THE UNITED REPUBLIC OF TANZANIA

(THE JUDICIARY

HIGH COURT LABOUR DIVISION

AT MTWARA

APPLICATION FOR LABOUR REVISION NO. 3 OF 2020

(From the Original Award No. CMA/MTW/105/2018 of the Commission for Mediation and Arbitration delivered by Mr. KWEKA, A. J., Arbitrator on 28th February, 2020 at Mtwara)

ALEX ERIYO.....1ST APPLICANT

LYDIA LUNGU.....2ND APPLICANT

EFRAUD KELVIN.....3RD APPLICANT

FRANK RHOBI.....4TH APPLICANT

SEPHANIA SILOMBA.....5TH APPLICANT

VERSUS

BANK OF AFRICA.....RESPONDENT

R U L I NG

8 Oct. & 12 Nov., 2020

DYANSOBERA, J.:

This ruling is on an application for labour revision in which the applicants herein are seeking revision of the Award of the Commission for Mediation and Arbitration in Complaint No. CMA/MTW/105/2018 dated 28th February, 2020. The application is made by way of notice of application accompanied with a chamber summons and is supported by an affidavit sworn by Juliana Donald Lawuo, learned advocate representing the applicants. According to paragraph 5 of the affidavit,

five material facts have been identified as the grounds calling for determination by this court, namely:-

a. That the Honourable Arbitrator erred in law and in fact in finding that termination was substantively fair while the Respondent (Employer) did not prove that the Applicants committed the alleged misconduct.
b. Misapprehension of evidence leading to improper or irrational conclusion that termination was fair.
c. The Arbitrator erred in law and in fact for holding that the applicants have already been paid terminal benefits in full in the absence of evidence of such evidence
d. The Arbitrator erred in law and in facts when she awarded compensation of a month salary (1 month salary) instead of amount prescribed by law which is twelve (12) months' salary.
e. The Honourable Arbitrator erred in law and in facts by admitting and relying upon some of the Employer's (Respondent's) documents as evidence with was not produced before contrary to law.

In resisting the application, the respondent has averred in her notice of opposition that the application should be dismissed for want of merit. She has, in addition, filed a counter affidavit sworn by Joyceline Kaika, the principal officer of the applicant (sic) in this application.

In order to understand and appreciate the points involved in this matter, it is necessary to set out certain facts. Briefly, the applicants were the respondent's employees at its Mtwara Branch who held various capacities. Towards the end of 2017 and early 2018, Emmanuel Bahati

Mwaya, the Regional Manager, noted some irregularities in the transactions carried out by the applicants and wrote a letter to Efraud Kelvin, , the then Branch Manager now 3rd applicant, to inquire into the irregularities. The said Branch Manager admitted the wrong doings and, in consequence, the Branch Manager reported the irregularities to the Human Resource Department which appointed two investigators to investigate about the matter. The investigation revealed that the applicants had committed the irregularities and /or negligence in performance of their duties. The applicants were served with allegation letters (show cause letters) to explain why disciplinary measures should not be taken against them. It is said that the applicants, in their reply, admitted the misconduct and pleaded for leniency. It is averred that a disciplinary hearing was conducted in which, again, the applicants, allegedly, admitted the misconduct and this led to their termination on 16th May, 2018 as per the termination letter (Exhibit KW 16).

The applicants were not satisfied with the respondent's action of terminating their contract of employment and referred their labour dispute to the Commission for Mediation and Arbitration on **two main grounds. One, that there was no fair trial and two, there was no valid reason for termination.** In their respective Forms for Referral of a Dispute to the Commission for Mediation and Arbitration, the applicants' claims were as follows:-

1. Eriyo Alex:
    a. Compensation: Tshs. 24, 960, 000/=
    b. Repatriation: Tshs. 10, 000, 000/=
    c. Notice pay: Tshs. 2, 080, 000/=
    d. Annual leave pay: Tshs. 1, 878, 709.97

e. Severance pay: Tshs. 202, 222.22/=
f. Contractual termination: Tshs. 10, 211, 293.7
g. Remuneration for work: Tshs. 1, 742, 100/=
h. Subsistence Allowance
i. Certificate of Service

Total amount claimed: Tshs.51, 079,424/=

2. Lydia Nestory Lungu:
    a. Compensation: Tshs. 6, 805, 200/=
    b. Repatriation: Tshs. 20, 000, 000/=
    c. Notice pay: Tshs. 567, 100/=
    d. Annual leave pay: Tshs. 512, 219/=
    e. Severance pay: Tshs. 165, 404/=
    f. Contribution: Tshs. 136, 104/=
    g. Certificate of Service

    Total amount claimed: Tshs.28, 186,024/=

3. Efraud Kelvin:
    a. Compensation: Tshs. 36, 300, 000/=
    b. Repatriation: Tshs. 25, 000, 000/=
    c. Notice pay: Tshs. 3, 025, 000/=
    d. Annual leave pay: Tshs. 2, 732, 258/=
    e. Severance pay: Tshs. 352, 916/=
    f. Contribution for terminal benefits: Tshs. 4, 511, 075/=
    g. Remuneration for work done: Tshs. 2, 541, 000/=
    h. Subsistence Allowance
    i. Certificate of Service

    Total amount claimed: Tshs.74, 462,245/=

4. Frank Immanuel Rhobi:
    a. Compensation: Tshs. 8, 166, 240/=
    b. Repatriation: Tshs. 10, 000, 000/=
    c. Notice pay: Tshs. 680, 520/=
    d. Annual leave pay: Tshs. 614, 663/=
    e. Severance pay: Tshs. 132, 323/=
    f. Contractual termination: Tshs. 609, 365/=
    g. Remuneration for work: Tshs. 571, 636/=
    h. Certificate of Service

    Total amount claimed: Tshs.20, 774,747/=

5. Stephania Samiye Silomba:
    a. Compensation: Tshs. 8, 438, 448/=
    b. Repatriation: Tshs. 25, 000, 000/=
    c. Notice pay: Tshs. 703, 204/=
    d. Annual leave pay: Tshs. 635, 152/=
    e. Severance pay: Tshs. 102, 550/=
    f. Contractual terminal benefits: Tshs. 1, 023, 493/=
    g. Remuneration for work done: Tshs. 590, 691/=
    h. Subsistence Allowance
    i. Certificate of Service

    Total amount claimed: Tshs.36, 493,538/=

After analysing the evidence that was before him, the Honourable Arbitrator was satisfied that there was gross negligence on part of the applicants and, therefore, the respondent had proved that the termination of the employment contract was with valid and fair reason but that the respondent violated the provisions of sub-rule (5) of rule 13 of the Employment and Labour Relations (Code of Good Practice) GN No.

42 of 2007 and awarded each of them compensation of one month's salary and certificate of service.

As said above, before this court the applicants are challenging the Arbitrator's Award on the stated grounds.

The hearing of this Application for Labour Revision was conducted by way of written submissions. Ms Juliana Donald Lawuo, learned Advocate of Felicity Attorneys, represented the applicants and argued in support of the application. In the time, Mr. Godwin Nyaisa, learned Counsel of B & E Ako Law, stood for the respondent and argued in opposition of the application.

The submission in support of the application was to the following effect. With respect to the first ground, learned Advocate for the applicants submitted that for termination to be substantively fair, the employer must prove that the reason for termination is valid, must follow a fair procedure and must have a fair reason to do so. In explaining on an employer who decides to terminate the employee for the substantive fairness for a reason of misconduct, counsel for the applicants stated that the said employer is required to consider whether the employee contravened the rule, whether or not the rule was reasonable among other factors, whether the employee committed the acts which justify termination and whether termination is the appropriate sanction. Further that the employer is also required to prove that the employee was actually guilty of misconduct and, the employer discharged burden by showing that the rule about misconduct in question exists either in law, in a disciplinary code, the employee's contract of service, a collective agreement or any other related policies on the Company and that the

employee actually broke the rule by mounting a thorough investigation and adducing evidence that links the employee and the disciplinary offence levelled against the employee.

As to what amounts to unfair termination, this court was referred to the provisions of sub-sections (1) and (2) of section 37 of the Employment and Labour Relations Act No. 6 of 2004 read together with rule 12 (1) of the Employment and Labour Relations (Code of Good Practice), GN No. 42 of 2007 hereinafter referred to as the Code of Good Practice.

It was learned counsel's argument that the respondent failed to prove that the termination was fair as the witnesses the respondent brought before the CMA did not show that the reasons for termination was invalid (sic) and failed to prove that the reasons for termination was fair reason. According to her, both the respondent and Arbitrator failed to prove if the applicants termination by the respondent was based on gross misconduct, insubordination leading to financial and reputational risk to the bank (Financial Loss); the allegations indicated in exhibit of the alleged conduct reasons which may justify termination by KW16.

Learned Counsel challenged the evidence of DW 1 by submitting that in any loan application, there is Offer Letter which is a legal document containing terms and conditions on the amount granted as a loan and which depicts the amount which was authorised and approved by the Bank to be granted to the borrower and both signed the said Offer letter signifying to be bound by the terms and conditions. She argued that the failure by DW 1 to tender any Offer Letter of Hurui Amcos to prove that the clients were given more money that they had applied for denied the

Arbitrator the opportunity to know the granted amount. The same applied to DW 1's failure to bring Offer letter of Mahamudu Likonwe of Lyenje Amcos on the deposit of Tshs. 27, 284, 000/= but the amount granted was Tshs. 8, 000, 000/= only. She maintained that producing Bank Statement without Offer Letter was not enough to prove the loan deposited in the clients' accounts.

Counsel for the applicants also questioned the authenticity of the report of DW 2 arguing that he was not an Internal Auditor authorised to conduct investigation on fraud related cases and prepare a report and, therefore, the applicants' misconduct was not proved.

With respect to DW 2's argument that there was double payment or overpayments basing on the cheques (exhibits KW9 and KW10), counsel contended that such argument has no basis as there is no evidence on the applicants receiving the said cheques and they were wrongly admitted by the Arbitrator as they were not even in the record of the Bank. It was further contended that overpayment or double payment was not proved inasmuch as none of the Amcos leader complained and no witnesses were brought to testify on those allegations. Counsel also urged the court to disregard the corrupt transaction allegations against the 3rd and 4th applicants as they were not proved.

With regard to the second ground on misapprehension of evidence, Ms Lawuo also took exception to exhibits KW 1-KW21 tendered by the respondent as providing enough evidence to prove that the termination was substantively and procedurally fair while the documents left a lot of doubt. She explained that those documents alone were not enough to terminate the applicants as there were some other relevant documents

which the respondent did not tender. She mentioned such documents to be Offer Letter and Investigation Report from the Internal Auditor which would have assisted in proving the allegations against the applicants. She argued that the Arbitrator shifted the burden of proof to the applicants which is in contravention of section 37 (2) of the Employment and Labour Relations Act, 2004 and section 60 of the Labour Institutions Act, No. 7 of 2004.

On the Arbitrator's holding that the applicants had already been paid their terminal benefits which is the third ground, counsel for the applicants argued that the Arbitrator was wrong to conclude that terminal benefits was used to deduct loan by the applicants without any proof of the remaining balance and what was paid already by the applicants. Further that since the Arbitrator was satisfied that the termination was procedurally unfair because the procedures to conduct the Disciplinary hearing were not adhered to by the respondent, he was in that respect, required to award compensation and the terminal benefits and leave it to the respondent to deduct or otherwise the awarded amount taking into account that the Arbitrator was not part of the loan agreement. It was prayed for the applicants that this court quashes and sets aside the Award and grant the applicants other terminal benefits to which they are entitled such as repatriation allowance, transport and subsistence allowance to the 1st and 3rd applicants, compensation for unfair termination, notice in lieu pay (sic), accrued annual leave, severance pay, certificate of services and contractual terminal benefit contributions.

Submitting on the fourth ground, counsel for the applicants, referring this court to page 47 paragraph 4 of the Award, contended that

since the Arbitrator concluded that the respondent did not follow the procedure for termination, she having violated the requirements of rule 13, of the Employment and Labour Relations (Code of Good Practice), GN No. 42 of 2007 in that the respondent during the disciplinary hearing did not call the witnesses to prove the allegation, members of the disciplinary hearing was the one complaining on the alleged misconduct, the applicants were not given the chance of cross examination and the applicants were found guilty basing on the report that no witness explained it and the applicants were not afforded opportunity to cross examine on the report. In her view, the termination having been found to be procedurally unfair, the applicants were entitled to twelve months compensation. Counsel for the applicants relied on section 40 (1) (c) of the Employment and Labour Relations Act and the case of **Leopard Tours Ltd v. Rashid Juma and Abdallah Shaban, Lab. Div. Revision No. 55 of 2013.**

On the last ground, relying on rule 24 (6) of the Labour Institutions (Mediation and Arbitration Guidelines), GN No. 67 of 2007, Counsel for the applicants submitted that exhibits KW1 and KW18 were wrongly relied on by the Arbitrator as they were not produced. She prayed them to be expunged from the record.

Responding to the applicant's written submission, Mr. Godwin Nyaisa, learned counsel for the respondent strenuously argued in opposition of this application. After detailing a brief background of the matter, he contended that the applicants were given allegation letters (show cause letters) to explain why disciplinary measures should not be taken against them and, in their response, admitted the misconduct and pleaded for

leniency and that following admission disciplinary hearing was conducted in which they again admitted misconduct hence termination.

As regards the 1st ground, learned counsel for the respondent submitted that the notice to show cause letters (allegations letters) were exhibited in CMA and marked exhibit KW 14, the notice for disciplinary hearing and allegations attached thereto was tendered in court and admitted as exhibit KW 15, the hearing forms were admitted as exhibit KW 19 and the termination letters were admitted in evidence as exhibit KW 1. He informed this court that all these exhibits refer to breach or contravention of bank policies according to Credit Policy, Branch Operation Manual and Human Resources Manual-exhibit KW 13 collectively. Mr. Nyaisa explained that the applicants were charged and found guilty of contravening the said policies regulating their working standards and that the Hon. Arbitrator, in arriving at the Arbitral Award, considered rule 12 (1) (c) of the Code of Good Practice. In buttressing his argument, counsel for the respondent made reference to page 40 of the Arbitrator's Award on the applicants' admission and apologies. He concluded that the holding by the CMA was reached after evaluating the contents in exhibits KW 5, KW14 and KW 19 and the applicants' testimonies during cross-examination. Further that the finding that the termination was substantively fair was justified. Reliance was placed on the case of **Oswald Chenyenge v Pangea Minerals Ltd** [2015] LCCD 8 and the case of **Nickson Alex v. Plan International**, Revision No. 22 of 2014. Arguing that the applicants were not prudent and honest employees, counsel for the respondent made reference to the case of **Paschal Bandiho v. Arusha Urban Water Supply and Sewage Authority**, Revision No. 76 of 2015.

Refuting the applicants' argument that there was failure to tender Offer Letter, Counsel for the respondent told this court that since the applicants admitted in writing that the transactions were done contrary to approval from the Head Quarters and /or bank policies, then there was no need to produce further evidence. Reliance was placed on the case of **TIB Development Bank Ltd v.Weruweru River Lodge Company and another**, Civil Case No. 8 of 2016 on the authority that facts admitted by the parties need not be proved as provided for under section 60 of the Evidence Act. The case of **Tarcis Kakwesigalo v. North Mara Gold Mine Ltd**, Lab. Div. MSM , Revision No. 6 of 2014 was distinguished on the grounds of lapse of time and absence of admission by employee. In putting emphasis on the fact that the contract was fairly terminated, Counsel for the respondent relied mainly on the allegations made against each applicants in KW 14 and their admissions in exhibit KW 19.

Submitting against the 2nd ground, Mr. Nyaisa termed the applicants' argument as an afterthought in that the exhibits were tendered without objections and that the doubts have not been specified. Counsel for the respondent also found comfort in rule 25 (1) of the Labour Institutions (Mediation and Arbitration Guidelines), Rules, GN. No. 67 of 2007 arguing that the applicants had also a duty to prove their innocence as the burden of proof lying on the employer is not beyond reasonable doubt. This court was referred to the case of **Tanzania International Container Terminal Service Ltd v. Shaban Kagere**, Misc. Application No. 188 of 2013. Counsel further contended that the CMA was satisfied that on the evidence tendered, the respondent had proved

misconduct on part of the applicants which amounted to gross negligence.

Counsel for the respondent then took this court through ground No. 3. He contended that the terminal benefits were duly paid and the respondent rightly utilized the same to set off their loans with the respondent. In support of this argument, counsel for the respondent referred this court to section 28 (1) (a) of the Employment and Labour Relations Act and 4th Condition under Warranty at page 2 of the loan agreement (exhibit KW 17) which were signed by the applicants hence consenting to their outstanding loans to be recovered from the terminal benefits. He said that the terminal benefits were proved by bank statements-exhibit KW 18.

With regard to the 4th ground on the award of one month's salary compensation instead of twelve months as statutorily provided, Mr. Nyaisa submitted that since the failure to call the witnesses which is in contravention of rule 13 (5) of the Code of Good Practice was not fatal as the CMA was satisfied that the applicants had confessed misconduct in their written reply to show cause letters (allegations letters) and during the disciplinary hearing as per hearing forms, the need for witness was redundant. Counsel for the respondent was of the view that the omission to call witnesses could not invalidate the outcome of the hearing and, therefore, the termination was procedurally fair. He concluded that where an employee admits misconduct, unfair termination does not arise.

On the applicants' argument that exhibits KW 1 and KW 18 being wrongly admitted, learned counsel for the respondent termed this assertion as a naked lie, baseless and frivolous. He explained that those

exhibits were listed in the list of additional documents to be relied upon, were served to counsel for the applicants and then admitted without objection. Counsel ended his submission by urging this court to dismiss the application for want of merit.

In a short rejoinder, counsel for the applicants refuted the respondent's argument that the applicants admitted the misconduct. He asservated that alleged admission was unclear, ambiguous and equivocal. He contended that the Arbitrator misevaluated the evidence. He said that there was no proof of gross negligence and insubordination leading to financial and reputation risk to the bank.

Counsel for the applicants further submitted that in believing the evidence in KW 1-KW 21 as proof that the termination was substantively and procedurally fair, the Arbitrator shifted the burden of proof to the applicants which is a violation of section 37 (2) of the Employment and Labour Relations Act and section 60 of the Labour Institutions Act. Counsel for the applicants maintained that failure to tender Offer Letter adversely affected the probative value of all other tendered documents. He castigated that the applicants were not involved in the investigation and were also not supplied with the investigation report before the disciplinary hearing was conducted. Counsel for the applicants was of the view that the procedure was violated.

Having given an introduction on what the court is called upon to do, the brief factual background of the matter and having detailed the submissions of both learned counsel, I am now in a position to deliberate on the grounds of revision raised by the applicants.

Before embarking on discussing the grounds for revision, I must point out that established legal principle is that for termination of employment to be considered fair it should be based on valid reason and fair procedure. That is the import of section 37 (2) of the Employment and Labour Relations Act No. 6 of 2004. Besides, Article 4 of the International Labour Organization Convention (ILO) 158 of 1982 provides that:

> *"The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on operational requirements of the undertaking establishment or service."*

This position was confirmed by this court in the case of **Tanzania Railways Limited v. Mwinjuma Said Semkiwa**, Lab. Div. DSM, Rev. No. 239 of 2014.

In the revision under consideration, the appellants' 1st ground of revision is that the Hon. Arbitrator erred in law and fact in finding that termination was substantively fair while the respondent (Employer) did not prove that the applicants committed the alleged misconduct. Indeed, this was the applicants' first ground of complaint before the Commission for Mediation and Arbitration where they complained that the there was no fair trial during the disciplinary committee hearing. As the record of the CMA reveals, that was not one of the issues framed. Instead, at the commencement of arbitration hearing, the first issue framed by the CMA was 'Endapo sababu ya uachishwaji kazi ilikuwa halali na ya msingi, which, in essence, could have been the second issue. In determining this

first framed issue, the Hon. Arbitrator observed at page 39 of the Arbitral Award thus:

> " katika kujibu hoja ya kwanza endapo sababu ya uachishwaji kazi ilikuwa halali, katika hoja hii walalamikaji wameeleza utofauti wa vichwa vya barua za kujieleza na tuhuma walizopewa kabla ya kikao cha nidhamu kwamba barua za kutakiwa kujieleza hoja ilikuwa "Mishandling of Business at Mtwara Branch" na tuhuma walizopewa hoja ilikuwa "Inappropriateness in handling AMCOS transactions". Mwajiri ameeleza sababu ya kuwaachisha kazi in Kukiuka taratibu za kibenki katika utekelezaji wa majukumu yao, kwamba walalamikaji kwa ujumla wao walikiuka taratibu za kazi kwa kutozingatia Human Resources Manual, Branch Operations Manual kama miongozo halali ya Benki. Baada ya kupitia KW14 barua za majibu ya walalamikaji walipotakiwa kujieleza.
>
> Mlalamikiwa amethibitisha walalamikaji walikiuka taratibu za kazi ambazo zimeainishwa bayana kwenye Operations Manual, Human Resources Manual na Job Description na kwa lugha nzuri ya kisheria kwa mujibu wa Kanuni ya 12 (3) (d) ya Employment and Labour Relations (Code of Good Practice), GN No. 42 of 2007 walalamikaji wameachishwa kazi kwa kosa la uzembe uliokithiri "Gross Negligence". Na hii ni sababu halali ya kuachishwa kazi.

With due respect to the Hon. Arbitrator, he went off tangent. In the first place, the records at CMA shows that the investigation report leading to holding disciplinary committee hearing was on Mishandling of

Business Operations at Mtwara Branch, the Allegations Letters spoke of "Query on Mishandling Business at Mtwara" while Notices for Disciplinary Hearing served on the applicants were on "Inappropriateness in Handling AMCOS Transactions" meaning that it was reported that the applicants had committed offences relating to Mishandling of Business Operations at Mtwara Branch (according to the investigation report). However, the charges levelled against them were on Query on Mishandling Business at Mtwara and at the Disciplinary Committee, the applicants were called to answer charges on inappropriateness in handling AMCOS transactions.

Second, in their letters of termination, the grounds for termination in respect of the 1st applicant were gross misconduct and insubordination leading to financial and reputational risk to the bank. The grounds for termination in respect of the 2nd applicant was misconduct which affected the bank financially and caused reputation risk. With respect to the 3rd applicant, the grounds for his termination were lack of integrity, professionalism and business ethics required of a banker; the actions which exposed the bank to financial and reputation risk. As with Frank Rhobi, the 4th applicant, his termination was grounded on lack of integrity amounting to misconduct which impacted the Bank financially and cause reputation risk. The ground for termination in respect of the 5th applicant was gross misconduct leading to financial and reputation risk to the bank. The Arbitrator was duty bound to resolve if these allegations were properly tried and proved during the disciplinary hearing. This was particularly so because, that was the gist of the applicant's first complaint before the CMA. He was not supposed to import his own ground and term it the offence the applicants were alleged to have committed which, in fact, did not lead to the termination

of their contract of employment. According to the Award, the Hon. Arbitrator, was satisfied that the respondent had proved gross negligence on part of the applicants. With due respect, it is not clear where the Arbitrator pegged his finding that the respondent had proved gross negligence in the absence of the applicants having been charged with the said offence of gross negligence and being found guilty by the Disciplinary Committee to have committed such an offence. Unfortunately, the record does not show the Disciplinary Committee Proceedings which could show how such offence was committed by the applicants and proved in the disciplinary committee hearing. Worse enough, gross negligence was not the offence that led to the applicants' termination. The Arbitrator should be reminded that gross negligence is an offence which had to be proved by establishing the existence of its elements as follows: one, the employee must owe a duty to the employer. Two, the employee must fail to perform such duty. Three, the employer must suffer harm or injury and four, such harm or injury must be linked to the failure of the other party to perform his duty. However, it should also be borne in mind that a negligent action only amounts to gross negligence if the following other elements are proved; namely, the employee acting in negligence was aware of the potential consequences of his or her action or omission and that he or she committed the negligence intentionally in order to cause harm or injury to the employer. Since the proceedings of the disciplinary committee are missing on record, there was no material upon which the Hon. Arbitrator could have based his finding that the respondent had proved gross negligence in terms of rule 12 (3) of the GN No. 42 of 2007 on part of the applicants. Besides, as the record shows, the applicants' services were not terminated on ground of gross negligence but on other grounds as

explained hereinabove. It cannot be overemphasized that the employer bears the burden of proving that the termination of the employee was for valid and fair reason. In the case of **Othman R. Ntarru v. Baraza Kuu la Waislamu (BAKWATA)**, Revision No. 323 of 2013 this court observed:

> *"the law puts burden of proof to the employer to prove that he had sufficient reasons and followed the required procedure in terminating the services of the employee".*

In my analysis, I am satisfied and hereby find that the respondent failed to discharge this burden, albeit on balance of probabilities. In other words, there was no evidence to connect the applicants with the alleged gross negligence and to prove that the applicants committed the alleged gross negligence as found by the Arbitrator.

The learned counsel for the respondent throughout his submission, dwelt mostly on the allegations levelled against the applicants and the argument that they had admitted them without showing how those allegations were proved at the disciplinary hearing committee. The same Arbitrator fell into the same quandary. In his written submission in opposition, at paragraphs 2.3 to 2.7 pages 3 to 14 , learned Counsel for the respondent relied on the observations and reasoning of the Arbitrator behind his finding that termination was substantively fair on the applicants admissions. I have taken pains to peruse the record of the CMA but could not find anywhere in which the applicants made unqualified and unambiguous admissions of their alleged misconduct which could justify their being terminated. Indeed, the charges according to the charge sheets were vague and the charge sheets did not clearly and precisely set forth particulars of the misconduct committed by them

and they were not given opportunity at the disciplinary committee hearing to refute the charges and establish their innocence by explaining the circumstances alleged against them and understand their defences. This is notwhistanding the fact that the respondent failed to lead sufficient evidence to prove the allegations that led to the applicants being terminated. It that respect, it cannot be safely concluded that the respondent discharged her both legal and evidentiary burden of proving that the applicants' termination was fair. In other words, it was not sufficiently proved that the negligence, if at all existed, involved dishonesty on part of the applicants to amount to gross negligence.

Even if, for the sake of argument, the respondent had discharged this burden of proof, I am far from being convinced that the termination of employment was the appropriate sanction in the circumstances of the case. Termination of contract of employment for misconduct is expected to be a measure of last resort, reserved for serious misconduct or for repeated misconduct where the employee has not heeded corrective disciplinary action such as warnings. The fundamental question to be asked is whether the misconduct committed by the employee renders the continuation of employment relationship intolerable. There is nothing on record showing that the misconduct, if at all existed, rendered the continuation of employment relationship intolerable. That aside, the Arbitrator was, before arriving at the finding that the termination by the respondent was fair and appropriate, enjoined to consider the other factors such as the lengthy of service of the applicants, their previous disciplinary records, their personal circumstances, the nature of their job and circumstances leading to the infringement itself.

I find the first ground of revision with legal merit. In view of what I have stated hereinabove, the determination of the 1st ground disposes of the 2nd ground as well which is answered affirmatively that the Arbitrator misapprehended the evidence and came to improper and irrational conclusion that the termination was for valid and fair reason.

It is also provided under section 37 (2) (c) of the Employment and Labour Relations Act that a termination of employment by an employer is unfair if the employer fails to prove that the employment was terminated in accordance with **a fair procedure**. In that spirit, Rule 13 of the Code of Good Practice provides a clear and detailed procedure for termination of employment. The issue is whether applicants' termination by the respondent was carried out in accordance with the prescribed procedure.

Before the CMA, the second issue was 'Endapo utaratibu halali wa uachishwaji kazi ulifuatwa'. In determining this second issue, the Hon. Arbitrator observed "katika kujibu hoja ya pili, kwa makosa ya kinidhamu, utaratibu huu umebainishwa bayana kwenye Kanuni ya 13 ya Employment and Labour Relations (Code of Good Practice), GN No. 42 of 2007".

The Hon. Arbitrator then proceeded that the applicants were challenging that the procedure of investigation done by the Permanent Control Unit was wrong as the proper authority was the Department of Internal Audit as stipulated under Human Resources Manual and they argued that the investigation was, therefore, null and void. It is indicated at page 44 of the Arbitral Award that the Arbitrator accepted the respondent's version that according to Human Resources Manual, violation of the bank procedures offences are investigation by an ad-hoc

committee and the Permanent Control Unit which conducted the investigation was the appointed ad-hoc committee and therefore, the Permanent Control Unit had mandate to conduct the investigation. Further that, the applicants were permitted to be accompanied by a representative who is an employee of the respondent as per rule 13 (3) of GN .No. 42 of 2007. He reasoned that the applicants were given the right of being represented but the applicants opted not to exercise that right. The Arbitrator, however, admitted that there was procedural irregularity on the failure to call witnesses and give the applicants opportunity to cross-examine the witnesses.

I think the applicants' complaint that the procedure was not followed is not without merit. Here the issues for determination are whether the disciplinary committee properly conducted the dispute, whether the dispute was given weight it deserved and whether rule 13 of GN No. 42 of 2007 was adhered to.

Going by the record of the CMA, the proceedings do not reflect that the applicants were notified on the allegations of gross negligence and heard on it and prepare their defence on it. There was no evidence given on part of the respondent at the disciplinary hearing to prove the said offence, no witnesses were called and the record is also clear that the applicants were not convicted of gross negligence. After all, as said in my ruling, the record is silent on the proceedings of the disciplinary committee. According to the Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedures made under the Code of Good Practice, a brief procedure is as follows. A Disciplinary Authority makes preliminary investigation by framing charges specifying offences,

attaching documents and then serve them to the employees concerned requiring them to respond in not less than 48 hrs.

Thereafter, the Disciplinary Authority receives and considers the employees' responses. If the Authority thinks that the employees were in breach and needs to impose a penalty, a Disciplinary Committee is formed to conduct hearing. It has to be given the charge or charges, responses and all evidence. The Disciplinary Committee then notifies the accused employees of the day, date, time and place of hearing. The letter summoning the accused employees has to inform them the right to select any other employees to accompany them.

The number of members of the Disciplinary Committee has to be between three to seven. During the hearing, there will be employer's representative who is NOT the Disciplinary Authority and the employees with their accompanying representatives.

The hearing of by the Disciplinary Committee has to be in two phases. In the first hearing phase, the charge is read over to the accused employee, witnesses are called and documentary evidence tendered. This must be in the presence of the accused employee who is to ask questions to each witnesses.

The second hearing phases relates to the employer's defence which starts with reading the responses submitted to the employees. Going through evidence submitted and asking questions to the employee regarding his response and evidence. The employees should be allowed to bring witnesses if they so wish.

At the end of the hearing the representative of the employer, if any, who is not a member of the Disciplinary Authority and the employees should be asked to leave so that the Committee remains alone to discuss what transpired at the hearing and then make **recommendations**. The recommendations should contain: whether charges have been proved or not, state the reasons, state any facts which mitigates the gravity of the offence and state any fact which in the opinion of the committee is relevant.

The Report of the disciplinary committee and the Hearing Form are submitted: one copy to the Disciplinary Authority for action and one copy to the accused employees.

After receiving the Report of the Disciplinary Committee and the Hearing Form, the Disciplinary Authority shall study the recommendations and take appropriate action such as imposition of penalty or not. In case of imposition of the penalty, the charged employees must be given a chance to mitigate.

The Disciplinary Committee is governed by the rules of natural justice.

According to the record of the CMA, that procedure is not indicated to have been followed. Besides, I am satisfied as was the Arbitrator that rule 13 of the Code of Good Practice which forms the basis for disciplinary hearing was violated. Apart from the fact that the record does not indicate actual conduct of the disciplinary committee hearing, in the absence of such proceedings on the record, what is clear is that the

provisions of sub-rule (5) of rule 13 of the Code of Good Practice was blatantly violated. The said provisions stipulate as hereunder:-

> *"Evidence in support of the allegation against the employee shall be presented at the hearing, the employee shall be given a proper opportunity at the hearing to respond to the allegations, question any witness called by the employer and to call witnesses, if necessary".*

As the CMA record reveals, there was no evidence given in support of the allegations against the applicants, no witnesses were called, the applicants were not given opportunity of not only to cross examine but also to call their own witness as per the law requires.

As demonstrated in my ruling above, the respondent's argument that the employer was not duty bound to call any witnesses on account that the applicants admitted the allegations is unacceptable and baseless.

This means that the there was no procedural fairness. In other words, the respondent did not follow the fair procedure before terminating the applicants.

With those findings I have made, I am satisfied that the termination of the applicants' services was unfair both substantively and procedurally. This application has, therefore, legal merit.

In view of what I have discussed above, I see no need of discussing the rest grounds lest it amounted to an academic exercise.

Invoking the powers vested in this court under the provisions of section 91 (2) and (b) of the Employment and Labour Relations Act No.

6 of 2004 read together with Rule 28 (1) (c) and (e) of the Labour Court Rules, GN No. 106 of 2007, I quash and set aside the CMA Award and order the applicants to be reinstated and be paid their remuneration in accordance with sections 40 and 44 (1) and (2) of the Employment and Labour Relations Act, No. 6 of 2004.

W.P. Dyansobera

Judge

20.11.2020

This ruling is delivered under my hand and the seal of this Court on this 20th day of November, 2020 in the presence of the 1st, 2nd, 3rd and 4th applicants and in the presence of Mr. Stephen Lekey holding brief for Mr. Kimario, learned Advocate for the respondent.

Rights of appeal to the Court of Appeal explained.

W.P. Dyansobera

Judge

20.11.2020