IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
(LABOUR DIVISION)
AT DAR-ES-SALAAM
LABOUR REVISION NO.838 OF 2019
(Originating from Labour Dispute CMA/DSM/ILA/R.794/17/855)

EDMUND MSANGI.....APPLICANT

VERSUS

THE GUARDIAN LIMITED.....RESPONDENT

JUDGMENT

Date of Last Order: 10/08/2020
Date of Judgement: 16/10/2020

NANGELA, J.:

In John Henry Cardinal Newman's treatise, *The Idea of a University Defined and Illustrated* (1852), p.168, the author had the following to say:

> "There are authors who are as pointless as they are inexhaustible in their literary resources. They measure knowledge by bulk, as it lies in the rude block, without symmetry, without design ... Such readers are only possessed by their knowledge, not possessed of it ...."

This judgement is a bit long. The above extract comes as a preamble to it to signify that I feel uneasy about its length. However, its length is inevitable owing to the account of the facts, the submissions made by the parties, the issues therein and their respective discussion.

This case is an application for revision. The application was instituted in this Court by way of a Chamber Summons under section

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91(1) (a) and 2 (b) of the *Employment and Labour Relations Act No.6 of 2004*; Rule 24 (3) (a), (b), (c), (d) and Rule 28 (1) (c), (d) and (e) of the *Labour Institutions (Labour Courts) Rules, 2007*. The Applicant's Chamber application was filed in this Court on 05th November 2019 and, the same, is supported with an affidavit of the applicant Edmund Msangi, sworn at Dar-Es-Salaam on the 30th October 2019 and presented for filing on the 05th October 2019.

It is also on record that, the Applicant did file, together with the Chamber summons and the affidavit, a '**Notice of the application**', wherein he notified the Respondent of the appointment of Naronyo and Company, Advocates, of Kigamboni Area, P.O. Box 78203, Dar-Es-Salaam, as his representative in this matter.

In his Chamber Summons, the Applicant has sought for the following orders of this Court:

1. THAT, this Honourable Court be pleased to revise and satisfy itself as to the correctness of the award of the CMA with reference ***No. CMA/DSM/KIN/R.793/18/176***, Dated 10th October, 2019, before the Commission for Mediation and Arbitration, Hon. Alfred Massay.
2. THAT, the Honourable Court be pleased to issue an order to set aside and quash the findings of the Commission.
3. THAT, the Honourable Court be pleased to determine the matter in the manner it considers appropriate and give any other relief (s) it considers fit and just to give.
4. Any other relief(s) that the Honourable Court may deem fit and just to grant.

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On the 05th December 2019, the Respondent filed a counter affidavit sworn by one Ayoub Semvua, a principal officer of the Respondent. The counter affidavit was filed together with a notice of opposition made under Rule 24 (4) (a) and (b) of the Labour Court Rules, 2007 and any other enabling provision of the law.

On 27th February 2020, the Applicant filed a reply to the counter affidavit. In its '*Notice of Opposition*', Mr Emmanuel Matondo, a Legal and Corporate Affairs' Manager of the Respondent, was appointed to represent the Respondent.

On 06th February, this Court made an order calling for the records of the Commission for Mediation and Arbitration (CMA) and fixed the matter for a mention before the Hon. Judge on 03rd August 2020. On the material date, the Applicant enjoyed the services of Mr Naronyo Kicheere, a learned counsel, while the Respondent's appointed Representative was absent.

However, Mr Ayoub Semvua, Acting Senior Human Resource Manager of the Respondent Company, informed the Court that Mr Emmanuel Matondo, the appointed legal representative of the Respondent, was bereaved and, for that matter, he had prayed for another date of hearing of this Revision case.

For his part, Mr Kicheere, had no objection. Nevertheless, he prayed that, if the matter is to be adjourned as prayed, then he proposes the hearing date to be the 10th day of August 2020 at 9.00. The prayer for adjournment was granted by this Court and the hearing was settled for the proposed date (i.e., 10/8/2020 at 9.00).

On the 10th August 2020, when the parties appeared before me, Mr Kicheere took the floor to address the Court. He prayed to adopt

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the contents of the two affidavits of the Applicant, as forming part of his submission, and, went ahead to challenge the decision of the CMA. Mr Kicheere contended strenuously that, the learned arbitrator was wrong when he made a finding that the Complainant (now Applicant) admitted to wrong doing. He argued that the arbitrator's findings on pages 9 to 10 of the award were erroneous because the Applicant never admitted to have committed any known wrongdoing.

Furthermore, Mr Kicheere faulted the learned arbitrator for being biased and pointed to four areas to demonstrate such biasness on the part of the Arbitrator. The first area of concern was that, the learned arbitrator intentionally quoted the Applicant's letter to the Respondent Manager dated 2nd July 2018 (*Exh.D4 or Exh.P-8*) out of context. He argued that, that was vividly so as the arbitrator chose to start his discussion of the letter from its paragraph three while deliberately leaving out paragraph one on which the Applicant had expressly and unequivocally denied any wrong doing. The first paragraph read as follows:

> "Katika toleo la Julai 2, 2018 la Nipashe, tulikuwa na kichwa cha Habari kilichosema: "**BARUA YA KKKT YAMNG'OA WAZIRI**" ambacho katika waraka wako kwangu umesema ni chonganishi. **Lakini si chonganishi** kwa sababu zifuatazo..." (Emphasis added)

Mr Kicheere submitted that, the above excerpt cannot and could not, in any way possible, form an admission to a wrong doing. He contended that, on the contrary, the whole of paragraph one of the Applicant's letter (*Exh. P-8*) was full of reasons as to why there was a need to interpret the news regarding the sacking of the Minister.

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He was of the view that, even the Applicant's letter to the Director of Information Services (**MAELEZO**), which was tendered and admitted as *Exh.P-9*, was not an admission. Mr Kicheere argued, therefore, that, the Applicant's professional communication exhibited in *Exh.P-8* could not be regarded as an admission of wrongdoing because, even the Director of Information Services (**MAELEZO**) did not take any further action after receiving those explanations rendered by the Applicant.

As regards the second ground of bias, Mr Kicheere submitted that the Arbitrator was biased on four instances, namely, that:

1. **Siding with the Employer on complaints that are imaginable**, (i.e., it was only the employer (Respondent) who complained while all other interested parties, the government, (through the *Director of Habari Maelezo*), professional bodies, including the Media Council of Tanzania (MCT), professionals themselves (journalists) or the KKKT (the author of the '*WARAKA*') and the general public, did not complain about the news paper headline. Even the Police Force, vested with the duty to prosecute seditious information (*habari chonganishi*) did not complain).

On the above point, Mr Kicheere wondered why then should the CMA Arbitrator, whom, with respect, he referred to as a novice in the journalism industry, sided with the Respondent to hold, as he did in page 11 of the award, that:

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> "Allegations that other similar news papers carried more or less similar information could not be an excuse as one wrong could not cure another wrong".

Mr. Kicheere argued that, if the above observations of the Arbitrator were correct, and, since sedition is a criminal offence, why then didn't the Police through the Director of Criminal Investigation (DCI) and the Director of Public Prosecution (DPP) did not raise charges at any Court? His conclusion was that, the arbitrator was biased.

2. The issue of forgery was not canvassed by the learned arbitrator.

It was Mr Kicheere's submission that, the issue of bias on the part of the learned arbitrator was also manifest in his non-actions. He argued, in particular, that, the Arbitrator did not investigate or discuss the issue of forgery of the Applicant's signature. Mr Kicheere submitted that, the Applicant raised a complaint to that effect because, no minutes were taken during the controversial Disciplinary Committee's Hearing Meeting and, that the purported signature appearing in the so-called 'minutes' of the Committee as his was a forged one. Mr Kicheere submitted further that, complaint was supported by **PW2**, who was one of the Committee's members and testified before the Commission that no minutes were taken at the Committee's hearing and, therefore, there were no minutes to sign.

It was contended further that, even though the arbitrator caused to be signed ten samples (specimen) signatures of the Applicant, nowhere did he discuss that evidence in his award and gave no reason for that inaction. Instead, it was argued, the arbitrator went ahead and

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used *Exh.D6*, the hearing form, in his very adverse decision against the applicant.

Mr Kicheere referred to this Court the case of **Tanzania Breweries Ltd (TBL) v Anthony Nyingi, Civil Appeal No.119 of 2014, CAT, (DSM) (unreported)** where the Court of Appeal of Tanzania held, at page 9, that, if a Court of law decides to accept or reject a party's argument, it must demonstrate that it considered it.

Mr Kicheere maintained his contention that, no minutes were taken during the Disciplinary Committee's Hearing meeting and, that; nothing was there to be signed as minutes of that Hearing Committee. He concluded, therefore, that *Exh.D6* was a forged minutes and signature of the Applicant.

3. The Arbitrator's act of turning himself to be a journalist 'guru' or expert.

Mr Kicheere submitted that, the arbitrator's biasness was also manifestly evident when he held that there was nothing to be interpreted from the context in which the impugned news headline was written. He argued that, that observation of the learned arbitrator was erroneous because, **PW3**, a long serving journalist and editor, as well as **PW1** (the Applicant), who is equally a long serving journalist, testified that it was proper to interpret the news, especially at this time of digital revolution, and, that, interpretation of news was one of the functions of journalist or Mass Media.

He castigated the arbitrator's findings on page 9 of the award where the arbitrator had concluded that:

> "Allegations that other newspaper carried more or less similar information could not be an excuse as one wrong could not cure another wrong."

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Mr Kicheere questioned the arbitrator's conclusion, wondering on whose interpretation the information was held to be wrong while the arbitrator was a novice in the journalism industry and the gurus or experts in that industry, who testified before the Commission, said the headline was proper and, that, interpretation of news is one of the functions of journalists. He further wondered as to how could an arbitrator who is not a trained journalist support the version of the Employer while all other interested parties and expert in journalism have not raised any complaint? He argued that, **PW3** emphasized on the need to interpret news in this present era of digital and social media lest a person publish that which is already stale news or news with no value.

He concluded, therefore, that, the examples given by **PW3** such as that of reinstatement of the suspended Registrar of Societies, could be interpreted to mean that the sacking of the Minister, who suspended the Registrar in the first place, was caused by the KKKT Circular (**WARAKA**) because that Registrar had threatened the KKKT that she would deregister it and, for that, she was suspended by the Minister.

4. The journalists were not made part of the Panel of Expert of Disciplinary Committee Members.

As regards the alleged fourth instance of bias on the part of the arbitrator, Mr Kicheere argued that, the CMA arbitrator could not even take into account the conspicuous missing of professional journalists in the Panel of members who formed the Disciplinary Committee which sat and deliberated on professional misconduct of a professional journalist, even after being told of that anomaly.

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He argued that, there was no single professional journalist to discuss matters of professional journalism, and, that, although Respondent has many qualified journalist, none of them was picked to help the committee to decide on matters of professional journalism. He contended that, such a decision was a deliberate one and cannot be shielded as being neither unintended nor coincidental. For that reason, he argued that, in accepting the employer's explanations while even the Director of information services (**MAELEZO**) had accepted the editor's explanations, the arbitrator was biased.

Finally, Mr Kicheere submitted that, this being the first appellate court, it has a duty to re-evaluate the evidence and arguments on record of the CMA and come up a true interpretation at it was emphasized in the case of **Future Century Ltd v TANESCO Civil Appeal No.5 of 2009 , CAT (DSM) (unreported)**.

In reply to Mr Kicheere's submission, when Mr Matondo took the floor to address this Court, apart from adopting the counter affidavit in opposition to the application, submitted, in the first place, that, the assertion of the Applicant on paragraph 27 of his affidavit that: "the Arbitrator was not an expert" is unacceptable. He was of the view that, such assertion should be ignored because the affidavit was sworn by a lay person and such words amounts to an insult to the Commission and to the arbitrator, as it means that someone unqualified was tasked to arbitrate the matter.

In his considered view, what was before the arbitrator was a dispute on termination of the Applicant from his employment, and, not the issue of the issue regarding journalism as a profession. He argued that, the Applicant's assertion is an issue to watch because, if the

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current application is dismissed, he will as well attack the presiding judge that he lacked qualifications of being a journalist. Mr Matondo argued, therefore, that the arbitrator was solely dealing with an issue of fairness of the reasons and the procedures which are laid down to terminate an employee and, therefore, he was not concerned with lecturing on journalism.

As regards the issue of alleged forgery of the Applicant's signature, Mr Matondo argued that, if that was the case, the Applicant would have reported the matter to the Police or should have made an application for verification of his handwriting or signature in any government department, but he did not do so. He maintained, therefore, that, since the Applicant acknowledged to have attended the disciplinary hearing and does not dispute the names of those who attend the meeting, but rather his signature only, his complaints are baseless.

As regards the fairness of reasons for his termination, Mr Matondo submitted that the termination was fair. He submitted that, there is no dispute that the Applicant was the managing editor of Nipashe Newspaper and he admitted to the wrongdoing. He argued that, an editor is the one who manages which news should go out to the public and which should not and the Applicant had more than 20 years of experience in journalism, so whatever went out on the 2nd of July 2018 went out under his blessings. He argued further that, the crux of the matter was the headline "**Barua ya KKKT yang'oa Waziri**" on the Mipashe Newspaper (*Exh.D2*), which heading he held to be completely wrong. He argued that, the Government Press release issued on 1st of July 2018 when H.E the President made

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changes to the Cabinet did not stated the reasons for the changes. He submitted that, on page 3 of *Exh.D2* it was stated that

> "Taarifa ya Ikulu iliyosomwa na Katibu Mkuu Kiongozi haikutaja sababu za kumwondoa Waziri huyo."

Mr Matondo submitted that, as a managing editor, the Applicant had a duty to give accurate information to the public and not sensational news. He argued that, the Applicant had all powers to refuse or order removal of any story, but the Applicant allowed such false story to be published. He contended that, even though the Applicant has stressed that there was no query from the government concerning the published story, the fact was that such a query was there and that is the reason why the Applicant had to write to the Director of information services (MAELEZO) (*Exh.D6*) stating the reasons why serious actions should not be taken against *Nipashe.*

He submitted that, *Exh.D6* was evidence that there was wrong information to the public. He referred to paragraph 3 of *Exh.D4* of a letter to the HR Manager of the Respondent alleging that, in that paragraph, the Applicant admitted that as from now on the information from the government were to be published as they were released to the public.

Mr Matondo maintained that, it was clear that the Applicant admitted to a wrong doing, that is to say, the headline had caused problems. He also referred to paragraph 9 and 10 thereto. He submitted that, there was nothing like interpretive journalism, since there was not anything to interpret about. He argued that, the argument that other newspapers had similar story was erroneous because, no newspaper published on the 2nd of July2018 stated the reasons why there was a cabinet reshuffle.

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He submitted that, during his tenure as the Editor the Applicant had been given several verbal warnings for publishing false and defamatory stories where the Respondent had to offer apologies, some of which were received as *ExhD.7*. He argued that, in the newspaper industry, one does not sale because he has beautiful name but because of credible news. For that reason, he contended, therefore, that, frequent issuing of apologies to the public tends to convince those in the market to define or categorise such newspaper one as being a questionable, weak and an unreliable source of news.

As regards the fairness of the procedures, Mr Matondo submitted that, the Respondent was fair as the termination was guided by procedures. Citing Rule 13 of the Employment and Labour Relations Code (GN 42 of 2007), he argued that, although it provides for the procedures to be followed, rule 13(11) givens an exception. He insisted that the Applicant admitted to wrong doing and wrote a letter to *HABARI MAELEZO* (*Exh.D6*); a letter to the HR Manager (*Exh.D4*), the Minutes of the Committee (*Exh.D8*), and that even PW2 did testify that he had asked for a lenient punishment.

He contended that, under Rule 13(1) the GN 42of 2007, an Employer may dispense with the procedures, but the Respondent was fair enough that, even when the Applicant had admitted the wrongdoing, still the Respondent had to follow all procedures. He referred to this Court the case of **National Microfinance Bank PLC v Andrew Aloyce LCCD [2013] 1**, at page 145 and argued that, in this instant case, since the Applicant admitted the wrong doing, the issue of procedural irregularity died a natural death. He therefore implored this Court to dismiss the Application.

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In a brief rejoinder, Mr Kicheere reiterated his submission in chief. He rejoined that, the Applicant was not insulting the Arbitrator at any rate and discussing what he did not did not do was not an insult. Rather, he argued, the Applicant's complaints were that, while there was a pool of professional journalists, the same were not deployed. Moreover, the Applicant did not admit to wrong doing. He insisted, therefore, that, *Exh. D8* was unreliable. He further stated that the newspapers of 3rd July 2018 contained enumeration of reasons why the Minister was removed including *"NGO za Hovyo"*. He requested the Court to re-examine the evidence and allow the Application.

I have carefully examined and dispassionately taken into consideration the lengthy submissions of the learned counsel for the parties herein. Basically, the central issue for determination in this case is: ***whether, in the circumstance of this case, the termination of the Applicant was fair***. To be able to respond to that main issue, however, this Court has to first respond to other auxiliary issues, namely:

(a) whether the Applicant admitted to any wrong doing;

(b) Whether the Arbitrator was biased and whether the arbitrator erred in law for not addressing the issue of forgery which was raised by the Applicant.

(c) whether the evidence upon which the CMA Arbitrator based his decision of was properly and sufficiently evaluated;

(d) What remedies are entitled to parties?

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I will commence with the above secondary issues before I take a look at the main issue. Before I do so, let me provide some basic principles worth noting in respect of this case. In the **first** place, it is imperative to note that, in the course of hearing of any case, courts or tribunals have the authority to either accept or exclude any piece of evidence being presented. To do so, however, a Court or a tribunal has to evaluate the evidence. And, I should also add, that, such evaluation is applied to all evidence on record.

Secondly, when this Court sits to determine a revision application such as the instant one, it acts as it would have acted in a first appeal. **Thirdly**, it is well settled that, a first appellate court is entitled to reconsider and evaluate the evidence and come up with its own conclusions, while bearing in mind the fact that it never saw the witnesses when they testified. The cases of **Future Century Ltd v TANESCO (supra); Pandya v R [1957] EA 336** and **Selle v Associated Motor Boat Co [1968] EA 123**, are all supportive of that legal position.

Having stated as I did herein above let me now revert to the issues I earlier raised herein to guide my deliberations.

THE FIRST ISSUE IS: *"Whether the Applicant admitted to any wrong doing."* As correctly submitted by the learned counsel for the Applicant, it cannot be said with all certainty that the Applicant admitted to wrong doing when he appeared before the disciplinary hearing Committee or in any of the letters he wrote in the course of defending his position in this matter.

Basically, an admission, as pointed out in the *Blackslaw Dictionary, 10th Edition, Dallas Texas, 2014, at page 56,* amounts to:

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> "a statement in which someone admits that something is true or that he or she had done something wrong, especially in any statement or assertion made by a party to a case and offered against that party; an acknowledgement that the facts are true."

It is worth noting that, one crucial and trite legal principle regarding admissions is that, an **admission must be clear** if it is to be used against the person making it. This is owing to the fact that, by virtue of section 19 and 23 of the Evidence Act, Cap.6 [R.E. 2019], admissions, are substantive evidence in themselves, even if they are not a conclusive proof an alleged fact. It means, therefore, that, in law, for a statement to constitute an admission of an alleged fact, it should, on the face of it, be unequivocal and categorical. In other words, it should not be a product deduced from an interpretive exercise of the Court.

In the instant case, my reading from the contents of **Exhibit P-8** plainly indicates from its first paragraph, that, the Applicant was not admitting to any wrong doing. While the allegations levelled against him were that, the Applicant had allowed publication of information with a headline considered to be seditious in nature, the words "...**Lakini si chonganishi kwa sababu zifuatazo...**" clearly indicates a negation of what was being alleged.

In my view, even if the phraseology which is extracted from **Exh.P-8,** (**quoted also in page 8 of the award**) reads:

> "....ninafahamu kichwa hicho kilileta usumbufu mkubwa kwa kampuni kutokana na baadhi ya watendaji serikalini kutuelewa tofauti. Hivyo nichukue fursa hii kuahidi nitakuwa mwangalifu zaidi siku za usoni..."

(and, which seems to contain an admission that the heading published created anxiety in the minds of some people within the

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government circles), I still find that, such an admission was not an admission of the Applicant's wrong doing.

In fact, the Arbitrator quoted from the Applicant's statement the following, (**see page 8 of the award**), which, in my view, was a clear demonstration that the Applicant had not admitted any wrong doing, *viz*:

> "....ingawa..taarifa ya Ikulu haikusema sababu mahususiya mabadiliko ya Waziri wa Mambo ya Ndani ya Nchi kutoka Nchemba kuwa Kangi Lugola, Nipashe chuni yngu tulijaribu kutimia moja ya majukumu yetu kama chombo cha habari kutafsiri tukio kwa manufaa ya walaji."

Certainly, as it may be observed herein above, what the Applicant was saying was that, there was no wrong doing in respect of what was published because what himself as the news editor and his Nipashe team did was to give interpretation to what had transpired for the easier benefit of their consumers of the news industry. In my view, it is indeed easy to understand that.

Essentially, journalism as a profession is not just a matter of presenting 'facts as they are'. It is about 'storytelling', a technique that seeks to make news more meaningful for news' consumers. In that regard, it entails the processes of representation, interpretation and construction.

In the first place, facts collected from the field undergo a conversion to appear in the form of a news report. Secondly, in such a process, they must, as well, be given meaning by way of interpretation in order to ensure that they are 'not just a report of facts' but rather a story telling of 'the truth' about those facts.

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The third stage synchronizes the two stages of representation and interpretation so as to construct the 'news story'. This requires a sense of 'objectivity' in arrangement of facts so as to give meaning to reality. That process is vital since facts must be given context in which they occurred.

What I can gather from what the Applicant's assertion that goes, **"tulijaribu kutimiza moja ya majukumu yetu kama chombo cha habari kutafsiri tukio kwa manufaa ya walaji"** (which was further reiterated by PW1 in his testimony (**see page 19 of the proceedings, the 6th line**) is, in my view, that, the Applicant and his team were employing the so-called interpretive journalism. With that, the writer seeks to find or give meaning of/to the event.

Generally, the interpretative news writer will endeavour to situate the event in its context, so as to bring about coherence and meaning. The evidence of **PW3**, one Theophil Makunda, a seasoned Journalist, clearly supported that view. On page 28 of the proceedings he testified that, for instance, that, after particular news is released on day one, the newspaper reporting it on day two will make a further interpretation of it.

In the final analysis, therefore, although the learned counsel for the Respondent maintains that there Applicant had admitted to wrong doing and that he pleaded for leniency, I find that the Applicant never admitted to any wrong doing and, for that matter, the first issue is answered in the negative.

THE SECOND ISSUE is: *Whether the Arbitrator was biased and whether the arbitrator erred in law for not addressing the issue of forgery which was raised by the Applicant.*

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In the case of **Dhirajlal Walji Ladwa and 2 Others v Jitesh Jayantilal Ladwa, Commercial Case No.2 of 2020, HCT CommD, (unreported),** this Court, referring to the case of ***Bahai v Rashidian*** **[1985] 3 All ER 385 at 391**, Balcombe LJ, noted that, bias is *"the antithesis of the proper exercise of a judicial function."* It was also observed, reference being drawn from the Australian Court's decision, in ***Ex parte Blume; Re Osborn*** **(1958) S.R. (NSW) 334 at 338,** that, *"suspicion is not enough and courts will not act on unsubstantial grounds of flimsy pretexts of bias"*. It is worth noting, however, that the issue of bias is assessed objectively, i.e., would a reasonable man, looking at the facts, draw the inference that the magistrate was biased one way or the other?"

In the instant case, the Applicant has raised the issue of bias through his affidavit (see paragraphs 13, 19 and 25). In the first place, paragraphs 13 and 19 of the Applicant's affidavit avers that, the Chairman of the Disciplinary Committee was the both the accuser and one of the decision makers. It stated that the issue was raised before the Arbitrator but did not consider it as shown in paragraph 25 of the Applicant's affidavit.

On page 20 of the CMA proceedings, PW1 testified that it was Mr Semvua who wrote him the letter (*Exh.P-7*) to 'show cause' why disciplinary measures should not be taken against him. At page 22 of the Proceedings PW1 is also shown to have raised the issue of unfairness of the Disciplinary Committee because it was chaired by the same Mr. Semvua. In my view, the CMA arbitrator ought to have taken this into account in his deliberations to find out whether

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procedurally the rumination was fairly arrived at or not. This was not done.

Looking at the record of the proceedings, I am of the view that, there was an issue of procedural as well as substantive fairness since Mr Semvua should not have been the accuser and judge at the same time. That immediately brings to the fore the issue of bias and any ordinary person would see it that way. And, to manifest that he was already biased, who was a member to the PW2 testified, (see page 26 of the proceedings) that, when the Committee was making decision, the members could not arrive at a unanimous decision.

It is clear from the record of PW2's testimony that, one (1) member recommended suspension, 2 members recommended for a warning (as they did not find any material breach), but the fourth member (the Chairman, who was Mr Semvua) recommended that the Applicant be terminated. The fourth member's proposal, which was a minority decision, carried the day instead of the majority who recommended for a warning to be issued to the Applicant. This, to me, indicates clearly how the Chairman was already biased towards seeing that the Applicant is eliminated from his employment.

I hold so because, in the ordinary course, unless there is a tallying of votes and the Chairman has a casting vote, the majority decision is the most appropriate decision to take. It follows, therefore, that, where an element of partiality in any proceedings is established there is an outright breach of the cardinal principles of rule of law, in particular the right to a fair hearing. Uncorrected, the situation leads to an injustice.

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As it was stated by the East African Court of Justice in the case of **Attorney-General v Anyang' Nyong'o and others [2007] 1 EA 12 (EACJ)** *"Judicial impartiality is the bedrock of every civilised and democratic judicial system. The system requires a Judge to adjudicate disputes before him impartially, without bias in favour of or against any party to the dispute."* In view of that, I find that the Chairman was biased and this affected the decision of the Disciplinary Committee a fact which was not rectified or considered by the CMA arbitrator thereby affecting his award as well.

There is yet another issue which is worth considering in this case, and which forms part of the 2nd issued herein. That issue is the alleged failure to address the alleged forgery which the Applicant raised before the Arbitrator. PW2 testified that there was no record of minute taken or signed. It wa submitted that, despite the resistance put forth by the Applicant that he never signed *Exh D6* or any minutes as there were none, still the arbitrator went ahead and used *Exh.D6*, the hearing form and made adverse decision against the Applicant. It was further submitted that the Arbitrator took some signature specimen of the Applicant but never discussed what his findings were in respect of the issue of forgery and gave no reason for that.

Indeed, looking at the award, I do not find anywhere the arbitrator discussed that issue of forgery, except at page 6 of the award where he summarised PW 1's testimony and noted his concerns of forgery. Mr Matondo who appeared for the Respondent brushed aside the allegations of forgery contending that, if that was the case, why the Applicant did not report the matter in Police or make an application for verification of his handwriting or signature in any

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government department. I think what Mr Matondo seem do here is to shift the burden of proof to the Applicant while the duty to prove that an employee's termination is fair rests on the employer according to section 39 of the ELRA, Cap 366 [R.E 2019] provides that, **'in any proceedings concerning unfair termination of an employee by an employer, the employer shall prove that the termination is fair.'**

In the case of **Tanzania Breweries Ltd vs Anthony Nyingi (MZA Civil Appl. No.12 of 2014) [2015] TZCA 3; [18 March 2015 TANZLII]**, the Court of Appeal held that:

> "if a Court of law decides to accept or reject a party's argument, it must demonstrate that it has considered it. Otherwise the decision becomes an arbitrary one."

Since the arbitrator did not consider the Applicant's arguments which were supported by **PW2** who was part of the Disciplinary Committee, and since no reasons were given regard why such a vital issue of concern was not considered, I also find that the Arbitrator erred in law. The second issue, therefore, is responded to affirmatively.

THE THIRD ISSUED is: *whether the evidence upon which the CMA Arbitrator based his decision of was properly and sufficiently evaluated.*

Essentially, every decision maker, be him a judge or arbitrator, is supposed to carefully evaluate or assess the evidence laid before him in order to establish whether the dispute before him has been proved to the required standards (which in our jurisdiction, the standard applicable to establishment of facts in civil proceedings is on balance of probabilities) or, if not proved, proceed to dismiss the dispute as unfounded.

Evaluation of evidence, therefore, is a process by which the Court either confirms, with its inner conviction, the existence or non-

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existence of facts suggested by the evidence laid before it or declares that, under legal rules applicable to evidence, an alleged fact is to be taken as proven. That process entails consideration of various issues such as reliability of the evidence tendered, weight, demeanour of witness and their credibility, as well as the degree by which the evidence is corroborated or undermined by other evidence.

In this instant case, having looked at the record of the CMA, and, after re-evaluation of the evidence which was submitted before the CMA arbitrator by the parties, I am convinced that, the CMA Arbitrator failed to appreciate the evidence before him carefully and adequately. I hold so because:

> ***firstly***, as I stated where addressing the first issue, the Applicant never admitted to the wrong doing, and, had the arbitrator addressed his mind carefully to what the Applicant had meant in *Exh.P-8*, he would not have arrived at the erroneous findings contained in pages 9 and 10 of the award that there was admission of wrong doing.
>
> ***Secondly***, as it is clear, as alleged by the Applicant in paragraphs 20, 24 and 23 his Affidavit, that, the arbitrator did not give careful consideration to the evidence of PW2 and PW3 other that summarizing what they had stated. One would have expected an appreciation of their evidence in the light of the allegations facing the Applicant. What is notable in the award is that the Arbitrator relied largely on what he believed to be an admission of wrong on the part of the

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Applicant, a fact which I have ruled out in the course of deliberating the first issue.

Thirdly, as it might be seen in the discussion held concerning the 2nd issue here above, the Arbitrator was not able to take into account the issue of forgery which was raised in the course of the proceedings and failed to assess and make a finding regarding the signature specimen he took from the Applicant and gave no reasons.

In the final analysis, I will now revert to the **MAIN ISSUE** which was "***whether, in the circumstance of this case, the termination of the Applicant was fair.***" According to section 37 provides that:

> **37.-(1) It shall be unlawful for an employer to terminate the employment of an employee unfairly.**
>
> **(2) A termination of employment by an employer is unfair if the employer fails to prove-**
>
> **(a) that the reason for the termination is valid;**
>
> **(b)that the reason is a fair reason-**
>
> **(i) related to the employee's conduct, capacity or compatibility; or**
>
> **(ii) based on the operational requirements of the employer, and**
>
> **(c) that the employment was terminated in accordance with a fair procedure.**

Looking at this provision in the light of the issues discussed in this application, I can confidently state that, the termination of the Applicant was unfair and unsubstantiated. In the first place, it is clear to me that, procedurally the disciplinary Committee's decision was unfair since the Chairman of the disciplinary was biased.

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Secondly, and coupled with the fact that the Applicant did not admit to wrong doing as the arbitrator had held, it is clear that the Arbitrator's findings on page 9 of the Award that the Employer was not bound to comply with the procedures itemised under Rule 13 of the Employment and *Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007* was erroneous. Rule 13 (11) provides that, the Employer can only do so in an exceptional case where action is taken with the consent of the employee. There were no such exceptional circumstances here.

Besides, Rule 12 (4) of Employment and *Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007* provides for the two principles that should be considered in determining whether or not to terminate the employee. The first principle relates to the seriousness of the misconduct in the light of the nature of the job and the circumstances in which it occurred and the likelihood of repetition. The second one is the circumstances of the employee, such as the employee's employment record, length of service, previous disciplinary record and personal circumstances. Unfortunately, I do not find a discussion of such a rule anywhere in the award taking into account that PW2 had testified that the Disciplinary Committee did not render a unanimous decision.

Secondly, substantively the decision was also unfair because the allegations against the Applicant were not fully established to the requisite standards prescribed under the law. In view of all that, and taking into account what was discussed herein in respect of the secondary issue, the main issue is responded to affirmatively. The Applicant's termination was unfair.

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THE FOURTH ISSUE: What remedies are entitled to parties?

Before I finally pen off, there is yet one issue to address, i.e., **the appropriate remedy which they Applicant is entitled to.** Section 40 of the ELRA, Cap.366 [R.E.2019], provides for what should be done in case this Court makes a finding that termination of an employee was unfair. The section provides as follows:

> **"40.-(1) Where an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer –**
>
> **(a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or**
>
> **(b) to re-engage the employee on any terms that the arbitrator or Court may decide; or**
>
> **(c) to pay compensation to the employee of not less than twelve months remuneration.**
>
> **(2) An order for compensation made under this section shall be in addition to, and not a substitute for, any other amount to which the employee may be entitled in terms of any law or agreement.**
>
> **(3) Where an order of reinstatement or reengagement is made by an arbitrator or Court and the employer decides not to reinstate or re-engage the employee, the employer shall pay compensation of twelve months wages in addition to wages due and other benefits**

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from the date of unfair termination to the date of final payment."

As the record shows, the Applicant was terminated from his employment on 29th May 2017. Up to the time when the CMA issued its award on 10th June 2018. The Arbitrator's decision was delivered on 10th October 2019. From the time of termination to the time when the arbitrator issued his award almost one year and a half. In view of what section 40 (1) and (3) of Cap.366 [R.E.2019] provides, the Respondent has two options to take and must choose one.

The first is reinstatement of the Applicant in his position of employment without loss of remuneration during the period he was absent from work due to the unfair termination. The second option is payment to him of equal to twelve months wages as compensation, in addition to wages due and other benefits from the date of unfair termination to the date of final payment.

The Court of Appeal of Tanzania in the case of **National Microfinance Bank vs Victor Modest Banda (Civil Appeal No.29 of 2018) [2020] TZCA 35; [26 February 2020 TANZLII],** the Court of Appeal held that those three options under S. 40(1) are awarded not in conjunctive but disjunctively. As the word used between the options is "or" thus the court cannot award two of the remedies. Only one remedy can be awarded.

In the upshot, this Court settles for the following orders, that:

(1) the Revision Application by the Applicant is merited and the termination of the Applicant was unfair;

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(2) the CMA's Award with reference ***No. CMA/ DSM/ KIN/R.793 /18/176***, dated 10th October, 2019, is hereby quashed and set aside;

(3) the Respondent is hereby ordered to reinstate the Applicant into his position of employment without loss of his remunerations during the entire period of his absence from work as the act of his termination was unfair.

(4) No order as to costs.

Order accordingly.

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DEO JOHN NANGELA
JUDGE,
High Court of the United Republic of Tanzania (Commercial Division)
16 / 10 /2020

Right of Appeal Explained.

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DEO JOHN NANGELA
JUDGE,
High Court of the United Republic of Tanzania (Commercial Division)
16/ 10 /2020

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