IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DODOMA SUB REGISTRY

AT DODOMA

LABOUR REVISION NO. 28234 OF 2023

(Arising from Labour Dispute No. RF CMA/DOM/81/2021 dated 06/05/2022 before the Commission for Mediation and Arbitration at Dodoma)

FINCA MICROFINANCE BANK LTD .....APPLICANT

VERSUS

JALALA HUSSEIN .....RESPONDENT

RULING

Date of last order:15/02/2024

Date of Ruling: 26/03/2024

LONGOPA, J.:

Through notice of application and Chamber Summons made under Sections 91(1)(a) and (b), 91(2)(b) and (c) and 94(1)(b) (i) of the Employment and Labour Relations Act, Cap 366 as revised; Rule 24(2) (a),(b)(c)(d), (e) and (f) and (3) (a)(b)(c) and (d); Rule 28(1)(c)(d) and (e) of the Labour Courts Rules, GN No. 106/2007 and any other enabling provisions of the law, the application is seeking the orders of the Court, namely:

1. *That this Honourable Court be pleased to call for and examine the records of the Arbitration proceedings and Award in Labour Dispute* ***RF CMA/DOM/81/2021*** *between* ***JALALA HUSSEIN AND FINCA MICROFINANCE BANK LTD*** *by the Commission for Mediation and Arbitration at Dodoma (Hon. J.R Katto, Arbitrator) in order to examine the said records and award thereof for purposes of satisfying itself as to the correctness, legality or propriety of the said award and order(s) made thereof, and as to the regularity of proceedings therein; as such revise the said award and orders therein and issue necessary orders.*

2. *That this Honourable Court be pleased to quash and set aside the Arbitration decision in Labour Dispute No* ***RF CMA/DOM/81/2021 between JALALA HUSSEIN AND FINCA MICROFINANCE BANK LTD*** *by the Commission for Mediation and Arbitration at Dodoma due to improper procurement and irregularities.*

3. *That this Honourable Court be pleased to grant any other order that it consider just and convenient to grant.*

Briefly, the applicant and respondent were the parties to an unfair termination Labour dispute at the Commission for Mediation and Arbitration (CMA) sitting in Dodoma. The dispute arose out of termination of the respondent's employment as Branch Manager for Dodoma of the applicant. It was alleged that termination of respondent's employment was caused by gross dishonesty, major breach of trust and causing loss to the employer. These emanated from allegedly serious violation of the companies' policies, Bank's Disciplinary Procedure Manual and FINCA Microfinance Bank Limited Code of Conduct on Record Keeping and Financial Integrity. Upon conclusion of the hearing of the matter before a Disciplinary Committee, the employment was terminated on 17th May 2021.

Being dissatisfied by the employer's decision to terminate his employment, respondent instituted an unfair termination labour dispute at CMA which was determined in favour of the respondent on ground that such termination was done on unfairness of reasons (substantive) and procedurally. The applicant is aggrieved by such finding of the CMA together with orders thereto to pay compensation the respondent a total of TZS 42,265,348/= which caters for 12 months' salary compensation and severance pay for three years' period.

The grounds for challenging the decision of CMA are articulated in Paragraphs 18 and 19 of affidavit of **Beatus Malawa** who is the principal office of the applicant in capacity of the Head of Legal Department and Company Secretary supporting the application. First, arbitrator's seriously

failure to evaluate and analyse evidence tendered by the applicant. Second, the arbitrator's failure to consider admissions made by the respondent on documents tendered by the applicant especially hearing minutes. Third, wrong ruling that applicant failed to observe requirements of Rule 13 of GN No. 42/2007 by failing to conduct investigation to show whether there were grounds to conduct hearing. Fourth, arbitrator's failure when he held that report was not signed by the Chairperson of the disciplinary hearing committee. Fifth, failure by the arbitrator by finding out that the applicant terminated the respondent without fair reasons and procedure.

According to paragraph 19 of the affidavit all those illegalities raises six legal issues, namely:

(a) Whether there was proper analysis and examination of evidence tendered by the applicant;

(b) Whether the arbitrator failed to consider admissions made by the respondent on the documents tendered by the applicant especially the hearing minutes;

(c) Whether the arbitrator wrongly ruled that the applicant failed to observe the requirements of rule 13 of the GN 42/2007 by failing to conduct investigation to show whether there were grounds to conduct hearing;

(d) Whether the arbitrator was justified in his failure to carefully scrutinize and take into consideration both oral and documentary evidence adduced on behalf of the parties during trial;

(e) Whether the arbitrator failed when he held that the report was not signed by the Chairperson of the Disciplinary Hearing Committee;

(f) Whether the arbitrator erred in law by holding that the applicant terminated the respondent without fair reasons and fair procedure.

It should be noted at the outset that respondent vide a notice of opposition categorically opposed the applicant's application. The respondent reiterated that this honourable court be pleased to dismiss the applicant's application for lack of merits. The notice of opposition was supported by a counter affidavit of **Jalala Hussein**, the respondent.

The applicant enjoyed the legal services of Yusta Kibuga, learned advocate while the respondent was represented Ramadhan S Wakulichombe from FIBUCA. This application was disposed of by way of written submissions parties both counsel for the applicant and respondent's representatives had the same prayer before this Court when the matter was fixed for hearing on 15th February 2024. I should commend parties at the outset for their diligence and vigilance in adhering to scheduling order on submissions as well as analysis put on their respective submissions.

In short, the submissions by the parties present their respective positions on the application. The applicant contends that respondent was terminated for gross dishonesty, major breach of trust and causing loss to

the employer, the applicant. The first, third, fifth and sixth issues were argued jointly by the applicant.

The applicant argued that the arbitrator erred by failure to analyse and examine evidence tendered by the applicant. This is by holding that there was no fair reason and failure to follow the procedure while terminating the respondent. It was applicant's submission that applicant through testimonies of DW 1 and DW 2 tendered Exhibits D-1, D-2, D-3, D-4, D-5, D-6, D-7, D-8 and D-9 that demonstrated existence of fair reason and procedure. It was reiterated that through Exhibit D-1, respondent authorized falsified business expenses report to facilitate withdrawal of funds from petty cash account for Dunia Mbwana, Hellena Mwalaji and Hellena James. The applicant faults the arbitrator on findings in investigation report that it was not signed. Also, the applicant argue that the respondent did not question the authenticity of report neither in the Disciplinary hearing nor at CMA.

Further, the applicant faults the finding of the arbitrator regarding proceedings at the Disciplinary committee. The applicant challenges finding that: First, exhibit D-1(investigation report) was not tendered during disciplinary hearing nor DW 1 did not testify at the disciplinary hearing. It is appellant's view that issue of which witness to call is a matter of the parties. Second, faulting exhibit D-6 for failure to record respondent's evidence was wrong. It is submitted that respondent was availed opportunity to be heard and opted not to bring witnesses. According to the

applicant, the respondent admitted having been responsible. Thus, the arbitrator's finding that respondent was not given opportunity to give evidence in disciplinary hearing is incorrect.

Regarding failure to observe the requirements of rule 13 of GN No. 42/2007, it was submitted that evidence on record indicate that investigation was conducted, and exhibit D-1 is a result of inquiry conducted. The applicant cited the case of **Paschal Bandiho v Arusha Urban Water Supply and Sewerage (AUWSA)**, Civil Appeal No. 4 of 2020, CAT at Arusha (Unreported) to cement that what transpired was within ambits of rule 13 of GN No 42/2007 thus the investigation suffices the requirements of the law.

On the aspect of absence of evidence that respondent was issued with the report prior to disciplinary hearing, it was submitted that evidence of DW 1 revealed that the respondent was given the report through email and acknowledged the same.

Thus, it was applicant's submission that respondent was able to prepare defence at the disciplinary hearing as admitted in Exhibit D-6. The findings of the arbitrator is due to failure to analyse and evaluate evidence.

The applicant's submission also challenges that arbitrator erred to find that respondent was not given opportunity to make mitigation. They

referred to exhibit D-6 (Minutes of Disciplinary Hearing) at page 9 that there is mitigation of the respondent.

On arbitrator's findings that the Minutes, Exhibit D-6 lacked signature of the Chairperson, it is submitted that exhibit D-6 is initial signed by the Chairman, respondent, and complainant in all pages and at the last page it is signed by the chairman, respondent, complainant, and secretary who prepared the report. Thus, it is argued findings of the arbitrator is founded.

Regarding second issue on arbitrator's failure to consider admission made by the respondent on documents tendered by the applicant especially hearing minutes, it was submitted that on pages 7 and 8 of the minutes reveal that respondent admitted. According to the applicant such admission means that respondent admitted to the charges and to have been served with the report prior to the disciplinary hearing. It was an error on part of the arbitrator to hold otherwise.

On the fourth issue on whether arbitrator is justified in his failure to carefully scrutinize and take into consideration both oral and documentary evidence adduced on behalf of the parties, it is submitted that it is trite law that in arriving at a decision, the Court must not only summarize the evidence but also objectively evaluate the gist and value of evidence of both parties, weigh it and give reasons for its decision failure of which would be a serious misdirection and would result in miscarriage of justice.

To cement the argument, the applicant cited the case of **Hussein Idd and Another v. Republic** [1986] TLR 166 where the Court of Appeal held that "*...it was a serious misdirection on the part of the trial Judge to deal with prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence.*"

It was submitted that on strengths of these arguments that CMA records reveals that arbitrator failed to evaluate evidence of the applicant which was tendered for purpose of establishing the charges against the respondent thus arrived at erroneous decision. It was the applicant's prayer that this Honourable court be pleased to quash and set aside the arbitration award in Labour Dispute **CMA/DOM/81/2021.**

On the other hand, the respondent argued that arbitrator made proper analysis and examination of evidence tendered by the applicant. The reasons are that: First, the arbitrator was correct to hold that there was no investigation report thus no ground for hearing since exhibit D-1 was a mere review report. Second, the minutes of disciplinary hearing was not signed by the chairman. Third, no witnesses gave evidence on the disciplinary hearing. Fourth, the respondent was not given Exhibit D-1 prior to the disciplinary hearing. Fifth, the respondent was not given opportunity to give his evidence as well as to cross examine. Sixth, there was no opportunity to mitigate. Seventh, the chairman was not impartial as he was the one giving the explanations and clarifications on the applicant side.

It was submitted that the applicant breached the provision of section 37(1) and (2)(a), (b) and (c) of the Employment and Labour Relations Act, Cap 366 R.E. 2019 and Rule 8(1)(c) and (d) of the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42/2007 which require employer to terminate employment for fair reason and fair procedure. The case of **Savero Mutegeki and Another v. Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma**, Civil Appeal No. 343/2019 Court of Appeal of Tanzania at Dodoma was cited to cement the point.

It was submitted that on Rule 13 of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 GN No. 42/2007 that provides on fairness of procedure requires mandatorily that investigation must be conducted prior to disciplinary hearing. Exhibit D-1 is not an investigation report, and its recommendations are to strengthen internal controls and not to take disciplinary measures to anyone.

According to the respondent, authenticity of Exhibit D-1 is also questionable even if the same is to be considered as investigation report. There is no marker of the report nor DW 1 is registered or authorized by the National Board of Accountants and Auditors (NBAA) or any other professional board to have qualifications to conduct audit. Further, it was not tendered during the disciplinary hearing and DW 1 did tender any oral testimony on the disciplinary hearing.

Further, it was reiterated that Rule 13(5) of GN No. 42/2007 requires evidence in support of the allegations must be presented at the disciplinary hearing. There was none tendered at the purported disciplinary hearing as exhibit D-6 reveals. There was allegations of falsification of the documents and breach of trust, but no witnesses nor documentary evidence tendered in that disciplinary hearing to support the same.

Moreover, it is submitted that Committee in Exhibit D-6 stated that after analysing evidence found the respondent guilty. However, there is nowhere in the disciplinary hearing report where it is indicated who gave evidence. Also, the said report indicates that there are questions asked and answers thereto, but it does not reveal who asked and who responded. It lacks clarity. It was argued that a lot of components of the hearing form are omitted thus leaves a lot to be desired. Respondent cited the case of **Mary Mbelle v Akiba Commercial Bank Ltd**, High Court of Tanzania (Labour Division) at Dar es Salaam, Labour Dispute No. 9 of 2013 dated 09/10/15 Labour Case Digest 2015 was stated to illustrate the contents of hearing report.

Additionally, it was submitted regarding mitigation that what is alleged to be mitigation is something else. The respondent cited Rule 13(7) of GN No 42/2007 and the case of **Rajabu Malenda v. Security Group (T) Ltd,** High Court of Tanzania, Labour Division at DSM, Labour Revision No. 188 of 2015 dated 27/11/2015 Labour Court Digest 2015 to illustrate that mitigation comes only when there hearing proceedings reveals that

employee is guilty of charges. It means that there must be a finding first prior to mitigation.

Regarding absence of signature of the Chairman of the Disciplinary Committee, it is argued that last page contains only signatures of secretary and respondent thus it is correct to state that Chairman did not sign the alleged disciplinary hearing report thus the Arbitrator was correct to so find.

The respondent submitted that the arbitrator evaluated and analysed the evidence of both sides prior to arriving at the decision thus the case of **Hussein Idd and Another vs Republic** cited is not applicable to circumstances of the matter at hand. The respondent invited this Court to have a look at pages 5 to 11 of the Award that indicate analysis of evidence, the applicable law/case law, decision thereon and reasons thereof thus the finding was based on proper legal principles.

On fairness of the reason, it was submitted that there is no evidence to prove that respondent committed the charged offences as there was no evidence tendered at the Committee hearing. All the rules that the respondent is alleged to have violated were not tendered. Also, allegations on contravention of Item 5 of the Employment and Labour Relations (Code of Good Practice) GN No. 42/2007 does not contain such item and offence lacks clarity.

It was submitted that the arbitrator was right to find that termination was unfairly substantively and procedurally. The arbitrator arrived at that decision based on correct analysis of the evidence in relation to laws applicable.

In a rejoinder, it was reiterated that substantive reason of termination was the evidence of DW 1 and DW 2 together with Exhibit D-1 which shows that respondent authorized falsified business expenses report to facilitate withdrawal of funds from petty cash account. It is argued that during the disciplinary hearing the respondent admitted the offences charged.

Also, it was reiterated that investigation report has no any prescribed format thus the arbitrator erred to disqualify Exhibit D-1. This is in line with the decision in the case of **Paschal Bandiho** that was cited in submission in chief.

I have dispassionately considered application and the respective affidavits, submission made by the parties and record from the Commission for Mediation and Arbitration (CMA) including the Award to determine whether this application has merits or otherwise. I shall analyse the same as follows:

The application originates from unfair termination of the employment contract of the respondent by the applicant. It was thus pertinent to the employer to ensure that there should exist two main aspects. First, there should be a valid and fair reason. Second, there should be fair procedure in relation to that termination. The Employment and Labour Relations Act,

Cap 366 R.E. 2019 is clear on this aspect. Section 37(1) and (2) of the Act 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.*

These aspects were clearly articulated in **Severo Mutegeki & Another vs Mamlaka Ya Maji Safi Na Usafi Wa Mazingira Mjini Dodoma** (Civil Appeal 343 of 2019) [2020] TZCA 310 (19 June 2020) (TANZLII), at page 10-11, the Court of Appeal reiterated the important aspect of unfair termination. It stated that:

> *In terms of the provisions of section 37 (2) of the Employment and Labour Relations Act, termination is adjudged unfair if the employer fails to prove that: One, the validity of reasons for termination; two, that the reason*

for termination is fair and three, that the termination was conducted in accordance with a fair procedure.

From the available record, at the Commission for Mediation and Arbitration the applicant had called two witnesses namely, John Bakari Mwanyoka (Senior Internal Control Officer) as DW 1 and Prudence Laurean Kamanzi (Head of Human Resource Unit) as DW 2. These witnesses testified orally and tendered documentary exhibits to demonstrate that termination of the respondent's employment was fair. These documentary evidence entailed the investigation report (Exhibit D-1), Employment Contract between the applicant and respondent (Exhibit D-2), Disciplinary Hearing Notification Form (Exhibit D-3), Disciplinary Charge Sheet (Exhibit D-4), Disciplinary Hearing Meeting Attendance (Exhibit D5), Minutes of Disciplinary Hearing (Exhibit D-6), Outcome of Disciplinary Hearing Meeting (Exhibit D-7), Notice of Intention to Appeal by the respondent (Exhibit D-8), and Termination Letter of Employment Contract (Exhibit D-9).

The most important documentary evidence relevant to establish existence of valid and fair reason for termination as well as fair procedure are the purported investigation report (Exhibit D-1) and Minutes of the Disciplinary Hearing report (Exhibit D-6). I state so for the following reasons. First, it is the contents of Exhibit D-1 that are purported cause of conducting the disciplinary hearing. Second, Exhibit D-6 is a result of purported inquiry/ disciplinary hearing that triggered the issuance of termination letter to the respondent which is Exhibit D-9. Third, the parties

took cognizance of the importance these two-documentary evidence. All their submissions mainly focused on these documents.

The evidence on record should be gauged on the enumerated legal procedures. Rules 8(1) (c) and (d) and 9 of the Employment and Labour Relations (Code of Good of Practice) Rules, GN No 42/2007 dated 16/02/ 2007 reiterate the requirement for the employer to adhere to fair and valid reason on one hand, and the fair procedure on the other hand. One of the valid and fair reason for termination relates to the conduct of the employee. In the instant application the basis of the termination of the respondent is the misconduct of the employee namely gross dishonesty, major breach of trust and causing loss to the employer. Thus, the reason falls within the ambits of the provisions of GN No. 42 of 2007.

Among others, for a reason to be valid and fair, it must be demonstrated that there was strict adherence to the contents of Rule 13 of the Employment and Labour Relations (Code of Good of Practice) Rules, GN No 42/2007. For ease of reference the relevant provision pertinent to answer the matter before this Court is hereby quoted in verbatim. It states that:

> *13-(1) The employer shall conduct an investigation to ascertain whether there are grounds for a hearing to be held.*

(2) where a hearing is to be held, the employer shall notify the employee of the allegations using a form and language that the employee can reasonably understand.

(3) The employee shall be entitled to a reasonable time to prepare for the hearing and to be assisted in the hearing by a trade union representative of fellow employee. What constitutes a reasonable time shall depend on the circumstances and the complexity of the case, but it shall not normally be less than 48 hours.

(4) The hearing shall be held and finalised within a reasonable time, and chaired by a sufficiently senior management representative who shall not have been involved in the circumstances giving rise to the case.

(5) Evidence in support of the allegations against the employee shall be presented at the hearing. The employees 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.

(6) N/A

(7) Where the hearing results in the employee being found guilty of the allegations under consideration, the employee shall be given the opportunity to put forward any mitigation factors before a decision is made on the sanction to be imposed.

The provisions require the following aspects to be adhered to: First, there must be an investigation to warrant hearing to be conducted. Second, the employee should be informed properly and, in a language well understood to that employee. Third, employee should be afforded reasonable time to prepare for the hearing of the disciplinary charges. Fourth, hearing should be done within reasonable time. Fifth, evidence should be tendered in the disciplinary hearing and opportunity to challenge such evidence should be availed to the employee.

The main question at this stage is whether available record reveals adherence to this well articulate procedure enumerated under the Code of Good Practice. I should hasten to say the answer is in the negative.

On fairness and validity of reason, it is my settled view that Exhibit D-1 does not suffice to be an investigation report. The reasons are simple and straightforward. First, the purported investigation report as exhibit D-1 was not tendered at the disciplinary hearing. Second, there was no evidence adduced to support the charges preferred against the respondent. Third, all other exhibits tendered before the CMA for the first time. They are not reflected in Exhibit D-6 which are the Minutes of Disciplinary Hearing to have been tendered at the disciplinary hearing committee. Fourth, the so-called investigation report was not availed to the respondent prior to the disciplinary hearing. It is evident from Exhibit D-3 which is Disciplinary Hearing Form that the only attached document that was availed to the notification of hearing was the Disciplinary Charge Sheet

which is Exhibit D-4. It is mentioned explicitly by Exhibit D-3. The investigation report is not mentioned.

Can this Court vouch that the Investigation report was availed to the respondent prior to disciplinary hearing? I am of the settled view there is neither oral or documentary evidence tendered at the Disciplinary Hearing Meeting indicating that Exhibit D-1 was availed to the respondent. Nowhere the investigation report is mentioned in Exhibit D 3 that communicated the notification of the disciplinary hearing meeting. As such, on available records regarding the conduct of the disciplinary hearing there is no evidence to confirm that the investigation report was availed to the respondent.

Moreover, as the arbitrator rightly found the author of the report is unknown thus authenticity could not be established. This is arrived at on two main aspects. First, the Internal Review Report for Petty Cash Dodoma Branch is not signed by a person who prepared it. Second, that person was not part of the disciplinary hearing proceedings. Neither the report itself nor the oral testimony of anyone purporting to have prepared it appeared before the disciplinary hearing committee to adduce evidence to substantiate the allegations. Precisely, failure to tender the report at the disciplinary hearing before the committee meant that allegations levelled against the respondent were never established. That is basically what the arbitrator analysed in pages 6 and 7 of the CMA's Award as the basis for disregard the Exhibit D-1. That was the correct exposition of the law.

In the case of **National Microfinance Bank vs Leila Mringo & Others** (Civil Appeal 30 of 2018) [2020] TZCA 240 (20 May 2020) (TANZLII), at pages 16-17, it was stated that:

> *It is undeniable that the business in which the respondents were engaged requires unqualified good faith as rightly put by Mr. Kamala. Acts that impair good faith such as dishonesty or deception may easily be construed as gross misconduct and warrant termination of employment. In the instant case, the issue from the very outset involved lack of good faith as well as gross negligence and misconduct (not gross misconduct). While Mr. Kamala's arguments on lack of good faith are in line with rule 12 of the Code of Good Practice, it appears to us that the learned High Court Judge made a thorough review of that rule and made a reasoned ruling on it; quite commendable an exercise. The learned High Court Judge agreed that the actions indeed fell under the scope and purview of the offences charged as observed by the CMA but disagreed on account of the reasonableness of terminating the employees considering the other factors contained in Rule 12 (4) of the Code of Good Practice. The fact of the unreasonableness of termination cements the fact that the respondents were unfairly terminated.*

The instant case involved charges of falsification of documents which is serious offence that calls for serious and uncontroverted evidence before the disciplinary hearing committee prior to any disciplinary actions being taken. It is unpalatable and very unreasonable for the applicant's side to level such serious offences without tendering anything at the disciplinary hearing committee to prove existence of such allegations. It was at the disciplinary hearing committee where the proof was required. The employer's representative was not the maker of the report. He is not the one who visited Dodoma Branch on 01/03/2021 to 16/03/2021 to audit the transactions on petty cash account. In absence of the proof being tendered before the disciplinary hearing committee for every charge preferred against the respondent employee makes all the allegations mere accusations without any proof at all. It is on these circumstances that the unreasonableness of the termination is gauged. In a country that adheres to equality before the law, condemning anyone without any tangible evidence being tendered at the disciplinary hearing committee cannot at any rate be considered as reasonable. It is clear unreasonable act and a serious violation of the rights of the charged employee.

From this analysis, it is evident that there was no basis for conducting the disciplinary hearing as nothing adduced and tendered at the disciplinary hearing committee to establish that there was a good ground/ reason to conduct the disciplinary hearing. The only thing that are evident on record is the notification of such hearing and disciplinary charge sheet. The disciplinary charge sheet contents were required to be proved by

tendering evidence both oral and documentary. The conspicuous absence of any evidence being adduced reflects that nothing on the charges was proved. Thus, the disciplinary hearing committee's recommendation was based on unproved allegations. That is contrary to the law.

On the fairness of procedure, Exhibit D-6 is vital in the circumstances. It reveals as to what happened on the material date set for hearing of the disciplinary charges against the respondent. It reveals that: First, there were a total of four persons in attendance, namely the Chairman, Secretary, Complainant, and respondent as they appear in Exhibits D-5 and D-6 respectively. Second, at the end of the report it the Secretary and respondent alone who signed and indicated their names and titles corresponding to their signatures. The chairman has not indicated his name nor signature. Third, there was no evidence oral or documentary in nature tendered in that proceedings. There were no witnesses at all in those proceedings who tendered any evidence. Fourth, the complainant and respondent made statements. Statements are not evidence. Evidence is tendered in a legally acceptable manner including a witness being sworn or affirmed. Also, the other party should be called to challenge that evidence. Sixth, at no point in time was the respondent afforded the right to present his evidence in the Exhibit D-6.

The conspicuous absence of evidence presentation at the disciplinary hearing as per Exhibit D-6 contravened the mandatory legal requirement. Without the evidence being adduced at the disciplinary hearing meeting,

there cannot be basis for findings of guilty or otherwise against an employee. Rule 13(5) of the Employment and Labour Relations (Code of Good Practice) Rules, GN No. 42/2007 require fair hearing to be observed, namely adducing evidence to prove the allegations, cross-examination of the employer's witnesses and the right to present evidence against the evidence of the employer. These were clearly articulated by the arbitrator on pages 8, 9 and 10 of the Award.

The right to be heard is constitutionally provided under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, Cap 2 R.E. 2002. Also, the labour laws in this country have put the same requirements to ensure fair hearing. In the case of **Anthony M. Masanga vs Penina (mama Mgesi) and Another** (Civil Appeal 118 of 2014) [2015] TZCA 556 (18 March 2015) (TANZLII), at pages 8-9, the Court of Appeal of Tanzania firmly stated that:

> *It appears therefore that the respondents were not afforded the right to be heard (audi alteram partem) on that aspect. In fact, nowadays, courts demand not only that a person should be given a right to be heard, but that he be given an "adequate opportunity" to be heard so as to achieve the quest for a fair trial. See the case of* ***The Judge i/c High Court Arusha & Another v. N.I.N. Munuo Ng'uni*** *[2006] T.L.R. 44. In the present matter, we are of the opinion that the respondents were not given*

an "adequate opportunity" to be heard in respect of Exh.P.1. Therefore, while taking note that these tribunals are given a wide decree of latitude to regulate their own procedure in conducting trials, we nonetheless think that where the adopted procedure compromises justice, a measure such as that taken by the first appellate court to expunge that evidence constituted in exhibit P1 from the record may be justified and we uphold it.

Indeed, failure to adhere to fair hearing resulted into miscarriage of justice. The respondent was clearly prejudiced by non-adherence to the legal requirements. The respondent was condemned unheard and without any basis.

I should hasten to add that all the complained allegedly violated regulations and policies were not part of the disciplinary hearing. Exhibit D-6 does not reveal that such alleged contravened policies and regulations were presented on the date of disciplinary hearing. None is reflected that any of them was tendered at the disciplinary committee.

Also, the conduct of the Chairperson of the disciplinary hearing committee was significant to the outcome of the disciplinary hearing. It can be explicitly seen in Exhibit D-6 that chairman acted as prosecutor/witness of the employer. In Exhibit D-6, the Chairman categorically intervened to state that:

Explanation from the Chairman: IT systems are capable to show if the staff has log in from the branch or from the field. Example Dunia Mbwana log in Orbit several times and the IP address is from Dodoma office and he used the computer that is found in office. Moreover, tablet used by staff in the field does not have domain while the log in by these staff shows domain.

It is without a flicker of doubt that indeed the Chairperson was not an impartial arbiter. He was clearly biased as the Chairman was essentially adducing evidence in favour of the employer in the same meeting he chaired. That is what it can be garnered from the quoted statement. Such explanations were only expected from the employer's representative as the chairman is required to maintain impartiality throughout the proceedings.

Furthermore, the Chairman did not sign the Minutes of Disciplinary Hearing. At the end of the report, it reveals only two people signed, the secretary and complainant. It indicates as follows:

Prepared by: ***Perpetua Livingstone*** *-Secretary Signed*
Seen and signed by: ***Jalala Hussein-*** *Charged employee*
(Sign) (Signed)
Date: 27/04/2021.

Absence of signature of the Chairman on a document evidencing the disciplinary proceedings against the charged employee is against Rule 4(9) of the Guidelines for Disciplinary, Incapacity, and Incompatibility Policy and Procedures, GN No. 42/2007 makes the authenticity of such minutes questionable. The Court in such circumstances should avoid relying on such document for the same lacks certainty.

In the case of **Richard Mchau vs Shabir F. Abdulhussein** (Civil Application 87 of 2008) [2008] TZCA 77 (15 June 2008) (TANZLII) at page 15; [2008] T.L.R. 317 [CA], the Court of Appeal noted that:

> *It is a two-page letter with the address of the applicant appearing on the second page thereof.* ***The second page has no signature to verify any receipt.*** *Instead, there is a signature at the bottom of the first page and adjacent to the signature, there is a date; 21.02.2006. No rubber stamp has been impressed thereon.* ***We highly doubt that the signature verifies with certainty that it was the respondent or his representative who received it.***

It is my view that reliance on such document that violates the rules of authenticity should not be allowed. It was the duty of the chairperson to sign to validate the contents to be reflecting the truth of what happened as he is the one who chaired that meeting.

In respect of mitigation, I am at one with the respondent that there was no mitigation. The mitigation presupposes that a charged employee must first be found to have committed the misconduct prior to mitigation. In Exhibit D-6 reveals that there is mitigation prior to the finding. Such a thing is not mitigation at all as envisaged mitigation intends to reduce or exonerate the employee from the possible sentence. Clear language in Rule 13(7) of the Employment and Labour Relations (Code of Good Practice), Rules GN No 42/2007 requires the mitigation factors to be put forward after the finding of guilty of the employee. In the Exhibit D-6, the purported mitigation factors were put forward before the charged employee was found guilty. It contravened the lucid provisions of the law thus there was no mitigation envisaged by the law.

Generally, a thorough review of the available record indicates that disciplinary hearing as evidenced by Exhibit D-6 has demonstrated that there was no proper disciplinary hearing to warrant findings of guilty or otherwise of the respondent on allegations levelled against him. The purported Minutes of Disciplinary Hearing deserves nothing than being discarded. The Minutes of Disciplinary Hearing are not worth the name envisaged by the law governing employment and labour relations in Tanzania as it has a lot of legal infractions.

It was a mere sham on the part of the employer to purport that a disciplinary hearing was conducted. We have found that there was no valid

or fair reason for the employer to subject the respondent employee to disciplinary hearing as no evidence at all was tendered to support the allegation. Also, there was no fair procedure adopted in dealing with the hearing of disciplinary complaints against the respondent.

On the first, third, fifth and sixth legal issues raised by the applicant, it my settled view that the arbitrator acted properly, correctly and within the legal boundaries to find out that the applicant had terminated the respondent (as per Exhibit D-9) without any valid/fair reason and without following fair procedure. Termination of the respondent was marred with illegalities and irregularities that touched the root of the case thus the same could not be rescued by any evidence tendered at the CMA.

On failure of the arbitrator to consider both oral and documentary of the parties, it is my humble view that the arbitrator acted correctly and within the legal boundaries. The reasons are simple. Neither DW 1 nor DW 2 testified before the disciplinary hearing committee. Thus, their evidence in CMA after termination of the respondent cannot change illegalities committed during the disciplinary hearing leading to termination.

In fact, evidence of DW1 and DW 2 is an afterthought. These were supposed to be appear and testify before the disciplinary hearing committee to establish that every allegation levelled against the respondent was true. It was supposed to be tendered in the disciplinary hearing for it to be worth of consideration in the arbitration proceedings at CMA. Second,

in addressing legal issues relating to validity of reasons and fairness of procedure, we have noted legal impediments on Exhibit D-1 and D-6 respectively. It means that having discredited those main documentary evidence on record there was nothing to stand on for the employer's case on unfair termination. The CMA was right to disregard these two main documentary evidence in the circumstances. Simply, the value of all documentary evidence tendered at CMA but not at the disciplinary hearing committee, namely Exhibit D1, including FINCA Human Resource Policy Manual have negligible evidential value at CMA for failure to tender them at the disciplinary hearing committee.

Lamentation by the applicant that there was failure to analyse and evaluate both oral and documentary evidence tendered at CMA is nothing but clear lies. I cannot agree with that submission of the applicant. Conspicuously, the arbitrator had explicit stated in page 5 all the way to page 11 of the Award on the analysis and decision of the Commission. It has a subtitle: **UCHAMBUZI WA USHAHIDI NA UAMUZI WA TUME**. I have keenly followed up the analysis and evaluation by the arbitrator. I commend the arbitrator for his industrious, thorough, and legally sound evaluation and analysis of the evidence of both parties. There is a lucid analysis of the evidence considering the legal position and clear determination on the two three main issues raised to resolve the dispute.

It is my settled understanding and settled view that fairness of reason and procedure relates to the time of termination and processes

leading to that termination of employment. It does not refer to the time the proceedings are heard at Commission for Mediation and Arbitration. Tendering of both oral and documentary evidence at CMA which were not tendered at the Disciplinary Hearing Committee that advised the employer to terminate the employee cannot legally rescue the matter of illegalities as there is a conspicuous absence of fairness of reason and procedure committed by the employer prior to termination of the respondent's employment.

The validity and fairness of the reason and procedure did not exist prior to the issuance of termination of the respondent's employment contract vide the termination letter (Exhibit D-9). The evidence tendered at the CMA trying to impress that there was a fair reason and procedure to accomplish the termination processes does not change the truth. It becomes a clear afterthought.

The last aspect is that related to the failure by the arbitrator to consider admission of respondent especially Exhibit D-6. As it has been rightly observed that Exhibit D-6 lacked validity to be relied on for its infraction on the law. Any alleged admission cannot stand as the whole disciplinary proceedings hearing was based on illegalities that touched the root of the case itself.

Even if Exhibit D-6 was valid to be relied upon still the duty to prove that respondent committed the misconduct remained with the employer at

the disciplinary hearing committee. To use of the word of the Court of Appeal in the case of **National Microfinance Bank vs Leila Mringo & Others** (Civil Appeal 30 of 2018) [2020] TZCA 240 (20 May 2020), at page 17, held that:

> *While subscribing to the finding of the High Court that the respondents confessed to have committed the offences,* ***we do not think it was correct to find that the issues of dishonesty and deceit had been proven through admission by the respondents****. We also do not consider as correct the general observation of the High Court that the respondents were first offenders who had not been warned before.* ***If anything, our perusal of the record of appeal unveils that the respondents agreed to having occasioned loss but not to dishonesty or deceitful conduct****.*

From exhibit D-6, there is nowhere the respondent is admitting that he committed the alleged misconduct. What is stated relates to the action of the employees who after the internal review was conducted, he questioned the respective employees, and his admission is restricted to being misled by the employees. Thus, both the second and fourth issues relating to the challenging lack merits.

Having found that found that all the issues raised by the appellant found in negative, it is lucid that the arbitrator exercised his mandate well within the strict adherence to legality, propriety and validity of the proceedings and decision. It was within the powers of the arbitrator to grant an award for unfair termination.

In the case of **Barclays Bank T. Limited vs Ayyam Matessa** (Civil Appeal 481 of 2020) [2022] TZCA 189 (12 April 2022) (TANZLII), at pages 13-14, the Court of Appeal reiterated that:

> *From the above provisions, it appears to be clear to us that, the jurisdiction to pronounce an award for unfair termination of service is exclusively conferred to the arbitrator and the Labour Court. Neither the CMA as an institution nor a mediator as a quasi-judicial officer is mentioned. We think, interpretation of the provision in question to mean that the mediator may arbitrate and award the reliefs created by the above provisions as he did, would amount to creating jurisdiction to the mediator which is implicitly excluded under the above provision.*

Totality of circumstances of available record reveals that there was no evidence whatsoever tendered before the disciplinary hearing committee, the findings that the respondent was guilty of misconduct namely gross dishonesty, major breach of trust and causing loss to the employer. The findings were not based on solid evidence as the same was not tendered.

In fact, if employer's representative is the one considered to be a witness that would be wrong. First, there is nowhere that person was sworn/affirmed before testifying. Second, he was not maker of the investigation report thus whatever he adduced on that report would be a hearsay. Third, the record does not reveal that charged employee was afforded opportunity to cross-examine. Fourth, the respondent was given the right to mitigate after the purported committee found that he was guilty of the misconduct. Thus, both reasons and procedure were flouted by the employer prior to the decision to terminate employment of the respondent.

Before I pen off this decision, I find it appropriate to state that in labour issues especially termination of employment, a disciplinary hearing is a serious business which should not be taken lightly and in casual manner. The results of the disciplinary hearing have effects of impairing the right to work of an individual person. It curtails enjoyment of the right to work, and right to livelihood as enshrined in Article 22(1) and 23(1) of the Constitution of the United Republic of Tanzania, Cap 20 R.E. 2019.

It is on this aspect that in **Elia Kasalile & Others vs The Institute of Social Work** (Civil Appeal 145 of 2016) [2018] TZCA 364 (4 April 2018) (TANZLII), the Court of Appeal at page 25 and 29 stated that:

> *Even in this case, the respondent's termination of the appellants' employment without giving them the*

opportunity of being heard, violated the Constitutional right on principles of natural justice, therefore, it was void and of no effect. We find that the suit involved all the 21 Appellants, and that since the appellants were not charged and heard before being terminated from their employment, it is obvious that the respondent violated the cardinal principle of right to be heard. Consequently, the appellants' termination was void and of no effect.

Having analysed and found that the respondent herein was denied his fundamental right to be heard and absence of fair reason and fair procedure resulted in miscarriage of the justice thus the Tribunal was right to find out that there was no proper reason and procedure in terminating the respondent's employment. I fully subscribe to that finding by the Commission for Mediation and Arbitration (CMA) for Dodoma as it is based on proper analysis of facts, evidence available on record and the legal principles pertaining to unfair termination of employment.

In the upshot, this application has been preferred without any merits whatsoever. It deserves dismissal for lack of cogent reasons to interfere with sound and legally acceptable decision of the arbitrator. It is therefore clear that award of the arbitrator in Labour Dispute No. RF CMA/DOM/81/2021 reflects the correct disposition of the issues before it. The Award has been issued within proper ambits of the law. Both the proceedings and award are correct, legally sound, and properly procured

after the thorough and full analysis of the available evidence before the Commission for Mediation and Arbitration.

This Court finds that there is nothing in the proceedings nor in the Award that may be legal infraction warranting this Court to revise the proceedings or interfere with such award. I shall uphold the CMA's award dated 06/05/2022 for being correct and legally sound decision. The application for revision therefore stands dismissed in its entirety for being destitute of merits.

It is so ordered.

DATED at **DODOMA** this 26th day of March 2024.

E. E. LONGOPA
JUDGE
26/03/2024.