IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: JUMA, C.J., MKUYE, J.A. And MLACHA, J.A.)

CIVIL APPEAL NO. 344 OF 2020

JONGO MWIKOLA.....APPELLANT

VERSUS

GEITA GOLD MINING LIMITED.....RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania (Labour Division) at Mwanza)

(Ismail, J.)

dated 22nd day of May, 2019

in

Labour Revision No. 61 of 2017

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JUDGMENT OF THE COURT

13th & 23rd February, 2024

MKUYE, J.A.:

The appellant, Jongo Mwikolo has lodged an appeal against the Ruling and Order of the High Court of Tanzania (Labour Division) at Mwanza (Hon. Ismail, J., as he then was) in Labour Revision No. 61 of 2017 dated 22/05/2019. Before embarking on the merit of the appeal, we find it appropriate to narrate brief facts of the case as follows:

The appellant was a former employee of the respondent, Geita Gold Mining Limited, in the capacity of a Ware House Clerk from

01/04/2007 when he was employed up to 22/07/2014 when his service was terminated. According to the respondent, on 27/05/2014 while the appellant was at his work place, he was observed by a security guard, Faida Mganga (DW3) passing out something to Saad Jaffar (DW2). The security guard became suspicious of the transaction and inquired from that other employee (DW2) of the content of the package he was given by the appellant. Upon inspection, it was revealed that it was a parcel containing a new pair of trousers worn by male employees at the mine site. A further inquiry over the matter revealed that the appellant had taken the trousers from undistributed stock without permission.

As a result, he was charged under the disciplinary code of the respondent on six counts interpreted within the context of stealing from the employer. Upon hearing the matter, the Disciplinary Committee found the appellant guilty and recommended that he be terminated from his employment. Aggrieved by that outcome, the appellant appealed to the Managing Director but his appeal was not successful.

He then, lodged a labour dispute in the Commission for Mediation and Arbitration (the CMA) in which the finding was made in favour of the

appellant. It also observed that by the nature of the offence committed, it did not amount to gross misconduct and being a first offender, he was entitled to a warning or reprimanding and not termination. It was further ordered that the appellant be reinstated in his employment.

Aggrieved by the CMA's decision, the respondent lodged an application for revision in the High Court in which upon observation that the termination was both substantively and procedurally fair, the decision of the CMA was quashed.

Still undaunted, the appellant has now appealed to this Court on sixteen (16) grounds of appeal raising complaints which can be paraphrased as follows:

1) *The affidavit in support of the application for revision lacked grounds, reasons, material facts and legal issues contrary to rule 24 (3) (b) and (c) of the Labour Court Rules.*
2) *The High Court omitted to record and consider appellants submission that the appellant had not confessed at the respondent's premises and the CMA.*
3) *The High Court omitted to record and consider the submission that DW3, DW4 and DW5 conspired to frame the appellant that he confessed to the misconduct.*

4) *The High Court failed to record and consider submission that the written statement of DW2 (Exhibit AB - 2) was obtained by coercion and fabrication at the instance of DW1.*

5) *The High Court considered only the respondent's evidence and ignored appellant's evidence, the act which amounted to bias towards the respondent.*

6) *The High Court considered only the CMA's Award in ignorance of the proceedings contrary to rule 28 (1) of G.N. No. 106 of 2007.*

7) *The High Court failed to hold that appellant had not confessed both at the respondent's premises and at the CMA on the misconduct.*

8) *The High Court omitted to hold that DW3, DW4 and DW5 conspired and colluded to frame the appellant that he confessed to alleged misconduct of attempted theft.*

9) *The High Court omitted to hold that the written statement of DW2 (Exhibit AB - 2) dated 28/05/2014 was obtained by coercion and fabrication at the instance of DW1.*

10) *The High Court omitted to hold that most evidence of DW1, DW4 and DW5 is hearsay evidence contrary to section 62 of the Evidence Act.*

11) *The High Court omitted to hold that the Arbitrator properly addressed and evaluated the respondent's evidence in the legal exercise of assessing the veracity and weight of respondent's*

admitted evidence under rule 27 (3) (d) (e) and (f) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007 (G.N. No. 67 of 2007).

12) *The High Court omitted to hold that appellant was denied a fair hearing at the disciplinary hearing when the respondent tabled and considered the contents of written statement of DW2 (Exhibit AB - 2) dated 28/05/2014 without calling DW2 to testify and be cross examined by the appellant as required by rule 13 (5) of the Code of Good Practice GN. No. 42 of 2007.*

13) *The High Court omitted to hold that most of the respondent's witnesses at CMA were unreliable and tutored witnesses.*

14) *The High Court omitted to observe the requirements of rule 11 (3) (4) (5) and (6) of the Code of Good Practice - GN. No. 42 of 2007 on the part of the respondent.*

15) *The High Court omitted to observe the requirements of rule 12 (1) and (2) of the Code of Good Practice - GN. No. 42 of 2007.*

16) *The High Court omitted to observe the requirements of rule 12 (4) (a) and (b) of the Code of Good Practice GN. No. 42 of 2007 so as to properly determine the holding of the Arbitrator regarding the same rule in the circumstances of the case.*

When the appeal was called on for hearing, the appellant appeared in person without any representation whereas the respondent was represented by Mr. Silwani Galati Mwantembe, learned advocate.

Ahead of the hearing of the appeal, the appellant lodged a notice of preliminary objection on purported point of law to the effect that:

> *"The respondent's written submission in reply is incompetent as from when it was field, it was not served on the appellant within 14 days contrary to Rule 106 (8) of the Tanzania Court of Appeal Rules, 2009 (hereinafter "the Rules")."*

As the practice of this Court demands, we allowed the parties to argue the preliminary objection first. The appellant argued that the respondent did not serve him with her written submission in reply as per rule 106 (8) of the Rules. He, thus, urged the Court to prohibit him from relying on it since he was prejudiced.

On his part, the counsel representing the respondent readily conceded to the appellant's complaint contending that it cannot be said with certainty if the appellant was served given the mode of communication the parties had adopted as they communicated through

mobile phones and sometimes sent documents using bus transportation and not the conventional means of serving documents to the other party through a process server.

In this regard, having considered the uniqueness of the scenario before us and the respondent having not registered any objection to the objection, we prohibited the respondent to rely on her written submission and ordered her advocate to utilize the provisions of Rule 106 (10) of the Rules in his submission, which he did.

Upon being availed with an opportunity to expound his grounds of appeal, the appellant, in the first place, prayed to adopt his written submission to form part of his submission and having done so, he intimated to the Court that he was abandoning grounds 3 and 4 and that he will argue the remaining 14 grounds which are well elaborated in his written submission. We marked grounds nos. 3 and 4 abandoned.

On his part, Mr. Mwantembe brought to the attention of the Court of its mandate in relation to matters originating from the CMA. He pointed out that, when a party is aggrieved by the decision of the High Court in its revisional jurisdiction and appeals to this Court is like a

second appellate Court. Thus, he argued, such party has to bring an appeal on matters of law only and not of facts. He went on arguing that, looking at the nature of the appeal lodged by the appellant is mostly on matters of facts. He cited an example of ground No. 2 in which the appellant faults the High Court Judge for failure to record and consider the appellant's submission that he had not confessed at the respondent's premises and at the CMA as being a matter of fact.

The learned counsel also assailed the appellant for fronting matters of procedure for the first time contending that the High Court never determined on matters of procedure since it was agreed by the parties not to be in issue. While relying on the cases of **Enock Chacha v. Manager, NBC - Tarime,** Civil Appeal No. 20 of 1995 and **Charles Mussa Msoffe v. NBC Holding Corporation,** Civil Appeal No. 33 of 1996 (both unreported), he urged the Court to dismiss such ground.

On the other hand, the appellant controverted Mr. Mwantembe's submission arguing that these grounds were not new or not on points of law. Regarding Mr Mwantembe's contention that the issue of procedure was not dealt with by the CMA and the High Court, the appellant blamed

his representative claiming that he was lured by the respondent to abandon it while there was procedural irregularity when Exhibit AB - 2 was admitted and used by the Disciplinary Committee to recommend his termination without calling DW2 for cross-examination. He made reference to ground No. 12 which he said was not raised earlier on.

We observe that there are two issues here. **One,** matters which ought to be brought to this Court on points of law only; and **two,** in relation to matters not raised and determined by the courts below.

We begin with the issue relating to appeals on matters of law. Section 57 of the Labour Institutions Act, Cap 300 R.E. 2019 (the LIA) governs appeals of labour matters to this Court. According to the said provision of the law, an appeal from the High Court to this Court is restricted to pure points of law and not fact. Section 57 of the LIA provides:

> *"57. Any party to the proceedings in the Labour Court may appeal against the decision of that court to the Court of Appeal of Tanzania on a point of law only".*

What is gathered from the above cited provision of the law is that the appeal against a decision of the High Court (Labour Division) automatically lies on points of law only. This stance was also emphasized in the case of **Ladislaus S. Ngomela v. The Treasury Registrar and Another**, Civil Appeal No. 66 of 2022, **Hassan Marua v. Tanzania Cigaratte Company Limited**, Civil Application No 338 of 2019, **Gloria Thompson Mwamnyange v. Precission Air Tanzania Limited,** Civil Appeal No. 55 of 2021, **MIC Tanzania Limited v. Imelda Gerald,** Civil Appeal No. 186 of 2019 and **Remigious Muganga v. Barrick Bulyanhulu Gold Mine,** Civil Appeal No. 47 of 2017 (all unreported). It follows, therefore, that where the appeal to this Court from the High Court is brought on matters of fact the Court would not have a mandate to entertain them - see **Ladislaus S. Ngomela** (supra), **Imelda Gerald** (supra) **and Remigious Muganga** (supra).

In this case, going by the memorandum of appeal consisting 16 grounds, we note that the appellant faults the High Court for: failure to record and consider appellant's submission that he did not confess at the respondent's premises and CMA (ground no. 2); considering only the

respondent's evidence and disregarding the appellant's evidence (ground no. 5); failure to hold that appellant never confessed (ground no. 7); omission to hold that DW3, DW4 and DW5 conspired and colluded to frame the appellant that he had confessed the alleged misconduct (ground no. 8); omission to hold that written statement of DW2 (Exhibit AB – 2) dated 28/05/2014 was obtained by coercion and fabrication (ground no. 9); failure to hold that the arbitrator properly addressed and evaluated the respondent's evidence and assessed the veracity and weight of respondent under rule 27 (3) (d) and (e) of the Mediation and Arbitration Guidelines Rules 2007, GN. No. 67 of 2007 (ground no. 11); omission to hold that the appellant was denied a fair hearing at disciplinary hearing when the respondent tabled and considered the contents of written statement of DW2 (Exhibit AB - 2) dated 28/05/2014 without calling DW2 to testify and be cross examined by appellant as required by Rule 13 (5) of Code of Good Practice - GN. No. 42 of 2007 (ground no. 12); and omission to hold that most of the respondent's witnesses at CMA were unreliable and incredible and tutored witnesses (ground no. 13).

Clearly, looking at those grounds of appeal they do not seem to be on pure points of law. For instance, in grounds 2, 3, 7 and 8 the appellant assails the High Court for not considering and finding that he did not confess at the respondent's premises and at the CMA. This requires re-evaluation of evidence. In grounds 3 and 9, the appellant faults the High Court for not considering his written submission in support of his case. In grounds 4 and 8, he assails the High Court for failure to find the DW1, DW3, DW4 and DW5 had conspired to frame him. In ground no 9, his complaint is that the written statement of DW2 who was the key witness was obtained by coercion from DW1. In our view, the determination of these grounds would require re-evaluation of evidence.

We also note that among the complaints is that his written submission was not recorded and considered. It seems to us that the appellant is impeaching the record of appeal something which is not allowed because the record of the court is presumed to depict the truth of what transpired in court. This position was underscored in the case of **Halfani Sudi v. Abieza Chichili,** Civil Reference No. 11 of 1996 (unreported), where it was stated thus:

*"We agree with our learned brother, MNZAVAS, J.A., and the authorities he relied on which are loud and clear that "A court record is a serious document. It should not be lightly impeached." (**Shabir F. A. Jessa v. Rajkumar Deogra,** Civil Ref. No 12 of 1994, (unreported) and that "There is always the presumption that a court record accurately represents what happened." See also: **Hellena Adam Elisha @ Hellen Silas Masui v. Yahaya Shabani and Another,*** Civil Application No. 118/01 of 2019 and **Alex Ndendya v. Republic,** Criminal Appeal no. 207 of 2018 (both un reported).

Regarding omission to consider the written submission, we wonder what would have been its effect of failure to do so. This is because, it is trite law that the submission is not a substitute of evidence. See - **The Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman, Bunju Village Government and 11 Others,** Civil Appeal No. 147 of 2006 (unreported), where it was stated that:

"... submissions are not evidence. Submissions are generally meant to reflect the general features of the party's case. They are elaborations or explanations on

evidence already tendered. They are expected to contain arguments on applicable law. They are not intended to be substitute for evidence."

See also: **Imani Omari Madega v. Yusuf Mehboob Manji and 3 Others,** Civil Appeal No, 135 of 2019; **Gulf Concrete & Cement Products Co. Ltd v. D. B. Shaprya & Co. Ltd,** Civil Appeal No 88 of 2019; **Shadrack Balinago v. Fikiri Mohamed @ Hamza and 2 Others,** Civil Application No. 25/8 of 2019; **Sunlon General Building Contractors Ltd and 2 Others v. KCB Bank Tanzania Limited,** Civil Appeal No. 253 of 2019 and **Trade Union Congress of Tanzania (TUCTA) v. Engineering Systems Consultants Ltd and 2 Others,** Civil Appeal No. 51 of 2016 (all unreported).

Be it as it may, the cited grounds were on matters of facts which this Court is not mandated to entertain them at this stage. They are matters which invite the Court to re-evaluate the evidence in order to arrive to the conclusion that the appellant would want to be which would be in contravention of section 57 of the LIA. Therefore, on the basis of our discussion above, we refrain from entertaining them. It follows that

our decision will base on grounds 1, 6, 10, 14, 15 and 16 which we consider to be on points of law.

The other limb is on the procedural issue raised in ground no. 12 as a new ground not dealt with in either CMA or the High Court. The law relating to new grounds is very clear that this Court has no jurisdiction to entertain them – See: **Enock Chacha** (supra) and **Charles Mussa Msoffe** (supra). In the case of **Hassan Bundala @ Swaga v. Republic,** Criminal Appeal No 386 of 2015 (unreported), when the Court was faced with similar situation, it stated as follows:

> *"It is now settled that as a matter of general principle this Court will only look in matters which came up in the lower court and were decided; not on matters which were not raised and decided by neither the trial court nor the High Court on appeal."*

In this case the problem is on ground no. 12. While the respondent holds a view that it being on procedure which was not dealt with at lower courts, cannot be brought because it is new, the appellant alleges that it is not new since it involves a procedural irregularity as the DW2's written statement was admitted at the Disciplinary Committee and

used to terminate his employment without calling its author for cross examination.

We had an opportunity of examining the record of appeal on the matter. Before the trial commenced as shown at page 77 of the record of appeal, it is clear that three agreed issues, including the one questioning the procedure, were framed as follows:

> 1. *Endapo kulikuwa na sababu za msingi za kuachisha kazi mlalamikaji.*
> 2. ***Endapo utaratibu wa kumwachisha kazi mlalamikaji ulifuatwa.***
> 3. *Nini stahili za pande zote mbili.* [Emphasis added]

However, on 26/6/2015 (page 119) there was a prayer made before the arbitrator that both parties have agreed to withdraw/abandon the issue relating to "whether the procedure for terminating the appellant was followed" and the CMA made an order that:

> *Tume: Kwa kuwa pande zote zimeridhia tume ina omit hoja bishaniwa namba mbili kwa upande wa utaratibu.*

Both parties signed to authenticate their agreement to abandon the second issue.

In his testimony, the appellant never complained about the abandoned issue relating to procedure (Pages 133 – 149). In his final written submission before the CMA at page 168 of the record the appellant acknowledged the two remaining issues after the abandonment of the issue relating to procedure which are as stated earlier on. In the award, the abandonment of the second issue on procedure was restated at page 218 and the remaining issues were reflected at page 219 of the record as follows:

"Tume ilibakia na hoja mbili tu ambazo ni:

1. *Endapo kulikuwa na sababu za msingi za kuachisha kazi mlalamikaji.*
2. *Nini stahili za pande zote mbili."*

Those were the issues to which that award of the CMA was premised meaning that the issue of procedure was not dealt with. In this regard, we agree with Mr. Mwantembe that since the said issue was not

canvassed at all it cannot be raised at this stage. As such, we refrain ourselves from entertaining it.

We now turn to the remaining grounds of appeal which are grounds nos. 1, 6, 10, 14, 15 and 16.

The appellant in the 1st ground of appeal faults the High Court in not holding that the respondent's application for revision was not maintainable for lacking grounds, reasons or material facts and legal issues as provided under rule 24 (3) (b) and (c) of the Labour Court Rules 2007 G.N. No. 106 of 2007 and section 91 (2) of the Employment and Labour Relations Act, 2004 (the ELRA). In his written submission, the appellant contended that the affidavit in support of the application for revision before the High Court, did not contain sufficient material to support the application which could have enabled the other party (the appellant) to reply to those material facts and the legal issues arising therefrom or to inform the court within a reasonable time about the material facts and the resultant issues. For clarity, the appellant referred us to pages 268 to 271 of the record of appeal. In his view, going by the said affidavit, the CMA's decision was not impeached at all.

In response, Mr. Mwantembe, while relying on rule 24 (3) of the Labour Court Rules firmly argued that the respondent's application complied with it. He elaborated that, looking at the affidavit in support of the application, paragraph 1 and 2 averred on the material facts; and paragraphs 4 to 8 made averment on the statement of legal issues and reliefs. In this regard, he urged the Court to find this ground devoid of merit.

Rule 24 (3) of the Labour Court Rules provides for the contents of an application for revision to the High Court. It states as follows:

> *"(3) The application shall be supported by an affidavit, which shall clearly and concisely set out -*
>
> *(a) the names, description and addresses of the parties;*
>
> *(b) a statement of the material facts in a chronological order, on which the application is based;*
>
> (c) *a statement of the legal issues that arise from the material facts; and*
>
> *(d) the reliefs sought."*

Having closely examined the impugned affidavit, we are in accord with Mr. Mwantembe that the affidavit in question complied with the provisions of the law. It is plain that in paragraphs 1 to 4 of the affidavit the applicant averred the respondent's material facts on which the application is based in which Kashindye Kichanja introduced himself and explained on how he was authorized to swear the affidavit; the facts relating to the employment relationship between the respondent and appellant and how the latter was terminated from his job (para 2); how the appellant lodged a dispute at the CMA (para 3); and the award of CMA in favour of appellant with an order for his reinstatement and payment of his contractual rights from the date of his termination (para 4). The said paragraphs as shown at page 268 of the record of appeal, are reproduced as follows:

> *"1. That, I am the Labour and Industrial Relations Superintendent of the applicant aware of the facts leading to this application. I have been allowed by the management of the applicant to swear this affidavit therefore I am conversant with the facts that I depose in the subsequent paragraphs herein.*

2.That the respondent was an employee of the applicant in the capacity of a Ware House Clerk from 1st April 2007 up to 22nd July 2014 when his services were terminated on grounds of breach of the Employers Disciplinary Code of Conduct.

3.That aggrieved by the termination the respondent contested the termination by referring the dispute to the Commission for Mediation and Arbitration at Mwanza and the dispute was instituted as Dispute No. CMA/MZ/GEIT/327 of 2014.

4. That after hearing evidence from both sides the Arbitrator (Safina Msuwakollo) on 18th September, 2015 delivered an award in favour of the respondent by declaring that the respondent was unfairly terminated on grounds that the reasons for termination were not valid. As such she ordered that the respondent be reinstated and be paid his employment contractual rights from the date he was terminated".

As to what the respondent was complaining of, she stated in paragraphs 5 to 8 of the affidavit as hereunder:

"5. In her findings, the arbitrator held that the reasons for termination were not proved, as she discredited all the evidence adduced by the applicant's witnesses before the Commission. She also based her findings on, among others, the fact that no CCTV evidence was tendered, inspection being conducted in the absence of the complaint that the respondent could not steal a trouser which was not his size, and that the trouser which was tendered during arbitration hearing is not the one which was identified by the respondent.

6. That being aggrieved by the award, on 29th October, 2015 the applicant filed in the Labour Court, a Revision Application Number 87 of 2015 seeking for the court's order to revise and set aside the arbitrator's award. The said application was struck out by the Court (Madame A.C. Nyerere, J.) on 20th October, 2017 for being incompetent. The Court further granted leave to the applicant to file a proper application within 4 days from that date, hence this application. Copies of the courts' proceedings and a drawn order dated 20th October, 2017 are exhibited hereto collectively marked as "GLC - A".

7. The legal issue that arise from the facts is as follows:

(i) Whether the applicant did not prove the reasons for the respondent's termination.

8. The relief sought by the applicant is for the honourable court to revise and set aside the arbitrator's award issued by the Commissioner for Mediation and Arbitrations at Mwanza in Dispute No. CMA/MZ/GEIT/327/2014 dated 18th September, 2015".

We gather form the above quoted paragraphs that the respondent explained the basis of the arbitrator's award in favour of the appellant that the reasons for termination were not proved and how the arbitrator discredited the respondent's witnesses evidence. The respondent also explained how she filed an initial application for revision but was struck out for being incompetent and granted leave to file a fresh one. In paragraph 7 she raised a legal issue for consideration which was whether there was no proof by the respondent of reason for the appellant's termination; and lastly, in para 8 she indicated the relief sought.

In this regard, from what we have endeavored to explain above we do not see the basis of the appellant's complaint. Therefore, we cannot fault the revisional court's decision as in our view, the affidavit in support of the application for revision met all the requirements as per Rule 24 (3) of the Labour Court Rules. This ground is, therefore, without merit and we hereby dismiss it.

In ground no. 6 of appeal, the appellant faults the High Court for considering the CMA award in disregard of the record of proceedings which was contrary to rule 28 (1) the Labour Court Rules, G.N. No. 106 of 2007. In his written submission, the appellant asserted that the documents which were listed from (a) to (i) at page 27 - 28 of his written submission were not considered in the ruling of the High Court in the application for revision. On the other hand, there was no response on this ground from the respondent's counsel.

We had an opportunity of going through the record of appeal but we were unable to see where the appellant's claims lie, more so, when taking into account that the appellant has not stated the exact document that was not considered. At page 27 of the record referred to by the

applicant, there is a list of exhibits which the respondent seems to have intended to rely on. The said list was not even tendered in the CMA. We have failed to see its relevancy in his claim. Otherwise, the learned revisional Judge, gauging from his ruling, had discussed extensively the award in relation to the evidence which was given by witnesses at the CMA. We think, this ground is misconceived and we dismiss it.

The other complaint is directed on ground of appeal no. 10. In this ground, the grievance is based on the High Court's omission to hold that most of the evidence of DW1, DW4 and DW5 is hearsay evidence which is contrary to section 62 of the Evidence Act. Elaborating this ground of appeal through his written submission, it is argued that none of DW1, DW4 and DW5 witnessed when the appellant committed the offence of attempted theft. It is the appellant's argument that, DW1 Joseph Kalungwana testified on the allegation which was narrated to him by Suleiman Machila who also testified on the incident as was narrated to him by Faida Mganga (DW3). DW5 testified on what was narrated to him by DW4. According to the appellant, this was confirmed by the arbitrator who stated that 80% of those witnesses' evidence was hearsay (see page 234 of the record of appeal). He lamented that, although this

issue was raised at the High Court, the High Court Judge just decided to brush it aside on the pretext that appellant had already confessed.

In response, Mr. Mwantembe just briefly, said that the Arbitrator had mis-interpreted the meaning of hearsay evidence. He explained that the law of Evidence takes it as primary or direct evidence, such evidence which has been perceived by five sensory organs of a person such evidence of a person who saw, or touched, or smelt, or heard by his ears. He insisted that DW1, DW4 and DW5s' evidence was testimonies from persons who heard the appellant confessing to commit the offence. In rejoinder, the appellant insisted that, their evidence was hearsay evidence.

We are mindful that section 62 of the Evidence Act provides for the inadmissibility of hearsay evidence and that even if it is admitted it would be of no significance or no evidential value in proving a fact in issues. In **Sarkar on Evidence,** 14th Ed. at page 39 the author reiterates on the spirit of direct evidence which is also referred to as "the original evidence" as that which a witness reports himself to have seen or heard through the medium of his own senses. As to hearsay, it is that

which the witness is merely reporting not what he himself saw or heard". Also, **Cross on Evidence**, 6th Ed. Page 38 insists that hearsay evidence is inadmissible as evidence.

We note that at page 234 of the record of appeal the arbitrator stated the 80% of DW1 and DW5s' testimonies were hearsay evidence. However, according to the record, DW3, DW4 and DW5 are the witnesses who testified to the effect that the appellant confessed to commit the offence. These witnesses heard when the appellant confessed. For instance, at page 107 of the record of appeal, DW3 testified to have witnessed the appellant confessing to commit the offence and pleading to be pardoned. Also see: DW3's written statement at page 160 (Exhibit AB - 3).

At page 115 of the record of appeal, DW4 explained how appellant confessed to have stolen a trouser. At page 117 during cross-examination, DW4 explained on how the appellant knelt down pleading to be pardoned. Also see: DW4's written statement (Exhibit AB 4) at page 161.

DW5 at page 123 of the record of appeal stated that appellant confessed to steal the pair of trousers. Also, the investigation report prepared by Joseph Kalungwana (DW1) (Exhibit AB - 1) page 153 shows that he admitted to have attempted to steal a new pair of trousers in the presence of Machila, Severian Mushema, Senyaeli Pallangyo and Faida Mganga.

As it is, these witnesses testified on what they perceived through hearing directly from the appellant confessing to have attempted to steal the new pair of trousers. Their evidence is not from what was narrated to them by other people on his confession to the commission of offence as the appellant tries to convince us. As to DW1, he was categorical that he was not present when the appellant confessed. As such, we are settled in our mind that the witnesses who testified on the appellant's confession gave direct evidence and not hearsay evidence. Therefore, this ground is devoid of merit, and we dismiss it.

We now turn to grounds nos. 14, 15 and 16 in which the appellant's complaints are that; **one** the learned High Court Judge failed to observe the requirements of Rule 11 (3) (4) (5) and (6) of the Code of

Good Practice on the part of the respondent. **Two,** failure by High Court Judge to observe the requirements of Rule 12 (1) and (2) of the Code of Good Practice; and **three,** failure by the High Court Judge to observe the requirements of Rule 12 (4) (a) and (b) of the Code of Good Practice so as to properly consider and determine the holding of the Arbitrator regarding the same rule in the circumstances of this case. Essentially all the provisions of the law, deal with proper management of the employees conduct and fairness of the reasons to terminate the employee for misconduct.

The basis of the appellant's complaint is the arbitrator's finding that the respondent failed to prove the offence of attempted theft and that even if it was proved, it would not amount to gross misconduct but rather to a minor offence deserving a warning and not terminating the appellant from employment.

In its decision, the High Court stated, among others, in relation to this aspect that, the arbitrator made such a finding in oblivious of what the appellant's employer's code of conduct provides and that the issue of penalty had to be gauged not only by the law, but by also going through

a code of disciplinary rules promulgated by the employer and see what they provide in respect of offences bordering on serious misconduct. The High Court Judge also took into account that in considering termination, the offence concerned must be looked as to whether the employee charged and convicted will make the employment relationship intolerable and concluded that, had the arbitrator considered all that, he would have realized that, irrespective of the value of the subject matter of the attempted theft, the violation was an act of gross dishonesty leading to intolerable situation warranting termination.

On these findings, it is complained that it was irregular for the High Court in failing to consider matters which ought to be taken into account. Besides that, the High Court Judge misapplied the Guidelines under Code of Good Practice. This is so because the Disciplinary Policy and Procedures (item 11) which the respondent had, on 26/02/2015 indicated in her opening statement at CMA, listed and attached as documents to be relied upon, leading the Arbitrator to frame issues, meaning that she was aware of the same.

It is also argued that, Rule 12 of Employment and Labour Relations (Code of Good Practice), 2007 (GN No. 42 of 2007) provides for the issues relating to fairness or validity of the reasons for termination of an employee but the High Court Judge did not observe it. The appellant insisted that, according to the circumstances of this case, the High Court Judge, ought to have observed the provisions of Rule 11 (3) (4) (5) and (6) of the Code of Good Practice providing for factors to be considered when determining disciplinary measures to a guilty employee which are: **one** corrective measure to correct the employee's behaviour through graduated disciplinary measures such as counselling and warnings. **Two,** the gravity of the misconduct. **Three**, the circumstances of the employee such as the appellant's seven years working with respondent unblemished and his family.

On the other hand, Mr. Mwantembe is of the view that, since the appellant committed a criminal offence, it was not a minor offence warranting a mere warning but a clear act of gross dishonesty.

Rule 11 (3) (4) (5) and (6) of the Code of Good Practice provides as follows:

"*(3) An employer's rules in the application of discipline and standards of conduct shall be made available to the employees in a manner that is easily understood.*

(4) Subject to sub-rule (3), discipline shall be corrective efforts and be made to correct employee behaviour though a system of graduated disciplinary measures such as counselling and warning.

(5) The effect of a warning is to notify the employee that a further offence of a similar nature may result in more serious disciplinary action being taken.

(6) Procedures of invoking disciplinary measures specified shall be taken as in the schedule to these Rules."

It is without question that, this provision deals with managing the conduct of employees as was rightly submitted by the appellant and more importantly, it provides for a system of graduated disciplinary measures including counselling and warnings all intended to correct the employees and even to notify him/her that any recurring offence of a

similar nature may attract a more serious disciplinary action against him/her.

In relation to rule 12 (1) and (2) covering ground no. 15 and rule 12 (4) (a) and (b) covering ground 16 of the appeal, they provide as follows:

> *"(1) Any employer, arbitrator or judge who is required to decide as to whether termination for misconduct is unfair, shall consider -*
>
> *(a) whether or not the employee contravened a rule or standard regulating conduct relating to employment;*
>
> *(b) if the rule or standard was contravened, whether or not -*
>
> *(i) it is reasonable;*
>
> *(ii) it is clear and unambiguous;*
>
> *(iii) the employee was aware of it, or* ***could reasonably be expected to have been aware of it;***
>
> *(iv) it has been consistently applied by the employer; and*
>
> *(v) termination is an appropriate sanction for contravening it.*

(2) ***First offender of an employee shall not justify termination unless it is proved that the misconduct is so serious that it makes a continued employment relationship intolerable.***

(3) The acts which many justify termination are -

(a) ***gross dishonesty;***

(b) wilful damage to property;

(c) wilful endangering the safety of others;

(d) gross negligence;

(e) assault on a co-employee, supplier customer or a member of the family of, and any other person associated with, the employer; and

(f) gross insubordination.

(4) In determining whether or not termination is the appropriate sanction, the employer should consider -

(a) the seriousness of the misconduct in the light of the nature of the job and the circumstances in which it occurred, health and safety, and the likelihood of repetition; or

(b) The circumstances of the employee such as the employee's employment record, length of service, previous disciplinary record and personal circumstances." [Emphasis added]

Generally, this provision deals with fairness of the reason for terminating an employee from employment. While the appellant is of the view that the termination was unfair for lack of fair reason, the respondent on the other hand, holds a view that the nature of misconduct depicted gross dishonesty warranting the termination of the appellant.

According to the record of appeal, the appellant was caught in his attempt to steal a new pair of trousers which he passed it to DW2, not even the respondent's employee, for safe custody on the pretext that he had forgotten his identification card which he had to retrieve. According to DW3, such parcel ought to have been left with the guards and not where the appellant left it. DW3, DW4 and DW5 testified that the appellant confessed to have done so. It is the appellant's further complaint that the alleged attempted theft was not proved and that even if it was proved, the sanction of terminating him from his employment

was severe considering that the value of the stolen property was very minimal.

However, we go along the respondent's line of argument that the attempted theft was proved as per evidence of DW2 to whom the stolen trouser was entrusted for custody and DW3 who saw when appellant gave a parcel containing the trouser to DW2. Apart from that, there was ample evidence from DW3, DW4 and DW5 who saw and heard the appellant confessing to the offence while pleading to be pardoned as opposed to the appellant's contention that their evidence was a hearsay.

Regarding the nature of punishment of termination from employment, we think, the High Court Judge ably reasoned as was submitted by Mr. Mwantembe that much as the item attempted to be stolen can be seen to be of minimal value, having regard to the circumstances of the matter, it did not only attract to a sentence of imprisonment but also it amounted to gross dishonesty to the properties of the respondent in terms of rule 12 (3) (a) of the Code of Conduct. In other words, we do not find any cogent reason to fault the High Court Judge's finding.

Finally, in view of what we have endeavoured to explain herein above, we find that the appeal is devoid of merit and we dismiss it. Since the matter emanates from a labour dispute, we do not make any order as to costs.

DATED at **MWANZA** this 22nd day of February, 2024.

I. H. JUMA
CHIEF JUSTICE

R. K. MKUYE
JUSTICE OF APPEAL

L. M. MLACHA
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of February, 2024 in the presence of the appellant appeared in person and Ms. Marina Mashimba, learned counsel for the respondent, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL