

TANZANIA / JUDGMENT

robert hamis pazi vs nmb plc

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM CONSOLIDATED
REVISION APPLICATION NO. 320 & 376 OF 2022 (Arising from an Award issued on 25/8/2022 by
Hon. Kiangi , N, Arbitrator in Labour dispute No. CMA/DSM/ILA/670/20/342 at Ilala) ROBERT
HAMIS PAZIAPPLICANT/RESPONDENT VERSUS NATIONAL
MICROFINANCE BANKRESPONDENT/APPLICANT

JUDGMENT

Date of last Order: 13/02/2023 Date of Judgment: 17/02/2023 B. E. K. Mganga, J. Brief facts of this consolidated Revision are that, on 7th January 2008, the National Microfinance Bank (NMB Bank PLC), the applicant in Revision application No. 376 of 2022 and respondent in Revision application No. 320 of 2022 hereinafter referred to as the employer, entered into employment contract with Robert Hamis Pazi, the applicant in Revision application No. 320 of 2022 and respondent in Revision application No. 376 of 2022 hereinafter referred to as the employee. On 08th May 2008 the parties entered into unspecified period contract of 1 employment whereas the employee was employed as loan officer. The employee's duty station was Lindi Branch. On 13th February 2019, that was a working day, the employee was involved in a car accident as he was driving his own motor vehicle while on personal business as a result, he was admitted at Sokoine Hospital within Lindi region. The employee was thereafter transferred to Muhimbili National Hospital for further treatment. It is undisputed fact that the employee traveled by bus alone from Lindi to Dar es Salaam for treatment. While in Dar es Salaam for treatment, the employee sent copies of medical report to the employer. The last report sent by the employee to the employer was dated 15th March 2019 showing that the employee will be required to attend at Muhimbili National hospital on 29 th March 2019. It is said that, after the said report, the employee neither communicated his medical reports to the employer nor resumed office duties at his duty station at Lindi branch. Due to that failure, the employer initiated disciplinary proceedings against the employee for the charge of absenteeism. On 9 th August 2019, the Disciplinary hearing Committee conducted disciplinary hearing in absence of the employee allegedly that he was untraceable and found him guilty of gross misconduct for absence from work without leave for more than five days without reasonable cause or permission 2 from the employer. On 15th August 2019, the employer terminated employment of the employee. It is further said that, on

undisclosed date, after full recovery, the employee traveled from Dar es Salaam to Mtwara to inform the Human Resources officer of the employer that he had a report that he was fully recovered and was ready to resume office duties. The employee travelled to Mtwara because Lindi is served by Mtwara administratively. It is further said that, while in Mtwara, the employee was informed that his personal record has been transferred to the employer's head office in Dar es salaam. It is also said that on 11th August 2020, the employee travelled from Mtwara to the employer's head office in Dar es salaam in possession of his medical report dated 8th August 2020. In the said medical report it was recorded that the employee has recovered and was ready to resume office duties. Upon his arrived at the employer's head office in Dar es Salaam, the employee was served with termination letter showing that his employment was terminated on 11th August 2020. Aggrieved with termination, on 21st August 2020, the employee filed Labour dispute No. CMA/DSM/ILA/670/20/342 before the Commission for Mediation and Arbitration henceforth CMA at Ilala 3 claiming to be paid TZS 20,242,368 as compensation for unfair termination, repatriation costs, leave allowance, severance pay and other benefits. In the Referral form (CMA F1) the employee indicated that the dispute arose on 15th August 2019. He also indicated that his employment was terminated on 11th August 2020 and that notice of termination was not issued and further that, reasons for termination were unfair. On 25th August 2022 Hon. Kiangi, N, Arbitrator, having heard evidence of the parties, issued an award that termination of employment of the employee was fair both substantively and procedurally. Despite that, the arbitrator ordered the employer to issue a certificate of service to the employee and pay the employee repatriation costs and TZS 1,600,000/= as leave pay. Aggrieved with the award, on 30th September 2022, the employee filed Revision Application No. 320 of 2022 seeking the Court to revise the said award. In his affidavit, Robert Hamis Pazi, the employee raised four grounds namely:-

1. That the Honourable Arbitrator erred in law and facts for delivering contradicting award by holding that there is (sic) reason and procedural fair to terminate the applicant from employment while the applicant was not given right to be heard before the disciplinary hearing since the 4 notice of hearing and the charge sheet was delivered to the applicant(sic).
2. That, the Honourable Arbitrator erred in law and fact to appreciate that the time given the applicant on notice of hearing and reply to the charge to appear for disciplinary hearing was too short.
3. That, Honourable Arbitrator erred in law and fact for delivering the award by using contradictory, untrustworthy and unreliable evidence.
4. That, Honourable Arbitrator erred in law and facts in failing to determine whether the permitted employee to attend treatment is the same to an absconding from workplace. On the other hand, the employer was also aggrieved by the award, as a result, she filed Revision Application No. 342 of 2022 but the same was struck out. Leave was granted to the employer to file a proper application within ten days hence Revision Application No.376 of 2022. In her affidavit in support of the Notice of Application, Ms. Sharifa Karanda, principal officer of the

employer raised two grounds namely:-

1. That, the Honourable Arbitrator erred in law and facts by disregarding the fact that the Applicant paid TZS 1,484,200 to the Respondent as repatriation and transport allowance to the place of recruitment.
2. That, the Honourable Arbitrator erred in law and facts for failure to consider the presented proof of payment of repatriation and transport allowance paid by the applicant. Since both Revision Application No. 320 of 2022 and 376 of 2022 emanated from the same CMA proceedings and award, on 28th November 2022, I issued a consolidation order in the presence of 5 counsel of both the employee and the employer. In the said consolidation order, I issued an order that the controlling proceedings will be recorded in Revision Application No. 320 of 2022. On the same date, by consent of the parties, I issued an order that the consolidated revision applications will be disposed by way of written submissions. I would like to thank the parties for complying with submissions orders. Arguing Revision application No. 320 of 2022 on behalf of the employee, Mr. Humprey Mwakajinga, learned advocate, submitted generally to the aforementioned four grounds that the notice of hearing was sent to a wrong address of the employee namely P.O. Box 46217 instead of P.O. Box 4617. Counsel for the employee submitted that due to that, both the notice of hearing and the charge sheet were never received by the employee. He argued that the employee was not afforded right to be heard because he was not served with both the charge sheet and the notice of hearing. Counsel for the employee went on that, the notice of hearing is dated 6th August 2019 and hearing was conducted on 9th August 2019. Counsel argued that it was a short notice of hearing considering that the notice of hearing was sent through EMS that normally takes two to three days to be delivered to the recipient. He argued further that, in such situation, it was not easy for the employee to attend. Counsel for the employee submitted further that, in the award, the arbitrator relied on a report that was not admitted in evidence to hold that the employer wrote a letter to Muhimbili National Hospital seeking to know health condition of the employee and that the said Hospital responded that the employee recovered and that they believed he resumed office duties. Counsel for the employee submitted that the said reports were dated 11th June 2019 and 23rd July 2019 and that they were not admitted in evidence as exhibits. Mr. Mwakajinga submitted that, reliance by the arbitrator to unadmitted exhibit amounted to miscarriage of justice and cited the case of Mhubiri Rogega Mongateko v. Mak Medics Ltd, Civil Appeal No. 106 of 2019(CAT), Mwanza(Unreported) to cement on his submissions. Mr. Mwakajinga, learned counsel for the employee submitted that there was procedural impropriety because the employer issued two different termination letters namely, exhibit P3 and exhibit D8 all with the same date. He submitted further that, in exhibit P3, the employer indicated that the employee had forfeited his terminal benefits while in exhibit D8 employer indicated that the employee was entitled to be paid remuneration for days worked for, one month in lieu of notice, repatriation costs to the place of recruitment, accrued annual leave pay 7 and to be issued with a certificate of service. Counsel for the employee strongly submitted that the employee did not abscond from work but he was attending treatment as evidenced by the medical

report (exhibit P2) dated 8th August 2020. Responding to submissions made on behalf of the employee in revision application No. 320 of 2022, Mr. Reginald Martin, learned advocate for the employer submitted that notification of hearing and the charge were sent to the accurate address, which is why, during hearing at CMA, the employee did not raise it or cross examined the witnesses for the employer. Counsel for the employer went on that, submissions that both the notice of hearing and the charge were sent by EMS to a wrong address is an afterthought and that should not be considered because it was not raised at CMA. Counsel for the employer cited the case of Farida and Another v. Domina Kagaruki, Civil Appeal No. 136/2006 CAT to support his submissions. Responding to submissions that time was too short for the employee to be served with both the notice of hearing and the charge, Counsel for the employer submitted that the Employment and Labour Relations (Code of Good Practice) Rules GN. No. 42 of 2007 is silent on the duration of saving the notice of hearing and the disciplinary charge. 8 He added that, the employer's HR policy provides 48 hours within which an employee to be served with the notice of hearing and that the said policy was complied with. Counsel for the employer cited the case of Michael Elifuraha Mavura v. Tanzania Breweries Limited, Revision No. 158 of 2021, HC (Labour Division) to support his submissions that the employee was served with both the notice of hearing and the disciplinary charge. Responding to the complaint by the employee that the arbitrator relied on reports from Muhimbili National Hospital that the employee was fit to resume office duties while the said reports were not tendered, counsel for the employer submitted that, despite rejection of the said reports, the arbitrator did not rely on the reports, rather, relied on oral evidence of DW1 who gave account of what the said hospital reported. He went on that, oral evidence of DW1 sufficiently proved that fact and that the arbitrator correctly relied on that evidence, because that evidence was not challenged by the employee's evidence. Counsel for the employer cited the case of Abas Kondo Gede v. the Republic, Criminal Appeal No. 472 of 2017, CAT to stress his submissions that oral evidence, is sufficient to prove a fact in issue in absence of documentary evidence if it is worth of credit. 9 On whether the employee absconded or not, counsel for the employer submitted that the employee absconded from work. He added that the employee served the employer with medical report dated 15th March 2019 showing that he was supposed to go back to hospital on 29th March 2019 and that therefrom, the employee neither notified the employer his health status nor attended at work. Counsel for the employer submitted further that, based on those circumstances, in absence of the employee's medical reports and information as to his whereabouts, the employer reasonably terminated employment of the employee on 15th August 2019 for absenteeism. In rejoinder, counsel for the employee submitted that sending the disciplinary charge and the notice of hearing to a wrong address is not an afterthought, because employer's witnesses were cross examined on that aspect and the same was covered in the employee's final submissions. He therefore maintained that the employee was not afforded right to be heard in the disciplinary hearing. Counsel for the employee cited Rule 13(3) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 and argued that the employee was not given reasonable time to prepare hearing considering that the employer knew that the employee was in Dar es

Salaam and 10 the notice was sent through EMS requiring the employee to attend the disciplinary hearing to be conducted in Mtwara three days thereafter. He argued that it was unreasonable for the employee to attend the disciplinary hearing within that short period. Counsel for the employee submitted further that, issuing two letters of termination made termination unfair both substantively and procedurally. In arguing revision application No. 376 of 2022 on behalf of the employer, Reginald Martine and Kheri R. Mbiro, learned advocates submitted generally to the two grounds that, the arbitrator erred in refusing to admit in evidence the bank statement that proved that the employee was paid TZS 1,484,200 as repatriation and transport cost on ground that the said bank statement lacked bank stamp. It was submissions by counsel for the employer that oral evidence of DW2 proved the said payment and further that the requirement of section 78 and 78A of the Evidence Act[Cap.6 R.E. 2019] were met for admissibility of the said bank statement. Counsel for the employer cited the cases of Lacent Laboratories Tanzania Limited v. January Munyuri Byaro , Revision Application No. 463 of 2021, HC(unreported), Julius Billie v. Republic [1981]T.L.R 333 and Flano Alphonse Masalu @ Singu vs. Republic , Criminal Appeal No. 366 of 2018, CAT(unreported) to 11 support their submissions that oral evidence suffices to prove a fact in issue even in absence of documentary evidence. In short, their submission was that oral evidence of DW2 proved that the employee was paid repatriation and transport costs. They therefore prayed evidence be re-evaluated hoping that in so doing the court will reach a different conclusion and hold in favour of the employer. Responding to submissions made on behalf of the employer in Revision application No. 376 of 2022, Mr. Humprey Mwakajinga, learned counsel for the employee submitted that, the arbitrator did not consider the bank statement because it was not admitted as evidence and referred the court to the holding of the Court of Appeal in Mhubiri's case (supra). Counsel for the employee went on that, the bank statement attached to this application has a bank stamp while the one filed at CMA had no bank stamp. He therefore resisted the prayer by counsel for the employer to re-evaluate evidence. I should point out that the employer did not file rejoinder submissions though she had that right. I will therefore only consider what was submitted by the parties. In disposing this consolidated revision, I will start with the issue relating to admissibility of the bank statement raised by the employer. I 12 have taken that option because during submissions by the parties, two issues arose namely, (i) power of this court to re-evaluate evidence adduced at trial; and (ii) whether; in deciding the merit of Revision application like the one at hand, the court considers new evidence attached to the affidavit in support of the application for revision or not. I have opted to start with these two issues to clear the air because, counsel for the employee submitted that the bank statement that was filed at CMA was not stamped while the one attached to the application at hand was stamped and resisted the prayer by counsel for the employer for the court to re-evaluate evidence adduced at CMA. Without hesitation, I should point out that, I have examined the affidavit filed by the employer in support of Revision application No. 376 of 2022 and find that there is no bank statement that was attached thereto. It is my view that, even if the same was attached, I could have not considered it, because, in revision or appeal, the court only considers evidence that was adduced at trial. The reason and logic is clear, that; the Court at

revision or appellate stage, cannot consider new evidence that was not put to the attention of the trial court or the arbitrator, otherwise the trial court or the arbitrator will be unjustifiably criticized for matters that was not put to his attention. More so, reception of new evidence at appellate or revision stage may be an invitation to the parties especially the one who lost the case, to cook evidence and find a way on how to criticize the trial court or arbitrator for matters that was not put to his/her attention. The side effect is that fabrication of evidence will go on and on whenever one side loses a case at any stage and will lead to endless litigations. I am aware that, in special circumstances, evidence can be received at appellate stage. see the case of Chandrakant Joshubhai Patel vs Republic , (Criminal Appeal 13 of 1998) [2002] TZCA 5. In the application at hand, there is no special circumstances warranting reception of new evidence and there was no such a prayer. The least I can say is that there was misconception on part of counsel for the employee. In their submissions, counsel for the employer prayed the court to re-evaluate evidence adduced at CMA but that prayer was resisted by counsel for the employee. I will not waste time on this submission because the appellate court or this court at revision stage, has power to re-evaluate evidence to see whether the decision reached by the first court or tribunal was sound in law or not. See the case of James Makundi vs Permanent Secretary, Ministry of Lands, Housing & Human Settlements Development & Others, Civil Appeal No. 181 14 of 2021 [2022] TZCA 242 and Millenium Coach Limited vs Africarriers Limited, Civil Appeal No. 323 of 2019 [2022] TZCA 392 to mention but a few. In my view, without re-evaluating evidence, the court may still be trapped into errors complained of and may not do justice to the parties. I will therefore, in the application at hand, re- evaluate evidence adduced by the parties at CMA to see whether the award can stand or not. It was submitted by counsel for the employer that the bank statement was erroneously rejected admission into evidence while all conditions provided for under section 78 and 78A both of the Evidence Act (supra) were met. On the other hand, it was submitted by counsel for the employee submitted to the contrary. In order to be focused I will reproduce the said section though to the detriment of making this judgment long. The said section reads:- “78.-(1) A copy of an entry in a banker’s book shall not be received in evidence under this Act unless it is first proved that the book was at the time of the making of the entry one of the ordinary books of the bank and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank. 15

- (2) Such proof under subsection (1) may be given by a partner or officer of the bank and may be given orally or by an affidavit sworn before any commissioner for oaths or a person authorised to take affidavits. 78A.-(1) A print out of any entry in the books of a bank on micro-film, computer, information system, magnetic tape or any other form of mechanical or electronic data retrieval mechanism obtained by a mechanical or other process which in itself ensures the accuracy of such print out, and when such print out is supported by a proof stipulated under subsection (2) of section 78 that it was made in the usual and ordinary course of business, and that the book is in the custody of the bank, it shall be received in evidence under this Act.

- (2) Any entry in any banker's book shall be deemed to be primary evidence of such entry and any such banker's book shall be deemed to be a "document" for the purpose of subsection (1) of section 64." I have examined evidence of Shaaban Kassali (DW2) and find that, while under cross examination, he testified that he doesn't recall who produced the disputed bank statement. On the other hand, Frank Rutakwa(DW1) simply testified that, after termination of employment, the employee was paid his terminal benefits as evidenced by the bank statement and prayed the bank statement be admitted as exhibit. Counsel for the employee raised objection and the same was upheld. I have examined the CMA record and find that at the time DW1 prayed to tender the said bank statement, he did not lay foundation to comply with the conditions set out in section 78(1), (2) and 78A(1) of the 16 Evidence Act(supra) especially the bolded ones as quoted hereinabove. It is my view therefore that, the arbitrator was justified not to receive the said bank statement as evidence. The complaint by the employer relating to failure of the arbitrator to admit the bank statement into evidence has no substance hence it is hereby dismissed. More so, the said bank statement was not certified to comply with the provisions of section 79 of the Evidence Act(supra). That said, let me revert to fairness of termination of employment of the employee because that is the main issue between the parties. It was submitted by counsel for the employer that there were valid reasons for termination because the employee absconded from work for more than five days. To the contrary, counsel for the employee submitted that the employee was attending treatment at Muhimbili National Hospital and that he had permission from the employer. I have examined evidence of the parties in the CMA record and find that there is no dispute that the employee was involved in a car accident while not in official duties, as a result, he was admitted at Sokoine Hospital in Lindi Region thereafter was transferred to Muhimbili National Hospital for further treatment. It is undisputed fact that, the employee travelled by bus without assistance of any person from Lindi to Dar es Salaam for 17 treatment. It is further undisputed that, while in Dar es Salaam attending treatment at Muhimbili National Hospital, the employee sent medical reports to the employer and that, the last report was dated 15th March 2019 (exhibit D4) showing that the employee will go back to the said hospital on 29th March 2019. I have read evidence of the parties and find that the employee was treated at Muhimbil National hospital as an outpatient. From these facts, it is clear that health condition of the employee was no bad which is why he travelled alone by bus from Lindi to Dar es Salaam where he was treated as an outpatient. As pointed hereinabove, the employee was terminated for absenteeism. In his evidence Frank Rutakwa(DW1), testified that the employee after notifying the employer through exhibit D4 of his health condition, did not further communicate with the employer. DW1 testified further that, the employee was not reachable over his mobile phone, as a result, they went to look for him at Namtumbo, a place where the employee's wife was working, but the wife of the latter did not know the whereabouts of the employee. Similar evidence was adduced by Shaaban Kassali (DW2). That evidence was not challenged by the employee or shaken during cross examination. 18 In his evidence in chief, Robert Hamisi Pazi(PW1), the employee, testified that, on 13th February 2019 he was involved in a car accident, as a result, he was admitted at Sokoine hospital within Lindi Municipality for treatment but he was

referred to Muhimbili where, on 16th February 2019, was diagnosed by Dr. Murtali who scheduled him to attend clinic on 16th March 2019 and 29th March 2019. In his evidence, PW1 testified that he was attending treatment at Muhimbili as an outpatient as he was residing at Gongolamboto and Tabata. He testified further that, while continuing with physiotherapy treatment, the said doctor informed him that his Health insurance is not working and that, he must pay for himself otherwise he should contact the employer. The employee (PW1) added that, he opted to pay by himself. While under cross examination, PW1 admitted that he did not notify the employer progress of his treatment after serving the employer with exhibit D4 and that, after sending the said exhibit D4, he only served the employer with the final report (exhibit P2) dated 8th August 2020. He testified further that, he became aware that he has been terminated from employment after stoppage of his salary and after his health insurance has ceased to function forcing him to pay by himself for his treatment. In his evidence under cross examination, PW1 admitted further that, the final medical 19 report (exhibit P2) does not show that he was uninterruptedly attending treatment from 29th March 2019 to 8th August 2020. He also admitted that there is no a letter showing that there was no possibility for him to continue working at the same time attending treatments. In his evidence under cross examination, PW1 is recorded stating in Swahili as hereunder:- “... S/J. Hukuweza kutoa taarifa kwa mwajiri ya kuendelea na matibabu baada ya tarehe 29/3/2019?

- Sijatoa taarifa. S/J- Kuanzia tarehe 29/3/2019 hadi Agosti 2020, mwajiri hakupata taarifa yoyote kuhusu matibabu yako?
- Hakupata taarifa sababu alinifukuza tarehe 15/8/2019 S/J- Tangu tarehe 29/3/2019 hadi tarehe 15/8/2019 hukutuma taarifa ya matibabu kwa mwajiri?
- Sikutuma hadi nilipotuma final medical report. S/J- wewe ulijuaje umefukuzwa tarehe 15/8/2019
- Niligundua nimefukuzwa kazi baada ya mimi & tegemezi wangu kukosa matibabu na kukosa mshahara. S/J- Hiyo ilikuwa lini?
- Sikumbuki S/J- Mshahara wako wa mwisho ulipata lini?
- Sikumbuki. 20 ...” It is my view that, from evidence of the parties, the employer had a valid reason for termination of employment of the employee. I am of that view because, the employee was treated at Muhimbili National hospital as an outpatient and was staying at Gongolamboto and Tabata. It was not also disputed by the employee that the medical report (exhibit D4) was sent to the employer through the employer’s branch at Gongolamboto. Therefore, the employee had a chance to communicate with the employer through that branch. In my view, the unexplained absence of communication from 29th March 2019 to early August 2020, the date the employee went to the employer at Mtwara and the headquarters in Dar es Salaam where he was served with termination letter on 11th August 2020, leaves much to be desired. In my view, it was not expected for the employer to keep the employee who willfully decided to remain mute for all that long period despite efforts taken

by the employer to trace his whereabouts by going to Namtumbo to ask his whereabouts from his wife, who, also had no clue of his whereabouts. If at all the employee was sick, at least his wife could have given the clues as to his condition and whereabouts. In my view, employer did what 21 was within her powers to ensure the employee continues with his employment which is why, she made all those traces. It is clear from Termination letters(exhibit P3 and D8) all dated 15th August 2019 tendered by the employee and the employer respectively, that employment of the employee was terminated due to absence from work for more than five days without permission from the employer. Therefore, logically, the employer could have not continued to pay salary and health insurance costs of the employee whose whereabouts was not known and who, has stopped working. As admitted by the employee in his evidence, from March 2019 to August 2020, he remained mute without communicating with the employer. In my view, absence of communication with the employer and the conduct of the employee for all that period amounted to abscondment from duty. I therefore hold that the employer had valid reason for termination of employment of the employee. It was submitted on behalf of the employee that arbitrator relied on a report that was not admitted in evidence to hold that the employer wrote a letter to Muhimbili National Hospital seeking to know health condition of the employee and that he believed that the employee had recovered and was able to resume office duties in June 2019. This 22 argument cannot detain me at this stage, because health status of the employee was supplied by the employee himself in his evidence when he testified that he was treated at Muhimbili National Hospital as an outpatient. As pointed out hereinabove, the employee(PW1) testified also that, he personally served some of his medical reports to the employer through the latter's branch at Gongolamboto and that, he was travelling on his own from Gongolambo to Muhimbili Hospital and back home. That in itself, in my view, explains how health condition of the employee was. In addition, that evidence, in one way or another, corroborated evidence of DW1 and DW2 who read the letter from Muhimbili. The letter did not find way of admission as evidence but that, in my view, did not do discredit oral evidence of DW1 and DW2. Having not received the said letter as exhibit, it was open for the arbitrator to believe or disbelieve evidence of both DW1 and DW2. See Flano Alphonse Masalu @ Singu vs Republic (Criminal Appeal 366 of

- 2018) [2020] TZCA 197 and Julius Billie v. Republic [1981]T.L.R 333. The arbitrator believed evidence of these two witnesses and I have no reason to fault that finding. In reaching finding that both DW1 and DW2 were credible, I am guided by the decisions of the Court of Appeal in the case of Goodluck Kyando v. Republic, [2006] T.L.R 363 and Patrick 23 s/o Sanga v. The Republic, Criminal Appeal No. 213 of 2008, CAT (unreported). Having considered evidence of the parties and guided by the aforementioned case laws, I conclude that termination of employee of the employee was fair substantively. It was submitted on behalf of the employee that there was procedural impropriety because the employer issued two different termination letters (exhibit P3 and exhibit D8) all with the same date. I have read the said exhibits and find that there is no evidence showing that both letters were served to the employee for the court to hold that employer issued two different termination

letters. What is clear in evidence is that the employee was served with one letter(exhibit P3) on 11th August 2020. There is no evidence that exhibit D8 was served to the employee. It should be recalled that, exhibit P3 was tendered by the employee and exhibit D8 was tendered by the employer. In exhibit P3, the employee endorsed that he received it on 11 th August 2020 but there is no such endorsement in exhibit D8. The only difference between the two exhibits is that, in exhibit D8 it was indicated that the employee will be entitled to remuneration for termination, one month salary in lieu of notice, repatriation costs and payment of outstanding annual leave. During hearing at CMA, there was no objection at the time of admitting 24 the said exhibit D8 and P3 in evidence from either side. These exhibits, as pointed out hereinabove, gives reason for termination of the employee and not procedure for termination. In my view, submissions by counsel for the employee that issuing two termination letters (exhibit D8 and P3) amounted to procedural impropriety is a misdirection and cannot be accepted. I am of that view because, the said exhibits D8 and P3 has nothing to do with procedural fairness of termination of the employee. It was submitted by Mr. Mwakajinga, learned counsel for the employee that, both the notice of hearing and the charge sheet were never received by the employee because they were sent to a wrong address hence the employee was not afforded right to be heard. I have carefully read evidence of the employee in the CMA record and find that, in his evidence, the employee (PW1), did not state that both the notice and the disciplinary charge were sent to a wrong address denying him right to be heard. Therefore, submissions by Mr. Mwakajinga have no leg to stand. In his evidence, PW1 he testified that both the Notice and disciplinary hearing were posted on 6th August 2019 and that they could have reached him after three days and that hearing was conducted before he received them. In his own words, PW1 is recorded stating:- 25 “...Wito uliandikwa tarehe 6/8/2019 kwenda kujibu shtaka la kutokuwepo kwa zaidi ya siku 5. Barua hiyo ilitumwa kwa posta tarehe 6/8/2019 na hearing ilifanyika tarehe 9/8/2019. Kwa vielelezo hivi nilishangaa kama ilitumwa kwa posta ingechukua hata siku 3 kufika, ina maana hearing walifanya hata kabla ya mimi kupokea barua...”. The quoted part of evidence of PW1 does not reflect what was submitted by his counsel before this court. Again, submissions by counsel for the employee that the employee was denied right to be heard is not backed up with evidence. In his evidence, PW1 said nothing relating to denial of right to be heard. He did not also state the date he received both the notice and the disciplinary charge that were sent through Post Office. In my view, since those complaints were not raised before the Arbitrator at CMA, they cannot be raised at this stage. The statement by PW1 that it could have taken three days for the said documents that were sent through Post Office to reach him, in my view, are speculation or assumption because in his evidence, PW1 did not support that conclusion. This court cannot act on speculations or assumptions. I should add that, even submissions by Mr. Mwakajinga learned counsel for the employee that normally EMS takes two to three days to be delivered to the recipient are speculations, that cannot, at any rate, be acted upon by the court. As pointed out 26 hereinabove, the employee did not give evidence showing that both the notice and the disciplinary charge were sent to a wrong address. Therefore, submissions that the employee was not afforded right to be heard lacks merit

and is hereby dismissed. It was submitted on behalf of the employee that the latter was given too short time to enable him to defend against the allegations levelled against him. It is my view that, these submissions lack merit considering time the employee remained mute and the time he reported back at work only to find that he has been terminated for absenteeism. It can be recalled that the employee (PW1) testified that the doctor notified him that his health insurance cannot work and that he had option to contact the employer or pay by himself. Applicant took the second option to pay by himself. It can be recalled that the employee was so advised by the doctor in 2019 but he only contacted the employer in August 2020 after termination of his employment. In my view, submissions by the employee could have been valid if he appeared before the disciplinary hearing only to be informed that the same was conducted few days ago. It is clear from evidence of the parties that both the notice to attend the disciplinary hearing and the disciplinary hearing itself was conducted in August 2019 but the employee reported to the employer in August 2020 after a lapse of one year. From submissions made on behalf of the employee, it can be concluded that the latter indirectly admits that he received the notice and the charge but time was too short to enable him to attend. As pointed out, there is no reasonable employer who can, for one year, continue to pay an employee who has absconded and who is unproductive. It is also not expected that any reasonable employer could have suspended the disciplinary hearing for one year waiting the employee who, has absconded, to appear for hearing. It is undisputed that the employee was granted three days within which to respond to the disciplinary charge and attend the disciplinary hearing. In short, the period that was available to the employee was more than 48 hours provided for under Rule 13(3) of the Employment and Labour Relations (Code of Good Practice Rules, GN. NO. 42 of 2007. It is my view that, the complaint that the employee was granted too short time to defend himself lacks merits. I therefore hold that termination was procedurally fair. Since termination was fair both substantively and procedurally, the order of payment of repatriation costs and TZS 1,600,000/= as unpaid leave was erroneously issued in favour of the employee. I therefore dismiss Revision Application No. 320 of 2022 filed by Robert Hamis Pazi, the employee, and allow Revision Application No.376 of 2022 filed by the National Microfinance Bank (NMB Bank PLC), the employer, quash and set aside the CMA award and orders arising therefrom. Dated in Dar es Salaam on this 17th February 2023. B. E. K. Mganga JUDGE Judgment delivered on this 17th February 2023 in chambers in the presence of Robert Hamis Pazi, the Employee, Applicant in Revision Application No. 320 of 2022 and Respondent in Revision Application No. 376 of 2022 and Suzan Michael, Advocate for the National Microfinance Bank (NMB Bank PLC), the employer, the Respondent in Revision Application No. 320 of 2022 and Applicant in Revision Application No. 376 of 2022. B. E. K. Mganga JUDGE 29

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