IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT MOSHI

LABOUR REVISION NO. 24 OF 2021

(Arising from Labour Dispute No. CMA/KLM/MOS/ARB/44/2019 of the Commission for Mediation and Arbitration of Kilimanjaro at Moshi)

THE REGISTERED TRUSTEES OF CATHOLIC DIOCESE OF MOSHI.....APPLICANT

VERSUS

FULGENCE ONESPHORI MASSAWE.....RESPONDENT

JUDGMENT

11/04/2022 & 27/05/2022

SIMFUKWE, J.

The Registered Trustees of Catholic Diocese of Moshi hereinafter referred to as the Applicant filed this application after being aggrieved with the award of the Commission for Mediation and Arbitration (herein after referred to as CMA) in Labour Dispute No. CMA/KLM/MOS/ARB/44/2019 of Moshi dated 30th April, 2021. The application was brought under section **91 (1)(a), Section 91 (2) (b) and Section 94 (1) (b) (i) of the Employment and Labour Relations Act, No. 6 of 2004, Cap 366 R.E 2019 (ELRA); read together with Rule 24 (2) (a) (b) (c) (d) (e) and (f) and 24(3) (a) (b) (c) and (d), Rule 24(11)(b) and Rule**

28 (1) (c) (d) and (e) of the Labour Court Rules, GN No. 106 of 2007. The Applicant prayed for the following orders:

1. *That, the Honourable Court be pleased to call for and examine the records and proceedings of the Commission for Mediation and Arbitration at Moshi award (sic) made on 30th day of April 2021 by Hon. G.P. Migire in the Labour Dispute No. CMA/KLM/MOS/ARB/44/2019 with view of satisfying itself as to its legality, propriety and correctness thereof and reverse, quash and set aside the same.*
2. *That, this Honourable Court be pleased to find that the award was illogical and unreasonable.*
3. *That, the Honourable Court to grant any other order deem proper and fit to grant.*

The application was supported by an affidavit sworn by Fr. William Ruwaichi, Principal Officer of the Applicant, which was contested by the counter affidavit sworn by Respondent.

The factual background of the dispute is to the effect that, the respondent was employed by the applicant on 1st January 2018 as a teacher at Kisomachi Secondary School in Moshi District, under a fixed term contract of two years (2) starting form 01/01/2018 to end on 31/12/2019. The agreed basic monthly salary was Tshs. 1,904,000/- only. He was transferred to Nsoo Secondary School as a Headmaster. The Respondent employment contract became sore when the same was terminated through the letter dated 29/04/2019 on the allegations that he misused his power in his position as a Headmaster, that he mishandled the school properties without the employer's permission which led to the loss of Tsh

38,759,000/=. Following such allegations, it was alleged that the special committee was appointed to investigate the anomalies which submitted the report to the Applicant's Education Director and the same was served to the applicant. On 28/12/2018 the School Board held its meeting and passed resoulution of appointing forensic audit which is Ndamallya & Company. The report was also said to have been served to the applicant. The applicant conducted the Disciplinary Committee meeting. However, the respondent did not attend the said meeting for the reasons which are debatable. Following the outcome of the disciplinary Meeting, the applicant wrote a termination letter. Subsequently to such termination, the respondent instituted Labour Dispute before the CMA which was decided in his favour. The CMA awarded Tsh 67,399,200 to the applicant following its findings that the applicant herein terminated the employment of respondent unfairly and unprocedural.

Aggrieved by the CMA award, the applicant herein preferred this application for revision on the following grounds:

1. *That, the learned Arbitrator erred in law and fact for being biased and partial to the extent of creating his own facts and evidence in favour of the Respondent.*
2. *That, the learned Arbitrator erred in law and fact for failure to appreciate the strongest evidence adduced by the Applicant to prove the fairness of the Respondent's termination of employment contract to wit:*
    i. *The arbitrator viewed that the Respondent was not availed of a proper procedure for his termination in respect of the right to appeal and*

proper composition of the disciplinary committee while the records were res ipso facto.

ii. *The arbitrator viewed that there was no valid reason for termination of the employment while in fact the reasons were properly established and the respondent deliberately refused to appear before the disciplinary committee to defend himself against allegations.*

3. *That, the learned arbitrator erred in law and fact by relying on closing submission instead of relying on the testimony and evidence adduced by the parties.*
4. *That, the learned arbitrator erred in law and fact for giving order against claims which were neither proven nor established.*
5. *That, the learned arbitrator erred in law and fact by awarding subsistence allowance basing on unfounded facts.*
6. *The Honourable Court to grant any other order deem proper and fit.*

The application was argued by way of written submissions. Both parties complied to the schedule. Mr. Aristides Ngawiliau learned counsel argued the application for the applicant, while Mr. Charles Mwanganyi learned counsel opposed the application for the respondent.

In support of the application, the applicant's advocate gave the historical background of the dispute which I find no need of reproducing it since the same has been narrated above. He also reiterated his prayers as stated in his chamber summons.

In support of the 1st ground of revision, that the Arbitrator was biased and partial since he created his own facts and evidence; Mr. Ngawiliau argued that the Arbitrator erred at page 12 of the Award when he held that: -

> *"The period he (Respondent) served at Nsoo Secondary School is too short to label him as such a bad headmaster. No any of such misconduct of misappropriating funds was ever established for all those ten years."*

As far as the above quotation is concerned, it was Mr. Ngawiliau's submission that the same is purely imaginary remarks and illogical ones. That, the same is a mere opinion and assumption that since nothing bad was discovered from the beginning, he could have not committed such misconduct later.

The applicant's advocate invited the court to consider the question that how long does it take for a person to be able to commit an offence? He argued that one may discover without any effort of imagination that the Arbitrator used the alleged ten (10) years of service (which was not even proved) to hide the misconduct of the Respondent as per exhibit R15 (annexure A8) of the Affidavit of the applicant. Mr. Ngawiliau, was of the view that this was the real meaning of being biased. He referred to the case of **Republic vs. Albert Awour and 3 Others, [1985] TLR at page 21** which cited the case of **Metropolitan Properties vs. Lannon [1969] 1 QB 577** in which Lord Denning M. R. stated that:

> *"In determining whether or not there is bias, the Court should not be guided by the subjective view of the accused, rather the test should be whether, in the circumstance of the case,*

right minded persons would think that there is a likelihood of bias."

Basing on the circumstances of this case, it was Mr. Ngawiliau's opinion that since the learned Arbitrator declared the Respondent to have worked with the Applicant for ten years without being alleged while he misappropriated Applicant's funds, it is as good as to mean that the Respondent could not commit any offence at any point in time later, which signifies bias.

Mr. Ngawiliau submitted further that it is a principle of natural justice, that, a party losing the case has a right to be given reason(s), otherwise, it is a denial of natural justice. That, failure to give such reason(s) for disregarding any evidence or a particular point also amounts to bias which is referred to as ***null arbitrium sine rationibus***. The learned counsel thus condemned the Arbitrator for disregarding the Applicant's evidence including Auditor's report tendered and admitted as Exhibit R15 by not giving any reason(s) as to why he thought it was insufficient. In support of such contention the learned counsel referred to the case of **James F. Gwagilo Vs. Attorney General [1994] TLR** at page 73 **(HC)** where Mwalusanya J, held that:

"It can be said with confidence that since article 13(6)(a) of our Constitution provides for the right of appeal and right of judicial review from every decision affecting citizen's rights, then ipso facto it creates a third head of the principle of natural justice ranking equally with Audi alteram partem (the rule against bias). Hence, it is a denial of natural justice to refuse to give reasons to the party who lost."

Basing on the above submissions in respect of the first ground of the revision, it was the learned counsel's prayer to this court to uphold the same for being meritorious.

Mr. Ngawiliau submitted in support of the 2nd ground of revision that the Arbitrator failed to appreciate the evidence adduced by the Applicant's witness to prove the proper procedure for termination of the employment contract and composition of the disciplinary committee. On the procedures for termination, it was alleged by Mr. Ngawiliau that the Applicant dully complied with the procedural law. That, the respondent herein was called to attend the disciplinary meeting by a letter with reference number CDM/NSS/PF/81/31 dated 02/04/2019 which was tendered by DW1 which is exhibit "R7" in the CMA and annexure A11 to the Affidavit in support of this application. Also, the Respondent received reminding letter with reference number CDM/NSS/PF/81/32 dated 10/04/2019 which is marked as annexure A12 of the Affidavit supporting this application to remind him to attend the said disciplinary hearing. That, the Respondent acknowledged receipt of the same during cross examination by the Applicant's Counsel in answering question number 28 as seen at page 71 of the proceedings of the Commission. He added that DW3 proved service of the letter dated 15/04/2019 inviting the Respondent to attend disciplinary committee meeting through Exhibit R16. However, the respondent refused to cooperate and attend the said meeting.

It was stated further that, the hearing form was duly filled in and the right to appeal was properly stated as admitted by the Respondent himself during examination in chief when answering question number 69 at page

60 of the CMA proceedings and as per the annexture A13 of the applicant's Affidavit.

Concerning the composition of the disciplinary committee, it was submitted that the applicant complied with provisions of **item 4(2) of The Employment and Labour Relations (Code of Good Practice) Rules G.N. No. 42 of 2007; Guidelines for Disciplinary, Incapacity and Incompatibility Policy and Procedure** which is to the effect that:

> *"The chairperson of the hearing should be impartial and should not, if possible, have been involved in the issues giving rise to the hearing.* ***In appropriate circumstances a senior manager from a different office may serve as chairperson.*** "[Emphasis was supplied.]

Basing on the above cited provision, the applicant's advocate argued that the Chairperson in the matter at hand was among senior employees of the Applicant (headmaster of Uru Secondary School) located about 40 kilometres away from Nsoo Secondary School. In addition, he said that in no way such chairperson was connected with the issues giving rise to the hearing. He commented that the choice was the best choice ever.

Another allegation by the learned counsel for the applicant was that the Arbitrator erred in law and fact in finding that there was no valid reason for termination of employment while in fact the reasons were properly established. It was Mr. Ngawiliau contention that the Respondent deliberately and illegally employed none teaching workers contrary to the Applicant's Running Cost Cut Down Policy of the institution as per finding number 5 at page 14 of the forensic audit report which was tendered and

admitted as Exhibit R15 and which is annexed as annexture A8 of the Affidavit supporting this application.

Mr. Ngawiliau pointed out that the sum of Tshs 38,759,000/= was embezzled by the Respondent as per details evidenced in the investigative report of Ndamalya Auditors report at pages 3 and 4 of Exhibit R15 and Annexture 1, 2, 3, 3.2, 3.2B and 4 of the said report as they can be seen at pages 16, 17, 18A of the application. That, the respondent assumed the duty of issuing, authorising and receiving the payments and performing purchases by himself contrary to the procurement procedures. Thus, he failed to account for all the money.

The learned advocate also referred at paragraph 3, 4, 5 and 6 on pages 5 up to 9 of Exhibit R15 which is also Annexture A8 of the Affidavit supporting this application as well as annexture 5, 6.1,6.2, 6.3A, 6.3B, 6.4, 6.5A, 6.5B, 6.6, 7, 8.1 and 8.2 of the said report; and argued that the Arbitrator failed to observe that the Respondent performed his duties without following procedures, rules and policies indicated and analysed in the investigative report by the auditors. Thus, failure to follow procedures occasioned Applicant's loss of funds and the same was established by the applicant before the CMA.

Moreover, Mr. Ngawiliau condemned the Arbitrator for failure to observe correctly that the Respondent illegally extended to himself the so called a loan of Tshs 6,400,000/= as per finding No. 2 at page 12 and 13 of the audit report (Exhibit R15) which is also annexture A8 of the applicant's Affidavit in this Application. It was the argument of Mr. Ngawiliau that had it been that it was a loan (as alleged by the Respondent) he would have applied to the Employer in writing and the same would have been

approved by the School Board and ultimately by the Employer. That, it was the procedure to all members of the staff at all times and this was stated during the trial at the commission. It was stated that the Respondent failed to prove how he obtained the alleged loan of Tshs. 6,400,000/=.

Mr. Ngawiliau went on to submit that the respondent before the CMA stated that he refunded the Applicant a sum of Tshs 6,400,000/= which he borrowed whereby he proved the same by tendering bank statement which was not admitted but received for the purpose of identification only and marked as "ID1". The respondent's counsel opined that the reason for receiving it as identification and not exhibit was because it was an unauthenticated document as it was not signed and stamped by the respective bank authority and indeed a mere paper as it can be seen at page ten (10) of the Arbitrator's Award. Therefore, since the same was not an exhibit, it was illegal for the learned Arbitrator to rely on it.

It was submitted further that the Arbitrator also failed to observe the evidence that the Respondent employed six (6) non-teaching staff members without approval of authority of the School Board while the Applicant's institution had set measures to combat her stressful economic situation by retrenching her employees as per finding No. 5 at page 14 of Exhibit R15 which is also annexture A8 of the Affidavit in this Application. That alone occasioned a loss of Tshs. 1,970,000/= as indicated on the table at page 6 of Exhibit R15. It was the opinion of the learned advocate that had the trial Arbitrator correctly evaluated all the above stated testimonies and exhibits tendered and admitted by the CMA, then he would have not declared that there was no any sufficient reason for termination.

In another ground of revision as raised at paragraph (e) & (f) it was alleged that the Arbitrator erred in law and fact by giving orders against claims which were neither established nor proven on balance of probabilities as per **section 110 and 111 of the Evidence Act [CAP 6 R.E. 2019].** As far as the return to place of recruitment is concerned, the learned advocate referred to the case of **Attorney General and 2 Others v. Eligi Edward Masawe and 104 Others; CAT, Civil Appeal No. 86 of 2002** at Dar es Salaam (Unreported) in which it was held that:

> *"The employee whose employment has been terminated have to mitigate the loss by proceeding home and claim what they incurred above what had been paid as terminal benefits.*

The learned advocate faulted the Arbitrator for wrongly connecting the facts of the matter at hand with the provisions of section 43(1)(c) instead of **section 43(1)(a) & (b) of the Employment and Labour Relations Act, 2004.** He quoted section 43(1) which according to him give two options to the Employer: That; The employer shall either:

> "a) Transport the employee and his personal effects to the place of recruitment and
>
> b) pay for the transportation of the employee to the place of recruitment under **section 43(1)(a) and (b) of the Employment and about Relations Act, 2004** respectively;
>
> OR
>
> "Pay the employee an allowance for transportation to the place of recruitment in accordance with subsection (2) and

daily subsistence expenses during the period, if any, between the date of termination of the contract and the date of transporting the employee and his family to the place of recruitment under section 43(1) (c).

Considering the above quotation, it was stated that the applicant (Employer) acted according to the first option under section 43(1) (a) and (b) by facilitating the Respondent with his terminal benefits which he himself acknowledged to have received during cross examination by the Applicant's Counsel when he was answering questions No. 47 and 49 at page 73 and 74 of the CMA proceedings. That, as per the 1st question at page 48 of the CMA proceedings, the respondent went to his place of domicile at Rauya in Marangu as he testified the same during examination in chief. Also, DW3, Rauya Village Executive Officer, testified that the Respondent is domiciled at Rauya and that she served him a document summoning the Respondent at the disciplinary hearing. Such proof was tendered and admitted as Exhibit R16. Mr. Ngawiliau commented that the Respondent received his terminal benefits and repatriated to his domicile pursuant to provisions of **section 43(1)(a) and (b) of the Employment and Relations Act,** (supra).

Furthermore, the applicant's advocate condemned the Arbitrator for ordering the Respondent to be allowed to take his personal belongings from Nsoo Secondary School in absence of prove on existence of his properties alleged in such premises during cross examination by Applicant's Counsel. That, he even failed to prove ownership of the alleged timbers at Nsoo Secondary School premises by showing gate permit to allow such timbers to be entered into school premises. The learned advocate also argued that even the purported permit from local

government authority to permit transportation of the said timbers does not describe from which particular place in Mweka the timbers were to be taken. Thus, he did not show anything to show that the timbers belonged to the respondent. Also, he did not give description and ownership proof of other alleged properties like books, mobile phone and others.

Disputing the payment of unlawful deductions of salary and responsibility allowance of the Headmaster from July - December 2018 as awarded by Arbitrator, it was stated that the respondent never claimed the same in terms of **rule 10(2) of Labour Institutions (Mediation and Arbitration) Rules, 2007 G.N. No. 64.**

In conclusion, the applicant's advocate implored the court to find that the award is illegal and hence dismiss it.

Opposing the application, Mr. Charles Mwanganyi learned counsel for the Respondent prayed to adopt the counter affidavit. He also gave the brief facts of the dispute.

Submitting in respect of the 1st ground of revision that the Arbitrator was biased and partial to the extent of creating his own facts and evidence in favour of the Respondent; Mr. Mwanganyi argued that this ground is devoid of any merit, baseless and unfounded. That, the said allegation was misconceived.

It was stated that the rule against bias is derived from Latin maxim ***nemo judex in causa sua*** which means that no one can judge on its own cause. Thus, the interpretation from the learned counsel that the Arbitrator was bias to the extent of creating his own facts and evidence is purely misconceived. It was Mr. Mwanganyi's argument that before the CMA, the respondent while giving evidence stated that he worked with

the applicant and promoted him to various positions including a position of a headmaster and that he had never misappropriated funds. Therefore, the Arbitrator's findings that the period served by the respondent at Nsoo secondary is too short to label him as such headmaster, was not creating his own facts and evidence rather it was the evidence adduced by the respondent before the CMA. He referred to the proceedings and exhibit P-6 which was tendered before the CMA and which the arbitrator relied upon and argued that sufficed that it was evidence and not facts from the Arbitrator, otherwise the same were remarks and obiter dictum, contrary to what was argued by the learned counsel for the applicant. That the case cited in respect of the same is distinguishable. He referred to the case of **Jasson Samson Rweikiza v Novatus Rwechungura Nkwama Civil Appeal No. 305/2020** CAT at Bukoba. He concluded that the said ground is frivolous and unfounded.

Responding to the ground that the Arbitrator failed to appreciate the strongest evidence adduced by the applicant to prove fairness of the Respondent's termination of employment, it was the learned counsel's opinion that the Applicant has been aggrieved with the remarks of the Arbitrator only in respect of the procedures regarding right to appeal and proper composition of disciplinary committee, hence he conceded that other procedures were not followed among them is right to be heard.

In the alternative, it was submitted that according to the evidence on record and exhibits tendered before the CMA, the procedures for termination were not followed at all. Thus, the submission from the Applicant's counsel is devoid of merits.

Mr. Mwanganyi insisted that, the procedures for termination of contract of employment according to the evidence on the CMA record, were not followed, tainted with bias and contrary to the principles of natural justice, that is, the applicant was condemned unheard.

He stated that as per the 12th Clause of the Contract of Employment which was tendered, admitted and marked as R-1 stipulates the procedures for termination of employment taking into consideration that the Respondent was employed by the applicant for the contract of fixed term of 2 years. As per such clause the party may terminate the employment contract after giving the other party 28 days' notice in writing stating the reason for termination. The respondent's counsel condemned the applicant for failure to give notice for termination as stipulated in their employment contract.

Also, it was submitted by Mr. Mwanganyi that the Applicant did not comply with the provision of **section 41 to 44 of the ELRA**. That, he terminated the Respondent while on leave contrary to **section 41 (4) (a) of ELRA** which states that a notice of termination shall not be given during any period of leave.

Mr. Mwanganyi also cited and referred to **section 37(2) (c) of the ELRA** which is to the effect that, the termination of employment by an employer is unfair if the employer fails to prove that the termination of employment was conducted according to the fair procedures. He also referred to provision of **Rule 9(1) of GN No. 42/2007** which stipulates that, the employer shall follow a fair procedure before terminating an employee's employment which depend to some extent on the kind of reasons given for such termination. Also, he cited **Regulation 13 of GN No. 42/ 2007**

and argued that the same stipulates the fairness of procedures for termination of employment contract which was never followed by the Applicant.

It was Mr. Mwanganyi's remarks that from the evidence adduced before the trial CMA, the Applicant terminated the Respondent without following fair procedures. To support his arguments, he referred to the case of **ONAEL MOSSES MPEKU V. NATIONAL BANK OF COMMERCE LTD REVISION NO. 46/ 2019 HCT DSM** (Unreported) and argued that the same demonstrates the procedures for termination of employment and particularly construed **Regulation 13** (supra).

It was also alleged that the respondent was not given notice of hearing, right to be heard or formal charge contrary to **Regulation 13(2) of GN. 42/2007.** That, from the evidence adduced before the CMA, the applicant stated that from the period of 22nd day of March, 2019 to 20th day of April, 2019 the Respondent was on leave after being required by the Applicant to go for leave. That, it is on evidence that the only notice of hearing from the Employer was served to the Respondent vide letter dated 20th day of December, 2018 (Exhibit P-8) which required the Respondent to appear for disciplinary hearing which was scheduled to be conducted on 28th day of December, 2018 whereas the Respondent dully attended but unfortunately the same was adjourned until further date on the reason of the respondent being sick on that day.

It was the learned advocate's averment that no any other dully notice from the employer was issued to the Respondent to appear before the disciplinary committee for the allegation raised and consequently terminated the Applicant from the employment. Also, there was no formal

charge issued to Respondent contrary to **Rule 13(2) of GN 42/2007** and as it was held in the case of **Dew Drop Co. Ltd v Ibrahim Simwanza Civil Appeal, No. 344 of 2020 at page 10,** Court of Appeal at Mbeya (Unreported).

Mr. Mwanganyi continued to state that as per the proceedings when DW-1 (Employer) was cross examined by the counsel for the Respondent he conceded that the Respondent was allowed to go for leave from 22nd day of March, 2019 to 20th April, 2019. Also, DW-1 conceded that he had never called the Respondent to appear to any disciplinary hearing, neither authorize any person to call the Respondent to the disciplinary hearing on his behalf. Reliance was made to the proceedings particularly during cross examination.

Mr. Mwanganyi disputed Mr. Ngawiliau's submission that they dully served the respondent with notice of hearing vide letter dated 02/4/2019 (Exhibit R-7) and reminder letter dated 10/4/019. It was argued that the exhibit tendered before the CMA and submission from applicant's learned Counsel is frivolous, misconceived and unfounded, on the following reasons:

First, the said letter dated 2/04/2019 and 10/04/2019 were not written by the Employer rather it was written by the headmaster of the school of the Respondent who is not the employer neither demonstrate himself to be acting or writing on behalf of the Employer. This was also said by DW-1 Fr. Ruwaichi during cross examination in response to the 21st question that:

> *"21. Is it true Headmaster is not an employer according to your policy?*
>
> - *Correct"*

Second, it was argued that the said letter was written while the Respondent was on leave. This contravenes the provision of **section 41 (3) (a) of the ELRA** which prohibit service of notice during any period or leave taken under the Act.

Also, the applicant's witness who is the Employer (DW-1) when he gave evidence and cross examined by the counsel for the Respondent, he conceded that he allowed the Respondent to go for leave. The respondent counsel quoted and reproduced the said part of the proceedings which is to the effect that: -

25. Did he ever went to leave?

- *I'm not sure if he went/ his leave was extended. He took it later on. (23/3/2019 - 20/4/2019).*

28. Did you force him to go to leave?

- *No. he requested, I allowed him.*

From the above quotation, it was submitted that since the Respondent was on leave while the said frivolous letter was served to summon him to appear before the Disciplinary Committee. He referred the court to Exhibit P-9, P-10 and P-20). It was the opinion of Mr. Mwanganyi that this contravened the principle of natural justice as the Applicant was condemned unheard. Also, it contravenes clause 8.5 of the Employment contract (Exhibit P-I) tendered before the CMA which clearly demonstrated that the employee is not required to work during the vacation.

In support of the allegation that the applicant was on leave and he was required to go for leave, he referred to the letter dated 12/02/2019(Exhibit P-9) with the Title *"likizo ya mwaka 2018/2019"* and the letter dated 13th

day of March, 2019 which required and forced the respondent to go for leave. He quoted the last paragraph of the letter dated 13/03/2019 Exhibit P-19 which is to the effect that: -

> *" Kutokuzingatia maelekezo hayo hapo juu utaweza kuhatarisha usalama wa shule na chochote kitakachotokea hutakwepa kuwajibika."*

Basing on the above arguments, it was Mr. Mwanganyi's opinion that the Respondent was on leave hence condemned unheard which is contrary to **Article 13(6) (a) of the United Republic of Tanzania Constitution of 1977** as amended from time to time which clearly demonstrated that anyone before judged or decided upon must be given an opportunity to be heard. That, it is the fundamental right according to the principle of natural justice. To cement this point, he referred to the case of **Abbas Sherrally v. Abdul Sultan Haji Mohamed Fazaboy, Civil Application No. 130/2002** (Unreported) in which the Court of Appeal had the following to say:

> *"That the right is so basic that a decision which arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of the principle of natural justice"*

He also referred to the case of **John Moris Mpaki v NBC and Another, Civil Appeal No. 95/2013** (unreported) in which the Court held that:

> *"It's trite law that any decision affecting the rights or interests of any person arrived without hearing the affected*

party is nullity, even if the same decision would have been arrived at had the affected party been heard "

Regarding the allegations that the disciplinary committee was properly constituted; it was submitted that the committee as revealed under hearing form which was tendered before the CMA was tainted with illegalities namely committee was not properly constituted and it was against the rule against bias *(nemo judex in causa sua)*. That, **rule 13(4) of GN NO. 42/2007** stipulates that:

"The hearing shall be held and finalized within a reasonable time, chaired by a sufficient senior management representative who shall not have been in the circumstances giving rise to the case".

In the instant matter it was argued that the committee was constituted contrary to the above-named regulation. That, the hearing form of 17th April, 2019 revealed that the committee was chaired with one Peter Raphael Osoki who identified himself to be the headmaster of Uru Secondary School. It was argued that such headmaster was neither in a senior management of the Applicant. Also, no authorization was tendered to show that he was represented as senior management of the applicant. It was stated that not only that it was chaired with unauthorized chairman but also the evidence adduced during such disciplinary hearing was adduced by one **FADHIL R. KIMBI [DW-2]** and **SULTAN MBOYA** who was deputy head master. Mr. Mwanganyi was of considered view that the said **FADHILI R. KIMBI** could not have been able to adduce evidence against the Respondent as a complainant for the reason that he was one who wrote the letter (Exhibit R-7) which summoned the respondent to

appear before the disciplinary committee. He stated that if at all he was an employer (the fact which they denied) he could act as employer and at the same time a witness to the allegation raised to the respondent. This was against the rule against bias. On top of that Mr. Mwanganyi contended that no one can be a judge of his own cause. Consequently, rendered the entire proceedings a nullity and construed as unfair termination. To substantiate the point, the learned advocate referred to the case of **NBC LTD MWANZA VS JUSTA B. KYARUZI, REVISION NO. 79/2009** which was cited with approval in the case of **ONAEL MOSES MPEKU** (supra) which held that:

> *"...the procedures should not be of a checklist, but the act of the Brach Manager sitting in disciplinary Committee, and signing of letter of termination by the chairperson vitiating the whole proceedings."*

Mr. Mwanganyi thus concluded that the submission from applicant's counsel is devoid of any merit, the hearing disciplinary committee was not properly constituted and tainted with bias. He referred to the case of **Avril Elizabeth Home for Mentality Handicapped v CCMA [2006] ZALC 44.**

Contesting the allegations by the applicant's counsel that as per forensic audit report Exhibit R15 there was embezzled of money by the Respondent and that he deliberately employed none teaching workers contrary to the Applicant's running costs; it was submitted that the same were new facts which were never adduced by any witnessed instead it existed only in the Report and this Court should not consider the same at this stage.

Further to that, it was argued that the burden and duty to prove fair termination lies to the Employer. That, according to the provision of **section 37(2) (a) (b) of ELRA**, termination of employment by employer is unfair if the employer failed to prove that; *the reason for termination is valid, the reason is fair reason and that the employment was terminated according to a fair procedure*. In the instant matter, the same was not proved by the Applicant before the CMA.

In addition, the respondent's advocate argued that not only that the reason for termination was not valid but also the termination was not conducted according to fair procedures. That, the evidence adduced by the Applicant to prove the reason for termination is from DW1 and DW3 as witnesses who gave evidence on the issue of reason for termination.

Moreover, the respondent's advocate submitted that the said Committee of Auditors from the evidence adduced before the trial Commission never called the Respondent so that they could obtain information about various transactions. That, the Respondent was condemned unheard as revealed from the Audited Report which was tendered before the Commission. At page 3 of the said report, it shows on 1st day of September 2018 vide cheque No. 330984 amount of 6,400,000 were paid to the respondent as personal loan and the same has not been refunded. However, when the Respondent adduced evidence before the CMA, he tendered a Bank slip dated 26/11/2018, a bank statement (Exhibit P-31) which showed that the said amount of personal loan was refunded.

It was the opinion of the learned counsel that if the Auditors could have wished to summon the Respondent and give him right to be heard, he could have given them various information and the allegation of

misappropriation of school fund could have not been established. That, it was among of controversy which could have been cleared by the Respondent if at all he was summoned by the Committee.

Responding to the contention that the bank statement was admitted as ID1, it was stated that he failed to note that after the original was brought before the CMA, the same was admitted as Exhibit P-31.

Also, it was emphasised that, the reason for termination was not valid for lack of fair procedures in termination of employment contract. That, as per **Regulation 27 of GN 42/2007** if there is allegation of misappropriation or bad proceedings and conduct of the employee, the Employer is required to suspend the employee pending investigation. In the instant matter, from the evidence adduced before the CMA, the Respondent has never been suspended pending investigation of the Committee appointed by DW-1 but he was forced to go for leave.

Mr. Mwanganyi continued to argue that, apart from the reasons stipulated in termination letter and adduced in evidence, evidence of the Respondent also revealed that the essence of his termination is religious conflict whereas the Applicant being the Head Master of the Applicant's school used to conduct prayers with the student. The counsel referred to Exhibit P-11, whereas the same was construed to be unethical to the applicant, then the applicant just found the way to terminate the respondent employment. This was contrary to **section 37 (3)(b)(iii) of the ELRA** which is to the effect that the employee cannot be terminated based on the ground of discrimination.

Regarding grounds No. (e) and (f) of the Revision that the Arbitrator erred in law and fact by giving orders against claims which were neither

established not proven on balance of probabilities; Mr. Mwanganyi strongly disputed the allegations as raised by the applicant's advocate under ground No. (e) and (f). To the contrary, Mr. Mwanganyi stated that the argument of the applicant's counsel is misconceived, frivolous and unfounded. As to the cited case of **Attorney General and 2 others v. Eligi Edward Massawe and 104 others**, he said the same is distinguishable or otherwise miss-interpreted. That, he wrongly interpreted that the applicant paid terminal benefits (the fact which the Applicant never proved before the CMA) means to transport the employee to his place of recruitment (sic), this is grossly misconceived by the Learned Counsel.

Mr. Mwanganyi also condemned the applicant's learned counsel for failure to interpret that once the employee has been terminated, he must be repatriated to his place of recruitment, this has nothing to do with his terminal benefits rather is to transport the employee, his family and properties to his place of recruitment. He was of the view that terminal benefits meant by the respondent during cross examination was NSSF payment and nothing else. That, from the evidence adduced before the CMA this has never been done. The consequence of failure to repatriate the employee is established under **section 43(1) (c) of ELRA**. Thus, Mr. Mwanganyi supported the Arbitrator for applying the provision of **section 43(1) (c) of ELRA**.

Concerning calculation of subsistence allowance, the respondent's counsel was of the considered view that it is well settled principle that subsistence allowance is calculated on the daily salary of a terminated employee paid on a monthly basis as per **Rule 16(1) of GN No. 47 of 2017** which provides that: -

"The subsistence expenses provided under section 43(2)(c) of the Act shall be quantified to daily basic wage..."

He also cited the case of **FELICIAN RUTWAZA V. WORLD VISION TANZANIA, CIVIL APPEAL NO. 223 OF 2019** the decision of the Court of Appeal at Bukoba (Unreported) which at page 17 stated that: -

"...the issue regarding the rate of subsistence allowance pending repatriation has long been settled, that is to say, it is calculated on the daily salary of a terminated employee paid on a monthly basis."

In that respect, Mr. Mwanganyi commented that **section (43) (1)(c) of ELRA** was properly relied upon by the Arbitrator **as it was prayed by the Respondent** in CMA F. 1 and the respondent proved in his evidence that he prayed for subsistence allowance and repatriation costs.

Regarding the claim that the arbitrator erred for ordering the Respondent to be allowed to take his personal belongings from Nsoo secondary school while the same has never been proved; it was stated that the same was proved and proof lies in the evidence adduced before the CMA and the Arbitrator was right when he ordered the same. It was added that the Arbitrator also properly ordered payment to the respondent for unlawfully deductions of salary as the same was prayed by the Respondent when he adduced evidence.

In conclusion, it was Mr. Mwanganyi's opinion that this revision is devoid of any merit. He prayed for the same to be dismissed and the Award of the CMA to be upheld.

In rejoinder, Mr. Ngawiliau on the outset noted that he has not been served with all unreported case laws cited by the respondent hence denied right to access the authority and respond accordingly.

He rejoined in respect of leave and submitted to the effect that clause 8.2 of the Employment Contract (Annexture A1 of the Application), stipulates that the Employer shall determine the annual leave of the employee after consulting him. Basing on that clause, he argued that, after the Respondent had been consulted by the Applicant, he allowed him to go for leave on condition that he should not go outside Kilimanjaro region in order to be available following the ongoing forensic investigation by the auditors. That, contrary to what was agreed upon, the Respondent decided to travel to Iringa something which the Employer did not allow. This was clearly stated on the Leave Application Form which was tendered by the Respondent during the trial. It was submitted that under those circumstances, the Respondent did not go for annual leave since he went contrary to what he had agreed with his employer (the applicant herein)

The Applicant's advocate insisted that the respondent ought to prove his claim for subsistence allowance on balance of probabilities in compliance with the provisions of **section 110 and 111 of the Evidence Act** [CAP 6 R.E. 2019] and the case of **Attorney General and 2 Others v. Eligi Edward Masawe and 104 Others** (supra).

That marked the end of parties' submissions.

I have considered the submissions of the learned counsels of both parties as well as their respective affidavits and the CMA record. I am of considered opinion that the following issues are to be determined:

1. *Whether there were valid reasons for termination of*

Employment of the respondent?

2. *Whether the employer adhered to fair procedures?*
3. *To what reliefs each party may be entitled to?*

The above issues will categorically discuss all the grounds of revision as raised and submitted by the applicant.

Starting with the first issue; This covers the 2nd ground of revision as stated under paragraph 21(b)(ii) of the applicant's affidavit. The learned counsel for the applicant argued that the Arbitrator failed to appreciate the evidence in respect of reasons for termination. He stated that as per Exhibit R15 it was reported by the Committee that the respondent employed non-teaching employee which led to the loss of Tsh, 1,970,000/-and that the respondent failed to follow procedures and rules which lead to the loss of funds. He also extended the loan to himself. On the other hand, the respondent's advocate argued to the contrary. He stated that the issue of embezzlement of fund is a new fact. He also faulted the audit report for failure to call the respondent to substantiate other claims.

The law governing matters of termination is the **Employment and Labour Relations, Act,** (supra) and the **Employment and Labour Relations (Code of Good Practice Rules) 2007, GN No. 42 of 2007** (Code of Good Practice).

Section 37(2) & (4) of ELRA, the law provides that:

> *"(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

(4) In deciding whether a termination by an employer is fair, an employer, arbitrator or Labour Court shall take into account any Code of Good Practice published under section 99."

Also, **Rule 9 (3) of Code of Good Practice** (supra) provides that:

"...the burden of proof lies with the employer but it is sufficient for the employer to prove the reason on balance of probabilities....".

In the case of **Stamili M. Emmanuel V. Omega Nitro (T) Ltd, Labour Division at DSM, Revision No. 213 of 2014 LCCD 2015** at page 17, it was held that:

"I have no doubt that the intention of the legislature is to require employers to terminate employee only basing on valid reasons and not their will or whims. This is also the position of the International Labour Organization Convention (ILO) 158 of 1982 Article 4. In that spirit employers are required to examine the concept of unfair termination on basis of employee's conduct, capacity, compatibility and operational requirement before terminating employment of their employees."

The Arbitrator at page 12 of the Award when dealing with this issue gave two reasons to substantiate that the termination was unfair. He said that:

> *"...the period he has served at Nsoo Secondary School is too short to label him as such a bad headmaster. He has been in good service of respondent since 2009 at Marangu Secondary School, then at Kisomachi Secondary School where he held top position of headmaster. No any of such misconducts of misappropriating funds was ever established for all those 10 years..."*

The second reason is found at the last paragraph of page 12 which reads:

> *"In addition, there is evidence that the money in school bank account could not be withdrawn by Headmaster himself except by three (3) signatories which are the priest (Paroko), Headmaster and Chairman of the school board..."*

The last reason is found at page 13 of the Award where the Arbitrator was of considered view that the respondent was not heard in respect of the alleged loss of Tsh. 38,759,000/-.

With due respect, I do not concur with the findings of the Arbitrator on the following reasons, First, it seems that the Arbitrator scrutinized only one reason for termination of the respondent's employment. As per exhibits R15 which was admitted before the CMA, the report of Forensic Audit revealed that not only that he caused the loss; he also misused his power as a headmaster and misused school properties for personal benefit. This is found from page 12 to 15 of exhibit R15. Also, in the attachment of the said report, there are testimonies from different people one being the Project Teacher which is to the effect that the respondent used the school properties for personal gain without knowledge of the

Project teacher. These other reasons were also stated by Fr. William Ruwaichi (DW1) at page 19 when answering question No. 19 of cross examination. Also, the same reasons are reflected in Exhibit R7 which is termination letter.

Basing on these findings, I am of considered view that there were valid reasons for termination of the respondent's employment.

With due respect, I hesitate to uphold the Arbitrator's comment that the respondent worked faithfully in the previous ten years and never misappropriated funds. This comment was too general since the same cannot conclude that the respondent did not commit any misconduct. I join hands with the applicant and conclude that the reason given by the Arbitrator by concluding that in the previous years, the respondent worked faithfully and so he cannot be labelled as such a bad headmaster was unfair comment. I therefore find the first ground of revision in respect of reasons for termination to have merit.

Coming to the second issue on the procedures of termination; **Rule 13 (1) to 13 (13) of Code of Good Practice Rules** (supra) provide for the procedures to be adhered to in termination of employee's employment. In the case of **Sharifa Ahmed vs Tanzania Road Haulage 1980 Ltd, Labour Division, DSM, Revision No. 299 of 2014,** it was held that:

> *"What is important is not the application of the Code in the checklist fashion, rather to ensure that the process used adhered to basics of a fair hearing in the labour context depending on circumstances of the parties, so as to ensure that, act to terminate is not reached arbitrarily,"*

Mr. Ngawiliau for the applicant was of the view that the procedures were complied with since the respondent was called before the Disciplinary Committee but he refused to appear. Concerning the composition of Committee, it was stated that the same was proper and the choice they made was the best choice ever since the headmaster was among the senior staff in the Management. The learned counsel for the respondent argued that the procedures were not adhered to since the employer did not issue notice of 28 days as per the employment contract, second, he was terminated while on leave, he was not served with formal charge and notice of hearing and exhibit R7 was not signed by employer and that the headmaster was not senior in the management.

I am persuaded with the case of **Sharif Ahmed (supra**) that the procedures as stipulated under Rule 13 should not be used as Checklist. However, in the instant matter the respondent was summoned to appear before the Disciplinary Committee while on leave. I am of settled opinion that since the law prohibits termination of employment while on leave, then summoning the respondent while on leave was unfair on the face of it.

Regarding the allegation that the employer did not suspend the respondent pending investigation, **Rule 27(1) of GN No.42 of 2007** provides that:

> *27-(1) Where there are serious allegations of misconduct or incapacity, an employer **may** suspend an employee on full remuneration whilst the allegations are investigated and pending further action." Emphasis added*

The above provision has used the word **may** to infer that the duty imposed is not mandatory. However, basing on the circumstances of this case, suspension was necessary since there was allegation of embarrassment from respondent. (See Exhibit P11). As rightly decided by the Arbitrator at page 14 of the Award, the problems could have been avoided had the applicant suspended the respondent pending further inquiry.

Instead of suspending the respondent herein, the applicant required him to take a leave. While on leave, the respondent was terminated. This was undisputed fact. However, the learned counsel for the applicant stated that the applicant allowed the respondent to go for leave on condition that he should not go outside Kilimanjaro in order to be available when needed. I have examined the letter which permitted the respondent's leave (Exhibit P). Among other things it states that:

> *"Kwa vile bado kuna taarifa za shule utakazohitajika kushiriki kutoa majibu unaagizwa usitoke nje ya mkoa bila taarifa. Hii itasaidia bodi ya shule ikikuhitaji upatikane mapema."*

As I have already stated herein above, since the law prohibit termination while the employee is on leave, then even summoning the respondent while on leave was not justifiable. The above quoted statement from the said letter, I presume it as an ouster clause to the right to leave of the employee. This is provided for under **section 41(4)(a) of ELRA.** As a matter of reference, the provision reads:

> *"Notice of termination **shall** not be given –*
>
> *(a) during any period of leave taken under this Act;"*

The above provision has used the word ***shall,*** which suggests that the duty conferred is mandatory. I am of considered view that the intention of the legislature in the above provision is to enhance the Constitutional right to be heard and not to terminate the employee by surprise. The applicant did contravene the above provision which amount to unfair termination.

Apart from that, the applicant did not give notice to the respondent as per the Employment Contract (Exhibit P1). **Item 12 of Exhibit P1** provides for Termination of Employment. It reads that:

> *"This contract may be terminated by either party giving the other one twenty eighty (28) days' notice in writing stating the reason for termination."*

Basing on the above term of employment contract, it goes without saying that the applicant contravened the terms of employment contract. Hence, the termination was unfair since the procedures were not adhered to.

Concerning the composition of the members of Disciplinary Committee, I find the same to be questionable as rightly decided by the Arbitrator. As per **Rule 4(2) of the Employment and Labour Relations (Code of Good Practice) Rules GN No. 42 of 2007; Guidelines for Disciplinary, Incapacity and incompatibility Policy and Procedure,** the chairperson must be impartial and in appropriate circumstances a Senior Manager from a different office is recommended to serve as Chairman.

In the instant matter, most of the letters including that of leave and employment contract were signed by Dr. William Ruwaichi who was the Education Director. However, the letter which summoned the respondent

to the Disciplinary Committee was signed by one Fadhili Kimbi the headmaster of Nsoo Secondary School. In that respect, I agree with the Arbitrator's findings that the respondent being former Senior staff in the position of Headmaster it was prudent for his matter to be handled by Senior Management member.

In the circumstances, since the procedures of termination were not complied with, as I have demonstrated above, then termination of the respondent was unfair. Although there were valid reasons for terminating the respondent, the fact that the procedures were not complied with, then the termination remains unfair.

The last issue for determination is reliefs; the applicant's advocate argued that unlawful deduction of salary was not claimed. He alleged that the respondent had admitted that he was paid his terminal benefits.

With due respect to the learned counsel, he misdirected himself since as per CMA F1 the respondent herein claimed for compensation for unfair termination which was awarded by the Arbitrator, payment of gratuity for 8 remaining months, breach of employment contract, the amount deducted from his salary, subsistence allowance, one month salary in lieu of notice, annual leave, transport allowance, responsibility allowance, certificate of service and other reliefs which the CMA deem fit to grant. Looking at the list of the claims in the CMA F1 vis a vis what was awarded, it may be noted that no item was awarded without being claimed.

Regarding the allegation that the respondent admitted to have received his benefits at page 73 during cross examination, I have examined the referred proceeding. This being a labour dispute, I hesitate to rely on the reply of the respondent at page 73. It is trite law that in labour disputes

the onus of proof lies on the employer. Having in mind the fact that payment of terminal benefits is a serious issue, the employer should have produced evidence of payment of the alleged terminal benefits. The respondent had listed terminal benefits among his claims; thus, the applicant should have annexed documentary evidence in his reply to substantiate that the respondent had been paid. Otherwise, the reply at page 73 is vague and insufficient to establish that the respondent was paid his terminal benefits. It reads:

"47. Did you get terminal benefits/ NSSF?

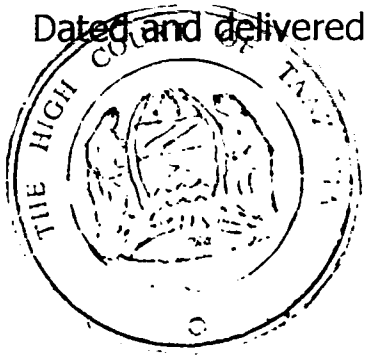
- *Yes"*

Therefore, since the respondent was unfairly terminated, I am of considered view that he was properly awarded as required under section **40(1), 43 and 44 of the ELRA**. Thus, I find no basis to fault the Arbitrator's findings.

In the upshot, I dismiss this application and uphold the CMA award. Since this is a labour dispute, no order as to the costs.

It is so ordered.

Dated and delivered at Moshi this 27th day of May, 2022.



S. H. SIMFUKWE

JUDGE

27/5/2022