**IN THE HIGH COURT OF THE UNITED REPUBLIC**

**OF TANZANIA LABOUR DIVISION**

**IN THE LABOUR COURT ZONE CENTRE**

**AT KIGOMA**

**REVISION NO. 7 OF 2014**

**BETWEEN**

**WORLD VISION TANZANIA ..... APPLICANT**

**VERSUS**

**CHARLES MASUNGA MAZIKU ..... RESPONDENT**

**JUDGMENT**

*05/11/2014 & 13/03/2015*

**Mipawa, J.**

World Vision Tanzania hereinafter referred to as the applicant filed the present Labour revision as against one Charles Masunga Maziku the Respondent herein. The applicant through the notice of application and a Chamber summons made under section 91 (2) (c ) of the Employment and Labour Relation Act 2004,[1] Rule 24 (1) (2) (3) and 28 (1) (c) (d) of the Labour Court Rules,[2] raised nine grounds challenging the CMA award[3] on unfair termination for misconduct based on ***gross dishonest*** and ***gross negligence***.

The hearing of this application for Revision was done by way of written submission in which the Applicant was represented by Mr.

[1] Act No. 6 of 2004 Cap. 366 R.E. 2009
[2] Government Notice No. 106 of 2007
[3] CMA refers to Commission for Mediation and Arbitration.

Bernard Buberwa Buhoma Learned Counsel and the Respondent enjoyed the services of Mr. Method Raymond Kabuguzi learned advocate. The grounds of revision may be summarized as follows:-

1. *The CMA erred in formulating, entertaining and adjudicating on procedural issues not subject of complaint before it and not taking cognizance of Respondent's admission of the disciplinary hearing.*

2. *The CMA grossly erred in brushing aside Applicant's Community Employment manual read together with Respondent's contract of Employment in which gross negligence constitute serious misconduct offence punishable with termination.*

3. *The CMA erred in not finding that Respondents continued approval of fuel consumption by the generator that was inconsistent with actual consumption is proof of his complicity.*

4. *Having been confronted with evidence of complicity and or gross negligence at the disciplinary hearing and in view of Respondent's unequivocal admission thereof. The CMA erred in finding that the disciplinary panel had to adjourn formulate fresh charges and afford Respondent time to prepare for the defence before trial could resume.*

5. *The CMA misdirected itself in alluding to and making findings on fuel consumer by applicant's motor vehicles which issue did not form part of the complaint or evidence adduced at trial.*

The learned counsel concluded that the CMA findings that the Respondent was not adequately informed of outcome of the disciplinary

hearing, is patently wrong and the CMA evaluation of evidence is biased, the award and orders made amounts to travesty of justice.

In order to comprehend what transpired in the commission a brief account of the fact is necessary. The Respondent was employed by the Applicant as a storekeeper and Transport Officer at the Applicant's offices in Kasulu and his daily duties were described in exhibit k-2, styled Functional title: Transport officer cum storekeeper[4], ***inter-alia*** the Respondent was required to check fuel consumption before approving further draws on logbooks.[5] The Applicant was beneficiary of fuel allocations by GTZ section of the United National High Commission for Refugees.[6]

According to the applicant the Respondent employment contract was increased for another six months after the former contract which started in the year 2007 had come to an end. The six months increased contract was to end on 31/12/2010.

In May, 2010 the Applicant received and installed a solar power generating machine which reduced the fuel consumption quite significantly. In November 2010 it occurred to the Applicant's offices at Kasulu that records kept by the Respondent indicated no reduction in the quantity of fuel consumed by the generator and hence an investigation Committee was formed to probe and report on the matter. Two employees in the course of the Investigation were netted and confessed to have been involved in theft of fuel. The generator operator one Yona Seth and a driver by name Simon Michael confessed and

[4] Job Description – Transport Officer cum STOREKEEPER
[5] See item 5 on transport exhibit k-2 the Job description of Respondents
[6] Commonly known for its ecronym as UNHCR

implicated the Respondent Mr. Charles Masunga Maziku. The three employees were suspended and appeared before the Applicant's disciplinary committee charged with ***gross dishonesty.*** That was on 10th December 2010.[7]

The Disciplinary hearing Committee found the generator operator Yona Seth and the driver Michael Simon guilty of theft, gross dishonest as charged but on the part of the Respondent the Disciplinary Committee did not find him guilty of ***gross dishonest*** but with ***gross negligence.***[8] The disciplinary chair found his negligence to have been gross, and gross negligence is an offence stipulated in the Applicant's Employment Manual.[9] The evidence before the Committee proved without and shadow of doubt the loss of 300 litres of fuel per month. It was the applicant contention that the two employees Seth and Michael Simon to have been selling 300 litres of fuel every month and it was the Respondent who was ordering them to sale the fuel. The Respondent was terminated from his employment for being negligent in verifying fuel consumption by the generator.

The witness who testified on behalf of the applicant included Anders Mutwe a Human Resource Officer of the Applicant who showed the job description and ordered that the Respondent was responsible to check the day to day fuel consumption before approving further fuel packages in the logbook and he was supposed to prepare fuel consumption report every month. The witness confirmed the story that the applicant was getting 594 litres fuel from GTZ every month for the

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[7] K. 9 Exhibit an invitation for disciplinary hearing letter
[8] See also Applicants written submission at page 2
[9] Paragraph 10:8 (offences) in the World Vision Tanzania Community/Project Employment Manual shows offence of gross negligence

generator and that the Probe Investigation team of the applicant netted Yona Seth and Simon Michael who confessed that they had been selling 300 litres of fuel every month by the order of their boss the Respondent Mr. Maziku.

The Respondent on his part told the Commission that he was employed by the Applicant in the year 2007 as Transport Officer and Storekeeper and his duties were to receive various items and enter them in the ledger book and then issue the same according to the needs of the employees. He was also involved on the supervision of fuel consumption of motor vehicles and to order spare of the vehicles.

The Respondent further argued that as a Storekeeper his duties were ***inter-alia*** to receive fuel for the generator and issue the same to the operator of the generator wholly in accordance with the laid down procedure, which he described as for example:-

- *Kujaza stores Requisition form kuyaomba.*
- *Mkuu wa Idara (Mhasibu) kusaini fomu*
- *Ikifika kwake (mlalamikaji) anamsainisha kuashiria mafuta yote anayapokea*[10]

The Respondent briefly says that after issuing fuel to the generator operator employed for that purpose/work, his (Respondent) duties were fulfilled. He concludes that at the Disciplinary hearing Committee he was charged with selling 300 litres of fuel per month through the month of May to December 2010.[11] He told the Commission that the Applicant dismissed him from the Employment for what the

[10] CMA arbitration award at page 8
[11] *Ibid*

Employer called "*gross negligence*" the Respondent believes to have been unfairly terminated.

The Commission after hearing the parties found that the Applicant employer had no valid reasons to terminate the Respondent. The applicant employer went against Rule 12 of Government Notice No. 42 Code of good practice Rules[12]. He did not consider the gravity of the offence and the circumstances of infringement the record of the employee, etc.[13]

The employer/Applicant did not consider Rule 12 (2) of the Code of Good Practice[14] which speaks that the first offence cannot justify termination unless the offence is great to the extent that employment relationship could not continue. That the confession of Yona Seth and Simon Michael cannot be used to implicate the Respondent because circumstances and evidence were different especially after the two had confessed to steel the fuel.[15]

The Learned Arbitrator also found that Rule 12 (3) of the Code of Good Practice GN. No. 42 of 2007 details two distinct offences which carry a penalty of termination that is 12 (3) (a) Gross dishonesty and 12 (3) (d) Gross negligence.[16] It was therefore improper for the Applicant employer to call the Respondent before the Disciplinary hearing committee on the charges of Gross dishonest and to defend himself over the said charge, but at the end of the day found him guilty of Gross negligence an offence which he did not prepare to defend himself

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[12] *op.cit. note 10*
[13] *ibid* CMA award
[14] *op.cit.* note 15
[15] *op. cit.* note 10 page 10
[16] Employment and Labour Relations (Code of good practice) Rules GN 42/2007

before the Disciplinary Committee. The Applicant had also contravened Rule 13 (2) of GN 42 (Code of Good Practice) Rules.[17] To show the distinction of gross dishonest and gross negligence, the Commission quoted U. Narrang, Legal Dictionary tilled "Academic's legal Dictionary" that; by gross negligence:-

> *...indicates a marked departure from the normal standard of conduct of professional Man as to ... a lack of that ordinary care which a man of ordinary skill world display ...*"[18]

On the phrase gross dishonesty the same Legal dictionary quoted above describes that:-

> *... Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person is said to do that thing dishonesty ...*[19]

The Commission therefore faulted the procedure used by the Applicant employer to terminate the Respondent that the Respondent, was not gives time to prepare his defence on the notice of Gross negligence, and that he had prepared his defence for the offence which he was charged before the Disciplinary Committee, to wit, Gross dishonest. The Applicant /Employer went contrary to Rule 13 (2) of GN. No. 42 Code of Good Practice.[20] The Respondent was not provided with

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[17] *op.cit note 16*
[18] Narrang Academics legal Dictionary as quoted from the Commissions arbitration award at page 11
[19] *ibid*
[20] *op. cit* note 15

the necessary 48 hours to prepare his defence on the offence of Gross negligence which the employer used to terminate him. (Respondent)[21].

On the other hand the Commission held that there was no evidence to show that fuel was being stolen in the hands of the Respondent or when the fuel was issued to other employees or authorities there was a difficult in supervising the consumption of fuel in motor vehicles than in the generator. Under Section 37(2)(a) and (c) of the Employment and Labour Relations Act,[22] the Applicant/employer had failed to prove that the termination of the Respondent/employee was substantively and procedural fair in the circumstances. The Commission concluded and awarded the Respondent.[23]

| | |
|---|---|
| 1. *One month salary in lieu of notice* | *394,000/=* |
| 2. *Severance allowance* | *424,307/=* |
| 3. *12 months compensation* | *4,728,000/=* |
| 4. *One month's salary in lieu of leave* | *394,000/=* |
| 5. *Costs "gharama za usumbufu"* | *350,000/=* |
| 6. *Salary unpaid (January – April 2011)* | *1,576,000/=* |
| ***Grand total*** | ***7,866,307/=*** |

The above details sparked the present application for Revision by the Applicant employer.

Briefly the Applicant's Counsel submitted in support of the application for revision that there was unassailable proof fuel was routinely stolen between May and November, 2010 under the Respondent's watch. He was the sole person responsible for issue and

[21] WVT/Poc/PF.387/Fol. No. 31 Termination on misconduct letter of 15 December 2010 from the Applicant to the Respondent
[22] Act No. 6 of 2004 Cap. 366 R.E. 2009
[23] *op.cit.* note 9 at page 13

verification of fuel consumption. Apart from confession by Yona Seth and Simon Michael, the Respondent admitted he slept on his job of verifying consumption by the generator. He submitted that it beats common sense for 300 litres of fuel missing every month without the knowledge of the Respondent.[24]

The applicant's Counsel further argued that it was wrong for the CMA to reason that the Respondent as a first offender should not have been terminated without the CMA considering the Employment Manual of the Applicant,[25] which punish gross negligence for termination just as Rule 12(3) (d) of the Rules.[26]

He submitted that the Respondent admitted to have been negligent he could have been instantly convicted, but both parties adduced evidence and hence, the Respondent knew well of the charges he was facing. In other word, the Respondent was not prejudiced. It was wrong therefore, for the CMA to hold that the disciplinary panel ought to have emended the charges, let him plead afresh before evidence was led and verdict pronounced.[27]

The Applicant's Counsel added that the Respondent's pleading did not show that he had problems with the procedure and therefore it was wrong for the CMA to include Procedure adopted as one of the issues for determination. That the Applicant did not flout procedure as found by the CMA because the notice containing charges[28] was served to Respondent on 7th December, 2010 and Disciplinary hearing hear on 10

[24] Applicant's written submission in supporting of the Revision at P.4
[25] *ibid*
[26] *op.cit* note 2 The Labour Court Rules, 2007
[27] Exhibit K-g Invitation for Disciplinary hearing
[28] Exhibit K.12 hearing form

December 2010,[29] more than 48 hours later.[30] (Summary of allegation selling 300 litres of diesel each month from May - September - 2010).

The learned Counsel for the Applicant finally submitted that, that Respondent contract of Employment (K1) was for a specific period of time (six months). It had commenced in July, 2010 and was to terminate on 31st December, 2010. In other words had his employment not been terminated for misconduct on 10th December, 2010 he had only 20 days remaining on his contract.[31]

He concluded that there would be no employer - employee relationship between the applicant and Respondent Post 31st December, 2010. Even if there was justification in faulting termination, there were no justifiable grounds for orders relating to payment of salaries for the months of January - April 2011 onward as well as leave pay. The order on "*gharama za usumbufu*" counting to Tsh. 350,000/= was not counted for. [32]He prayed the court to revise the CMA award.

On his part the Respondent Counsel briefly submitted that there was flimsy evidence adduced by the Applicant to implicate the Respondent with the alleged theft nor to prove that the same was negligent. The applicant "*fielded*" only one witness (Mr. Andes Mutwe) In a bid to prove that the Respondent's service was fairly terminated by the Applicant.[33] There was no proof that the Respondent was actually grossly negligent in issuance of the alleged fuel to the said operator of the generator and driver (Yona Seth and Simon Michael) since the

[29] *op.cit.* note 23 at page 5
[30] *op. cit* note 23 at page 6
[31] *op. cit* note 23 at page 6
[32] *ibid*
[33] *op. cit.* note 30 at p. 7

Respondent issued the fuel in the course of his normal duties and hence if the said operator and driver stole the same or a part of it there was flimsy evidence to infer the alleged theft against the Respondent.[34]

That the alleged confession of theft of fuel against the Respondent made by the co-suspect do not suggest that confession was made in the presence of the Respondent. The alleged disciplinary Committee interrogated the alleged suspects privately and as such their confession had no any evidential value against the Respondent on which acts constituted the alleged "*gross*" negligence of the Respondent. Further that the said or alleged negligence could not amount to gross negligence because the Applicant never had any evidence to demonstrate the extent of the loss allegedly occasioned to him (Applicant). [35]

He submitted further that the Applicant ought to have adhered to the provisions of Rule 12 (1) or (2) of GN. 42 of 2007 in imposing the punishment.[36] Hence there was no fair reasons for Applicant to terminate the Respondent's service.

On the issue of fairness of the procedure, the Respondent submitted that fairness of the procedure was among the issues that were framed by the Commission for determination and the Commission did not go wrong on that as the Applicant had submitted. Even if the Respondent had not made such complaints in the relevant form the

[34] Employment and Labour Relations (Code of Good Practice) Rules Government notice No. 42 of 2007
[35] Respondent's submission
[36] *op.cit.* note 30 at page 8-9

Commission was legally right and empowered to frame that issue ***suo motu*** for its fair decision.[37]

The Respondent's Counsel added that it is demonstrated in the decision of the Commission that the Applicant also skipped fair procedures in terminating the Respondent's service notably Rule 13 (2), (5), (7) and (8) of GN. No. 42 of 2007.[38] There was no congenial evidence to prove that the Respondent was afforded a reasonable time to make his defence against the charge ***"gross negligence",*** with which he was convicted. He did not cross-examine the co-suspects and the Applicant did not ***communicate the decision*** of the Disciplinary Committee to Respondent.

As regards to the amount which the CMA awarded the Respondent, the Counsel for the Respondent argued that the same is merely challenged in the submission but was not challenged at the Commission, neither evidence was adduced at the Commission to rebut the same. There is hence flimsy evidence on record for faulting the decision of the Commission to that effect.

I have duly considered the submission of both parties and read the CMA record from cover to cover with ***ex-abandunt cautela*** (will eyes of extreme caution) in the course of this judgment I will consider the learned counsel's grounds of revision in light of the two or three core

[37] *op. cit.* note 33 at page 9
[38] *op. cit.* note 33 at p.10

nagging questions ***c'est-a-dire*** (that is to say):-

1. *Whether or not there was valid and fair reason(s) for the Applicant to terminate the employment of the Respondent (substantive fairness).*

2. *Whether or not the Applicant employer followed fair procedure before terminating the Respondent employment (Procedural fairness).*

3. *Was termination of the Respondent employee the appropriate sanction imposed or taken by the Applicant Employer.*

Let me albeit in brief commence with the requirements of the International Labour Organisation Standards regarding unfair termination. The International Labour Organization (ILO) being an organization aimed at promoting social justice worldwide[39], has formulated guidelines concerning unfair termination or dismissal whatever the case.

***Par exampli*** (for example) Convention 158 of 1982 styled "Termination of Employment at the initiative of the Employer Article 4 of the convention provides that:-

> *...The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking establishment or service...*[40]

[39] ILO was founded in 1919 to promote social justice thereby to contribute to universal and lasting peace
[40] Article 4 of convention 158 of 1982

The importance of Article 4 lies therein that, it requires the employer to have a reason for dismissal (termination). In other words the employer cannot dismiss the employee at will. The convention ***note bien*** article 4 puts or regulates the permissible categories of reasons for termination or dismissal being the ***capacity*** of the worker, the ***conduct*** of the worker or the ***operational requirements*** of the business. Article 4 of the convention refers expressly to termination of employment "*connected with the conduct of the worker*" traditionally a worker's improper behavior is treated as misconduct and can result in termination of employment if it is considered to be sufficiently serious. Reasons for termination of employment connected with the ***conduct*** of the worker can be constituted either by professional misconduct, which may lead to disciplinary action and termination of employment on improper behaviour. Misconduct belongs to two categories as stated in the general survey on the termination of employment convention ILO No. 158 and recommendation No. 166 of 1982:-

> *...Misconduct can belong to one of two categories; the **first** usually involves inadequate performance of the duties the worker was contracted to carry out; the **second** encompasses various types of improper behavior. The **first** category may include such forms of misconduct as **neglect of duty**, **violation of work rules** (particular mention is sometimes made of rules related to safety and health)*

*disobedience of legitimate orders and absence or lateness without good cause...*[41]

The **second** category includes in particular disorderly conduct, violence, assault, using insulting language, disrupting the peace and order of the work place, turning up for work in a state of intoxication or under influence of narcotic drugs, or the consumption of alcohol or drugs at work place[42]. Also:-

> *... Various acts displaying a lack of honest and trustworthiness, such as Fraud, deceit, bread of trust, theft and various disloyal activities (such as divulging trade secrets or undertaking activities in competition with the employer) or causing material damage to the property of the undertaking. Certain forms of misconduct, such as absence or lateness without good cause or turning up for work in a state of intoxication often have to be habitual or repeated if they are to warrant dismissal...*[43]

The above was all about International Labour Standards on the substantive fairness the ILO conventions have been incorporated in our Laws as it demonstrated hereunder. On procedural fairness of a dismissal or termination the international Labour Organization ILO Convention 158 of 1982 yet prays another extremely important guidance, Article 7 of the convention sets requirements with which the employer must comply before the employee can be fairly terminated; it

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[41] ILO protection against unjustified Dismissal General survey on the termination of Employment and convention [No. 158 and recommendation No. 166] 1982 p. 37
[42] *ibid* [ILO convention]
[43] *ibid*

reads thus:-

> *... The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide the opportunity...*

The above requirement is commonly referred to as the Procedural fairness for ***a fair termination.*** The Procedural requirement is in line with our laws. The employment and Labour Relations (Code of Good Practice) Government Notice No. 42 of 2007[44]. Where Rule 9 (1) (3) states:-

> *(1) An employer shall follow a fair Procedure before terminating an employee's employment which may depend to some extent the kind of reasons given for such termination.*
>
> *(2) .....*
>
> *(3) The burden of proof lies with the employer but is sufficient for the employer to prove the reason on balance of probabilities ...*

The Employment and Labour Relation Act[45] also stipulates that it shall be unlawful for an employer to terminate the employment of an employee unfairly the ***law is clear*** that the termination of employment by an employer will be unfair if the employer fails to prove the following;

*a. That the reason for termination is valid.*

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[44] Government Notice No. 42 incorporated ILO convention 158 of 1982
[45] Act No. 6 of 2004 Cap 366 RE 2002

*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*[46]

Therefore ILO convention, on substantive fairness and Procedural fairness are incorporated ***in our municipal laws***.

I will now turn back to the present revision application and I propose to start with the substantive fairness, that is to say, whether there was valid and fair reason(s) for the Applicant to terminate the employment of the Respondent employee. The offence which the Respondent was charged and the offence which he was terminated with, ***id est*** [that is] gross dishonest (as per charge before the Disciplinary Hearing Committee) and gross negligence (which he was convicted with) fall under the quagmire of ***misconduct***. Therefore in our laws; 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.*

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[46] *ibid* Act 6/2004

*(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.*

*(v) Termination is an appropriate sanction for contravening the rule.*

In the present revision we have to ask first if there was any ***rule existed*** which the Respondent employee contravened. Under the Applicant's Community/Project Employee Manual, the employer shows offences in which an employee who breaks the rule concerning or regulating conduct relating to employment like gross dishonest and gross negligence termination of the employment may follow. Rules which regulate conduct relating to employment are found in various sources like:-

*(a) Disciplinary code*

*(b) In employees written contract of employment.*

*(c) In a policy or personnel manual and notice placed on the notice board in the work place.*

*(d) Legislation.*

*(e) Common law; in terms of common law, the employee must act in good faith towards the employer. An employee was guilty of misconduct breaks this common law duty.[See Prof. Annali Basson et.al Editions 'Essential Labour Law Vol. 1 individual Labour Law Third Edition Labour Law Publications Houghton 2002].*

The Applicant employer has in our case however not shown the CMA below or in this court a written Code of Conduct or disciplinary Code, except the applicant Community/Project employee manual which shows various minor and major offence with the punishment for example gross dishonest and gross negligence appear at paragraph 10:8 of the employee manual and their sanction where committed is termination. Nevertheless, be that as it may, in spite of the fact that there is no code of conduct showed by the Applicant when the rules contravened may have been shown, it does not mean that the employer cannot terminate the employee for misconduct in contravening the rule regulating the conduct relating to employment. Dr. Emil Strydom correctly put it clear in his article "*Dismissal for misconduct the statutory requirements for a fair dismissal for misconduct*" (which I entirely and respectfully agree) that:-

> *... However if a code does not cover such an act or omission, the employer may rely on the common law and discipline the employee on that basis for the particular act or omission. In other words, the fact that a common law act or omission is not covered in the employer's disciplinary code or in any of the other documentation dealing with the employee's conduct does not prevent the employer from acting against the employee who has committed such an act or omission ...*[47]

The Respondent who was a Store Keeper and Transport Officer had the duty, among others to check on fuel consumption before

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[47] Prof. Annal Basson et.al [Editions] Essential Labour Law Vol. individual Labour Law third Edition 2002 Labour Law Publications Houghton

approving further draws on log books. This is as per his job description exhibit K.2.

There was proof that fuel consumption was unusual and the Applicant investigative panel found that there were losses of 300 litres of fuel. The Respondent had pleaded before the ***Disciplinary Hearing Committee*** that "*things had fallen apart*" for he was approving fuel which were different with the log book. [See question No. 27 and its answer in the Disciplinary hearing Committee]. The Respondent was in breach of the Common Law duty to act in good faith, he was negligent because he was approving issuance of fuel without checking on fuel consumption before approving further draws in the logbook, and I entirely agree with the learned Counsel in ground No. ***three*** and question the innocence of the Respondent when:-

> *...300 litres of fuel could go missing every month for five consecutive month's without the Respondent's* ***knowledge*** *and* ***intervention****...*

It was therefore wrong for the CMA not finding that the Respondent's continued approval of fuel consumption by the generator was inconsistent with actual consumption. There was evidence from the Applicant to prove the fact that the Respondent was grossly negligent in approving of fuel consumption, and without checking the actual consumption. Gross negligence has been defined by the supreme Court of the **Philippine Islands of the Republic of the Philippine Islands, in the case between Rowena De Leon Cruz V.**

**Bank of the Philippine Islands**[48] that:-

> *...Gross negligence cannotes want or absence of or failure to exercise slight care or diligence or the entire absence of care. It evinces a thoughtless disregard of consequences without exerting any effort to avoid them...*

The Respondent was a senior official of the Applicant holding the position of Transport officer and Storekeeper he was therefore required and expected to act with due diligence and in good faith because a great degree of trustworthiness was required and expected from him. [Senior officer than a junior employee]. ***In JD Group Ltd. V. De Beer***[49] the Labour Appeal Court of South Africa (our laws are in **parimateria**) held that; (the position I entirely subscribe)

> *...on the other hand we agree that a greater degree of trustworthiness is to be expected from a more senior employee, to which may be added a greater measure of responsibility....*
>
> *The Respondent's (the employee) senior position must therefore be regarded as having aggravated his conduct...*

The negligence of the Respondent in handling fuel and not checking the consumption, an act which led to the loss of 300 litres of fuel per month as evidenced by the Applicant, puts him in the position of committing gross negligence which according to the Applicant's Community Manual (Employment) constituted serious misconduct. The

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[48] GR No. 173357 Philippines per velasco, Peralta, Abad, Mendoza and Leonen Justice of the supreme Court of Philiphines Islands

[49] [1996] 17 ILJ 1103 LAC

CMA was therefore wrong and erred in brushing aside Applicant's Community Employment Manual read together with Respondents ***contract*** and to add the job description. I agree with the Applicant's ground two of the revision and as pointed out by S.D. Anderman in his book ***Labour Law Management Decision and Worker's Rights;*** that:-

> *...Employer's disciplinary powers... are well developed in* ***terms implied in every contract.*** *Even if nothing is put in express terms of contract, the employer's disciplinary control is careful preserved in the employees duty to obey as an implied term of the contract...*

The fact that the Respondent in the instant case was acting contrary to his job description that wanted him to ***"CHECK ON FUEL CONSUMPTION BEFORE APPROVING FURTHER DRAWS ON THE LOGBOOKS"*** failed to obey as an implied term of the contract and his responsibility to check fuel consumption and tally the same with the issuing of the fuel. It was therefore right for the Applicant employer to probe the Respondent who admitted to have been authorizing fuel without checking the consumption of the same if they go hand by hand. Although the Respondent was charged with gross dishonest before the Disciplinary hearing committee, I think in my view the Applicant Employer was right **not to convict the Respondent with gross dishonest as it did to Yona Seth and Simon Michael** co-accused because the later had pleaded guilty that they stole the fuel every month at 300 litres and therefore had the ***intent element*** rather than the Respondent who was negligent in approving the fuel. Prof. Le Roux

and Van Nierk define dishonest in their book tilled "*the South African Law of Dismissal*" (1994) at page 131 that, dishonest is:-

> *...Any form of dishonest conduct comprises the necessary relationship of trust between employer and employee and generally will warrant dismissal. Dishonest conduct by definition* ***implies an element of intent****. It is necessary, therefore to demonstrate some deception on the part of the employee which may assume a possible form, for example by making a false statement or representation or negative form...[emphasis mine]*

The conduct of the Respondent employee in course of his duties as a Transport officer and Store Keeper required trust or confidence and the act of the Respondent approving fuel without checking the consumption in reality was by and large a break of common law duty because he acted negligently to the extent that many litres of fuel were stolen or had fallen into the hands of dishonest people as evidenced before the CMA. The deeds of the Respondent were inconsistent with common law duty to act in good faith. This position was reiterated by the ***South Africa Court of Appeal in the Case of Council for Scientific and Industrial Research V. Fier (1996) 17 ILJ 18(A) at 26 D-E (Per Horns J.A***) that:-

> *... it is well established that the relationship between employer and employee is in essence one* ***of trust and confidence and that at common law, conduct clearly inconsistent therewith entitled the "innocent party" to cancel the agreement***
> *...it does seem to me that in our law it is not*

*necessary to work with the concept of an implied term. The duties referred to simply flow* ***naturalia contractus...***

The Respondent indeed on the foregone contravened the rule or standard regulating conduct relating to employment, and the Disciplinary Committee of the Applicant was right to convict him of gross negligence. The CMA was wrong to make a finding that there was no fair reason by the Applicant to terminate the employment of the Respondent. The Respondent cannot come and say that he was not aware of the Rule or standard regulating conduct relating to employment. The Respondent was aware of such rule or standard because:-

*...not all rules must be brought to the attention of the employee ... certain forms of misconduct may be so well known in the work place that notification is unnecessary. The most important examples of such misconduct are those that have their origin in the common law...[See Dr. Emil Strydom article "Dismissal for misconduct the statutory requirements for a fair dismissal for misconduct..."]*

I entirely and respectfully agree with the position above regard being had the fact that our labour laws are in **Pari materia** with the Labour laws of South Africa and indeed heavily borrowed from. Furthermore although there is no record that the Applicant employer had previously issued warnings as regards to the conduct of the Respondent employee, suffice it to say that ***where the misconduct committed is a serious one the issue of progressive discipline*** does not have a room. The policy of progressive discipline connotes the

warning of an employee either by written warnings or verbal warnings. This position [which I subscribe] was also reached by the Labour Appeal Court of South Africa in ***Changula V. Bell Equipment (1992)*** 13 ILJ 101 (LAC) at 111 C-D in which the appellate court on Labour Matters stated:-

> *...(s)ound industrial relations practice requires an employer to endeavor to correct misconduct and adopt a policy of progressive discipline, except in circumstances, where the conduct complained of is serious enough in itself to justify terminating the employment relationship...*

It is therefore apparent clear that the employer has been given powers to terminate an employee who commits a serious misconduct as per the Employment and Labour Relations (Code of Good Practice) Government Notice No. 42 of 2007 in which under Rule 12 (3) (a) and (d) the offences of gross dishonesty and gross negligence are by and large listed as offence which may justify termination. The gross negligence which the respondent had committed and which the applicant had proved on the balance of Probabilities after the investigation and plea of the Respondent to have been negligent on his noble duty, though he challenged during the hearing of this revision as it were in the Disciplinary Hearing I found that his arguments and defence fall short of merit and I consider them as mere kicks of a dying horse ***in articulo mortis*** [at the point of death]. There can be no doubt that the employer used his legal rights to terminate. A learned Author Mr. J. Grogan Cemented the above position (in his master piece book tilled

***Riekert's Basic Employment law*** 2nd Ed. (1993) 88) in the following words

> *...(t)here can be no doubt that the employer's unfettered legal right to dismiss forms the basis of his disciplinary power. His answer to the employee who contests his disciplinary rules can always be; "if you don't like here, go and find another employer"...*[50]

The Respondent employee has also challenged in his written submission that "*indeed as correctly found by the commission that, he was the first offender and has served the Applicant for a long time and hence the Applicant ought to have adhered to the provisions of Rule 12 (1) and (2) of the Employment and Labour Relations (Code of Good Practice) Rules GN. No. 42 of 2007 in imposing the punishment upon the Respondent".*

I have discussed above and found that the employer Applicant adhered to the provisions of Rule 12(1) and (2) of the said Code of good practice. Nevertheless I would briefly say on the issue regarding long service of the Respondent in the business or undertaking of the Applicant employer that, it is not a "*knee jerk*" to be used by the employee to have an alternative sanction apart from the sanction stated by the employer's disciplinary code or the provisions of the Law, although in some circumstances years of service will usually account in the employee's favour as it was held in a South African Case of ***SA Commercial Catering and allied Workers Union V. Pick and Pay Retailers*** (Pty) Ltd (1997) 18 ILJ 1474 and as correctly pointed by Dr.

[50] J. Grogan: Riekerts Basic Employment Law 2nd Ed. [1993] p. 88

Emil Strydom in his article, ***Dismissal for Misconduct the Statutory Requirements for a fair dismissal for misconduct.*** (The position I entirely agree and subscribe)

> *...Years of service will usually count in the employee's favour. However this may not always be the case. The employer often puts a great deal of trust in an employee with long service. It could count against the employee that the later has breached this trust after many years of service...*[51]

Therefore the argument that the Respondent was a first offender and has worked for many years in the service of the Applicant does not ***par-excellence*** thwart the fact that the Respondent was grossly negligent and has breached the trust relationship after many years of service. The employer had expected a great degree of trustworthiness towards the employee of long service and senior official. Like the Respondent in this case.

The negligence of the Respondent in handling fuel issue orders and for not checking the consumption of fuel to satisfy himself before issuing the same as evidenced before the Commission and in the Disciplinary hearing Committee, had indeed occasioned loss of 300 litres of fuel every month and the Applicant employer had lost confidence and trust on the Respondent employee who held the sensitive positions of Transport Officer and Storekeeper of the Applicant. Hence the offence he committed, of gross negligence in his duties, is a serious one and the Applicant employer was right to terminate the Respondent. To borrow the persuasive holding of the supreme court of the Philippines in

[51] See Prof. Annal Basson et.al Essential Labour Laws *op. cit* note 47

***Rowena De Leon Cruz V. Bank of the Philippine Islands***[52] ***quoting with approval the case of Bristol Byerssquibb (Phills) V. Baban***[53] that:-

> *...(A)s a general rule, employers are allowed a wider latitude of discretion in terminating the services of employees who perform functions by which their nature require the employee's full trust and confidence.* ***Mere existence of basis for believing that the employee has breached the trust*** *and confidence of the employer is sufficient and does not require proof beyond reasonable doubt. Thus when an employee has been guilty of breach of trust or his employer has ample reason to distrust him a labour tribunal cannot deny the employer the authority to dismiss him...*

Indeed the misconduct of gross negligence committed by the Respondent employee in course of his duties as a transport officer and storekeeper had breached the trust and confidence relationship inter parties, and the employer Applicant **could not be expected to keep the Respondent employee in employment**.

The above discussion in extenso [at lengthy] has by and large covered also the question as to whether the sanction of termination of the Respondent's employment was appropriate in the circumstance. I conclude that termination of the Respondent was proper as the employer had acted fairly on the reason and exercised his right to terminate because, as it was correctly pointed and held in ***Nampak***

[52] Supreme Court of the Philippines Islands op.cit note 48

***Corrugated Wadeville V. Khoza*** (1992) 20 ILJ 578 (LAC) at 584 by the South African Labour Appeal Court (our laws are in **Pari materia** with South Africa) that:-

> *... The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However the discretion must be exercised fairly. A court should not therefore lightly interfere with the sanction imposed by the employer, unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer but whether to the circumstances of the case the sanction was reasonable...*

I subscribe to the above position and without flicker of doubt decide that the sanction imposed by the employer to the employee was reasonable and the employer acted fairly. The decision of the CMA that the Applicant employer did not have the valid reason to terminate is revised and quashed.

The issue of procedural fairness as the record shows was by and large flouted [treat without respect and go against]. There was a serious procedural flaw committed by the employer before terminating the Respondent employer, as rightly pointed out by the learned Arbitrator in the Commission's Arbitration award, which I entirely and respectfully agree. First and foremost the respondent was charged with the offence of gross dishonest and he was summoned before the Disciplinary hearing committee "*under the cover of the charge of gross dishonest*".

The invitation for Disciplinary hearing on December 10th 2010 read in part (exhibit k-9) that:-

> *...you are invited to appear before the disciplinary committee for hearing to be held at the Kigoma Programme Office on December 10, 2010 at 10:00 am for the following charge:- as per MUT Employee Manual Section 10:8 this* ***amounts to gross dishonest****...*

Indeed as rightly pointed out by the learned Arbitration in the Commission and also by the learned Counsel for the Respondent in his written submissions before this court, that the offence of gross dishonest which the Respondent was charged with before the Disciplinary Hearing Committee, and had prepared his defence for the offence of gross dishonest, is different from the offence of gross negligence which the Respondent was found guilty of and terminated with. The respondent was denied his right to defend himself on the offence of gross negligence and had never prepared for it as the Law prescribes. He was denied his natural right. The Employer Applicant did not comply with Rule 13(21) of GN No. 42 of 2007 as right pointed out by Commission. The Rule reads:-

> *...Rule 13(2) of GN No. 42 of 2007 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...*

Now taking into consideration that the allegation laid before the Respondent's bed were those of **gross dishonest** and not **gross negligence,** it clicks clear that the employer did not notify the

employee on the allegations of gross negligence **par-excellence**, and therefore he was not heard and did not prepare himself on the offence of gross negligence which he was charged, it is my considered view that it was tantamount to not hearing the Respondent employee defence on the allegations of **gross negligence** of which he was terminated with. He did not even give his defence as the law of Man and God require, because as one English Judge put it:-

> *... the laws of God and man give the party an opportunity to make his defence. If he has any. I remember to have heard it observed by a very learned man upon such an occasion that even God himself did not pass sentence upon Adam before he was called upon to make his defence. Adam (says God) where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou should not eat? And the same question was put to Eve...*

Now since the two offences of gross dishonest and gross negligence are not the same, the Respondent was denied his right to be heard and prepare his defence on the offences of gross negligence which he was terminated with. The Respondent had prepared as per the law to defend himself on the offence of gross dishonest as charged.

Generally the procedural fairness is entailed under Rule 13 (1) - (13) of the Code of good Practice. Some Aspects of Procedural fairness include the following:-

- *Investigation.*
- *Notice of the charge and the investigation.*
- *Reasonable time to prepare response.*

- *Employee entitled to state a case in response.*
- *Employee entitled to assistance.*
- *The decision to be communicated.*
- *The employee must be informed of the reason for dismissal.*
- *Appeal, employee must be told of his right to appeal.*

The Applicant employer did not follow the fundamental right and procedure at the demise of the Respondent and on detriment of natural justice. I entirely and respectfully agree with the learned Arbitrator and the learned Counsel for the Respondent that there was no procedural fairness followed by the Applicant employer before terminating the Respondent. There was flaw of the important aspects of procedural fairness as I have indicated above.

In the event and on the foregone I revise and quash the Commission for Mediation and Arbitration decision which held that there was no valid reason to terminate the Respondent employee and rule that there was valid and fair reason to terminate the Respondent employee.

However I uphold the Commission decision that the Applicant Employer did not follow the fairness of procedure before terminating the Respondent employee and on this the Employer/Applicant has to suffer the consequences of not following the fair procedure by paying the Respondent/employee compensation of six (6) months salary to wit 2,364,000/=.

The following orders of the Commission are quashed:-

1. *Severance allowance kiinua mgongo to the tune of 424,307/=.*
2. *Gharama za usumbufu Tzs 360,000/=.*
3. *Malimbikizo ya mshahara January - April 2011 1,576,000/= salary arrears. There was no justification of paying the January – April as the contract of Respondent ender in December 2010.*

I.S. Mipawa
**JUDGE**
13/03/2015

On one month salary in lieu of notice, the Respondent is entitled if he was not paid by the Employer/Applicant. He should be paid to wit Tzs 394,000/= plus six month salary 2,364,000/= total to be paid is Tzs 2,758,000/=.

Revision is partly successful to the extent indicated.

It is so ordered.

I.S. Mipawa
**JUDGE**
13/03/2015

**Appearance:-**

1. Applicant: Present Agness Lyogelo
2. Respondent: Absent but a Legal Officer from the Respondent Advocate is present for the purpose of receiving ruling/judgment

**Court**: The Judgment has been read today in the presence of the Applicant and in the presence of Mr. Kabuguzi, Advocate Legal Officer for the purpose of receiving Judgment only.

I.S. Mipawa
**JUDGE**
13/03/2015

Right of Appeal explained to any aggrieved party.

I.S. Mipawa
**JUDGE**
13/03/2015