof that PW1 was notified because he had no access to PW1's emails. In fact, DW2 did not claim to be the sender of the alleged emails hence cannot claim that complainant received the alleged information. It was claimed by DW2 that payment was done in accordance with the M.O.U which is whole incorporated in the voluntary agreement (exhibit P5) and that exhibit P5 was signed for record purposes only. In a contradictory way, DW2 testified that all NBC employees continued to benefit from the provisions of exhibit P5 including but not limited to Health care, salary until when a new agreement was signed in 2017. One quick issue that has come into my mind is, how can the document that was signed for record purposes only meaning that its use was exhausted prior signing, can continue to be beneficial to NBC employees on matters of salary, health care etc. Contradictory as he was, DW2 gave evidence that the Agreement that was signed for record purposes was operative save for Clause 14 that relates to retirement award. It is my view that evidence of DW2 is not worth to be believed. It was held by the Court of Appeal in the case of Goodluck Kyando v. Republic,

[2006] T.L.R 363 that: - "Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness." Again, in the case of Patrick s/o Sanga v. The Republic, Criminal Appeal No. 213 of 2008, (unreported) the Court of Appeal held: - "...To us, there are many and varied good reasons for not believing a witness. These may include the fact that the witness has given improbable evidence; he/she has demonstrated a manifest intention or desire to lie; the evidence has been materially contradicted by another witness or witnesses; the evidence is laden with embellishments than facts; the witness has exhibited a clear partiality in order to deceive or achieve certain ends, etc...". I have explained hereinabove that DW1 testified that complainant(PW1) was paid TZS 4,287,602/though that evidence is uncorroborated. In their evidence, both DW1 and DW2 testified that 37 retirement award was payable as lumpsum as of 30 th June 2005. The same was testified by PW2. This appears to be in line with clause 14.1 and 14.2 of exhibit P5 that provides:- "For the purpose of this Agreement, retirement award is a once-off lumpsum payment to an employee under the terms and conditions prescribed herein below. "14.2. The following

amount shall become due t and payable, and shall be paid promptly and without unreasonable delay, to employees as follows:

- (a) 50% of monthly basic salary times the number of completed years of service up to 30 June 2005, the rate of salary being as on 30th June
2005. TUICO and NBC will jointly pursue the possibility of obtaining a favourable tax relief in respect of these sums. Meanwhile, the said sum will be deposited into a suspense account and each employee will be furnished with information indicating the pre-tax amount payable to him/her.
- (b) Employees eligible for payment are those who were in the employment of NBC Limited as of 1 st April 2000(i.e., at privatization) AND who are still in the employment of NBC Limited as of 30 June 2005.
 - (c) All employees of NBC Limited will receive salary adjustment based on their monthly basic salary, as at 1 September 2005. The effect of this adjustment will be an overall increase of 2.1% of the total (pre-tax) NBC basic salary bill as at 1 September 2005". Complainant(PW1) testified that, upon her retirement on medical grounds in 2015, she was paid TZS 100,000/= only as retirement award. It is my view that, in interpreting the said Voluntary Agreement(exh. P5) all clauses must be read and given intentions of the parties. I have read 38 clause 13.3 that relates to retrenchment package and find that the amount payable to the retrenched employee is far better than the amount that was paid to PW1. The said clause reads:- "13.3 Retrenchment package. The parties agree that in the event of a retrenchment exercise, the retrenched employee shall be entitled to a compensation package, which shall be computed as follows: 13.3.1 The previous compensation package as described in the expired Voluntary Agreement No. 4 of 1995 shall apply up to 31 December 2002... 13.3.2 From 1st January 2003, the following formula shall apply:
 - (i) 3 weeks basic pay per completed year of service up to maximum of 12 months'. (ii) a once-off payment of Tshs.350,000.00 for house allowance. (iii) a once-off payment of Tshs. 300,000.00 for medical expenses. (iv) a once-off payment of Tshs. 250,000.00 as retrenchment allowance.
 - (v) Award of a Certificate of satisfactory service. It is my view therefore, as admitted by DW1 and DW2 that, since exhibit P5 was operative, then, these were criteria applicable in payment of retrenched employees. As pointed hereinabove, the amount of TZS 100,000/= that complainant was paid does not reflect a reality for an employee who worked for 30 years. The said TZS 100,000/= complainant(PW1) was paid is reflected in the Notice of Retirement on Medical grounds (exhibit P2) wherein it was recorded that complaint was 39 paid the said amount as retirement award. I therefore answer the 2 nd issue in the negative and hold that there is no justification for the respondent to pay the complainant(PW1) TZS 100,000/= as retirement award. It should be recalled that prior to 2015, PW1 did not retire hence no payment was paid to as retirement award. That said and done, I hold that complainant(PW1) is entitled to be paid TZS 19,608,576/= for the thirty years as retirement

award i.e., half salary times thirty years she worked with NBC calculations based on her monthly salary of TZS 1,307,238.42 as evidenced by the salary slip (exhibit P4). It was testified by PW1 that NBC had health insurance and that based on that policy, an employee who got permanent disability and consequently terminated, was paid by NBC three years monthly salaries. PW1 testified further that her vision disability was due to (i) the use of computers that had no glass to reduce light and (ii) office condition because light was going directly in her eyes sometimes forced to close windows. That evidence was not contradicted by evidence by the respondent. In fact, complainant(PW1) explained more on the cause of her disability while under cross examination. Evidence of the complainant(PW1) is supported by evidence of the respondent especially the medical report(exhibit D1) that was issued by Dr. Athumani, a 40 medical specialist from the Department of surgery at Muhimbili National Hospital dated 30th November 2016 that was tendered by DW1 as exhibit D1. The said report reads:- MEDICAL REPORT Name of patient: CHRISTINA BOSCO MREMA. Describe fully the cause and circumstances of the accident as stated to you A diabetic patient with a prolonged computer use. ... Nature of injury – please give detailed particulars Rinitis Pigmentosa. ...” Since there is no evidence to contradict evidence of the complaint(PW1), and whereas evidence of the respondent corroborates evidence of the complainant(PW1), I find her evidence as credible and hold that respondent facilitated the disability of the complainant(PW1) and that now NBC cannot escape from that liability. I have held hereinabove that NBC contributed or facilitated or was the cause of PW1’s permanent disability hence was supposed to accommodate PW1’s disability or find an alternative post and continue with her employment up to her compulsory retirement age. It is my further view that respondent cannot be allowed to enjoy the service of the complainant(PW1) at the time her sight was normal or she was in good health condition and dump her after permanent vision disability caused 41 or facilitated by respondent. It is my view that after extracting juice, we should keep the remnant for future use. The employer(NBC) exploited knowledge and expertism from the complainant and after being sure that complainant has oriented another person who can perform her duties in her absence, decided to dump her without help. It was the duty of the respondent, in terms of clause 10 of exhibit P5 to ensure occupational health and safety standards of her employees PW1 inclusive and find alternative position in the same environment and keep her to the age of compulsory retirement. More so, in terms of clause 7 of the said Voluntary Agreement(exhibit P5), an employee was entitled to non-contributory medical benefits provided by NBC through single service provider, there was no justification for the complainant not to be compensated. It is my view that clause 7 of exhibit P5 confirms what was testified by PW2. Again, since her evidence that an employee who suffered permanent disability and lost employment was paid salary for three years was not challenges, I accept that evidence. In her evidence PW1 claimed to be paid TZS 47,059,583.12 being payment of three years, calculation based on her monthly salary of TZS 1,307,238.42, I allow that amount. 42 I have held hereinabove held that retirement of the complainant on medical grounds was not proper because Rule 19 of GN. No. 42 of 2007 (supra) relating to fairness of reason and Rule 21 of GN.No. 42 of 2007 (supra) relating to fairness of procedure were

flawed and due to absence of certificate of the Medical Board as required by the Voluntary Agreement (exhibit P5), therefore, complainant is entitled to be paid TZS 109,808,027 calculations based on her monthly salary of TZS 1,307,238.42. In total, complainant is entitled to be paid TZS 176,476,186/=. Dated in Dar es Salaam on this 21st November 2022. B. E. K. Mganga JUDGE Judgment delivered on this 21st November 2022 in chambers in the presence of Pascal Temba, personal representative of the Applicant and Wivina Karoli, Advocate for the Respondent. B. E. K. Mganga JUDGE 43

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