THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT ARUSHA

LABOUR APPLICATION No. 15 OF 2020

(From the Decision and the Award of the CMA at Arusha Labour Dispute No. CMA/ARS/48/2016)

ARUSHA URBAN WATER SUPPLY AND SANITATION AUTHORITY..... APPLICANT

VERSUS

HAMZA MUSHI.....1ST RESPONDENT

CHARLES KIHIYO.....2ND RESPONDENT

NELIGWA RAYMOND NKYENDANON.....3RD RESPONDENT

SEMEKA LUBANGA KALULU.....4TH RESPONDENT

PRISCUSA MICHAEL MASAWE.....5TH RESPONDENT

OBEIDI SAMAMBA MKAMA.....6TH RESPONDENT

JACKSON THOBIAS MALLE .....7TH RESPONDENT

JAMES LOMAYAN MOLLEL .....8TH RESPONDENT

JUDGMENT

18th August & 27th October, 2022

TIGANGA, J.

The applicant, Arusha Urban Water Supply and Sanitation Authority herein the applicant, was dissatisfied with the award given by the Commission for Mediation and Arbitration for Arusha at Arusha with common acronyms "CMA" to be used throughout this judgment. The

award was in favour of the respondents. The CMA condemned the applicant to have procedural and substantive unfairly terminated the respondents.

This application was through chamber summons lodged in court under Sections 91(1)(a) and (b), 91(2)(a), (b) and (c) of the Employment and Labour Relations Act, No. 2 of 2010 and Rules 24(1),(2)(a)(b)(c)(d)(e) and (f), (3)(a)(b)(c) and (d), 28(a)(b)(c) and 9(e) of the Labour Courts Rules, GN No. 106 of 2007.

The applicant seeks this Court to call for the record of the CMA and examine the same in order to satisfy itself on the legality, correctness and propriety of the award and thereafter, revise and quash the award emanated therefrom.

Through the notice of opposition this application was opposed by the respondents via joint counter affidavit sworn by Mr. Salvatory Mosha, Learned Advocate who represented the respondents before the CMA and this Court. The affidavit by the applicant was sworn by Kazimili Kanyanza, the Human Resource Manager of the applicant dealing with administrative and employees relations affairs.

Before indulging to the deliberations and determination of the matter, it is my conviction that, I start with summarising though briefly, the factual background which gave rise to the disputes between the parties.

At different times, the respondents were employed by the applicant in various capacities. They all served and worked for distinct period as hereunder:

Hamza Mushi (1st respondent) was employed by the applicant on 1st December, 1999 and at the time of termination was serving as a Senior Planning and Construction Artisan I and he was terminated on 14th December 2015. Charles Kihiyo (2nd respondent) was employed on 1st December 2010 and at the time of termination he was serving as Customer Billing Technician II and Technical, he was terminated on 14th December, 2015. Neligwa Raymond Nkyendanoni (3rd respondent) was employed on 01st December, 1999 and at the time of termination he was working as the Customer Service Manager and he was terminated on 11th December, 2015.

Others are Semeka Lubanga Kalulu (4th respondent) who was employed on 1st November, 2003 and at the time of termination he was serving as the Information Communication and Technology Officer and

he was terminated on 11th December, 2015. Priscusa Michael Masawe (5th respondent) at the time of termination, he was employed as the Credit and Control Officer and he was terminated on 14th December, 2015. Obed Samamba Mkama (6th respondent) was employed on 15th February 1986 and at the time of termination he was working as Credit Control Assistant. Jackson Thobias Malle (7th respondent) was employed on 01st December, 1991 as the Principal Customer Billing Artisan II and he was terminated on 14th December 2015. The last is James Lomayan Mollel (8th respondent) who was employed on 01st January 2003 and at the time of termination he was serving as an ICT Technician II and he was terminated on 14th December, 2015.

These respondents were accused of various misconducts. Hamza Mushi and James Mollel (Dishonesty in the performance of duty contrary to revised Staff Regulations (AUWSA)-2013 item 7(a) of the Disciplinary and Code procedure. Obedi Samamba Mkama, Semaka Lubanga Kalulu, Charles Kihiyo and Jackson Thobias Malle (Dishonesty in the performance of duty contrary to revised Staff Regulations (AUWSA)-2013 item 7(a) of the Disciplinary and Code procedure and Substantial Negligence in the performance of the duties contrary to Revised Staff Regulations (AUWSA)-2013 item No. 3(g) of the Disciplinary Code and

Procedure. Priscusa Michael Masawe was accused of four counts all being of Substantial Negligence on the performance of duties contrary to Revised Staff Regulations (AUWSA)-2013 item 3(g) of the Disciplinary Code and Procedure. Neligwa Raymond Nkyendanoni was charged with three counts all being of Substantial Negligence on the performance of duties contrary to Revised Staff Regulations (AUWSA)-2013 item 3(g) of the Disciplinary Code and Procedure.

The alleged disciplinary hearing committee found them all guilty of gross misconducts and therefore, the were terminated. The respondents as said above, considered the termination being unfair in both procedure and substance. The matter was referred to the CMA for mediation which failed and therefore proceeded to arbitration. After full trial, the CMA found the applicant in violation of procedure and also that the termination was substantially unfair. In its award, the CMA ordered the applicant to pay the respondents terminal benefits and others were reinstated coupled with other benefit payments. Hence, this application.

In this application, the applicant was represented by Mr. Mkama Musalama, learned State Attorney, whereas Mr. Salvatory Mosha, Learned Advocate represented the respondents.

In his submission in chief, Mr. Musalama adopted the contents of the affidavit sworn by Kazimil Kanyanza, a Human Resource Manager and he had three area of faults. One, that, during termination there was no pending criminal case as was ruled by the CMA at pages 47-51 of the impugned award. That, the respondents were arraigned in court of law after termination as it was also quoted at page 35 of the challenged typed award. That, Section 37(5) of the Employment and Labour Relations Act, [Cap. 366 R.E 2019] prevents the employer to take any action in form of penalty, termination, or dismissal against the employee where there is a case pending before the court of law and not during the report being made to police or pending investigation. Also, that, the provision does not prevent disciplinary action first followed by criminal action.

Mr. Musalama agues that, there is no evidence on record showing that, during disciplinary proceedings there was any criminal matters before any court of law but only that the matter was reported to police and the investigation was going on. That, criminal proceedings are commenced by the charge sheet or indictment filed in court charging the accused person. Bolstering his argument, Mr. Musalama cited the case of **Trustees of Tanzania National Parks versus Majuto O.**

Chikawe and George S. Saina, Labour Revision No. 15 of 2020, HC Labour Division at Mwanza (unreported). Also, the case of **Peter Maghali versus Super Meals Limited**, Civil Appeal No. 279 of 2019 CAT at DSM (unreported).

Another fault pointed out by Mr. Musalama in the CMA award is that, the chairperson Mary Ngonyani Ntula (DW1) who was disqualified as being incompetent to chair the disciplinary hearing committee by the CMA for not being senior to all respondents, Mr. Musalama argued that she was senior to all respondents because she has served as Human Resource and Administration Manager for thirty years while, all respondents were less than such period of serving to the applicant. That a person can be senior on the reasons of being appointed first, confirmed to work first and or promoted to a higher grade. To buttress the argument, he cited Order D. 48, 49 and 50 of the Public Service Standing Orders, 2019 and clause 2.4 of the applicant's Regulations.

The last fault identified by Mr. Musalama in the CMA award is the fact that, the disciplinary hearing committee was convened by the Director instead of the Board. That, Exhibit P5 and pages 44 and 45 of the typed challenged award, the Arbitrator justified that it was the Board which appointed the disciplinary hearing committee and not the Director

as held by the Arbitrator. That, the said committee was appointed by the Director on behalf of the Board of directors. Thus, due to that submission, the disciplinary hearing committee was competent and impartial for being appointed by the Board of Directors as required by the law, said Mr. Musalama.

In reply, Mr. Mosha opposed all of the three contentions advanced by Mr. Musalama. However, before going to the substance of the matter, he raised a preliminary objection that, the application is incompetent for violating rule 34(1) of the Employment and Labour Relations (General) Regulations, GN No. 47 of 2017. That, the application was instituted without first lodging the notice of an intention to seek revision of award at the CMA which made the Award. That, this is contrary to the requirement of the law and therefore it must be dismissed.

Counteracting the first fault Mr. Mosha maintained his position that, to hold that the termination was both, procedural and substantive unfair as it was done by the CMA was legal and justifiable because there were criminal charges pending. That, there were criminal allegations against the respondents and therefore, the applicant was not mandated

to take disciplinary action against the respondents as she did because, it is against the rule of double jeopardy.

Mr. Mosha went on arguing that, the applicant terminated the employment of the respondents without following proper procedure and without valid reasons, the fact which the applicant does not dispute. That, the applicant had no sufficient evidence to prove the alleged misconduct against the respondents.

In rejoinder, Mr. Musalama reiterated his position in submission in chief. However, he went on opposing the preliminary objection raised by Mr. Mosha that, at the time when this Court ordered for the disposal of the application via written submission on 16th June, 2022 there was no pending preliminary objection in Court. That, it is a trite law that preliminary objections should be raised at the earliest stage of the proceedings. That the act of the respondents' counsel raising the objection at hearing stage without order of the court is bad in law and unmaintainable. To strengthen the argument, the case of **Betam Communications Limited versus China International Telecommunications Construction Corporation and Another**, Misc. Civil Application No. 511 of 511 of 2019 HC at DSM (unreported).

Alternatively, Mr. Musalama contended that, the application was competently filed because it was filed under section 91 of the Employment and Labour Relations Act and rules 24 and 28 of the Labour Court Rules GN No. 106 of 2007. That, the application can be considered incompetent when filed without considering the above cited provision of the law and not regulation 34(1) as argued by Mr. Mosha.

Mr. Musalama went on saying that, labour courts are courts of law and equity aiming at expediating matters without due regard to technicalities as provided for under rule 3(1) of the Labour Courts Rules, 2007. To strengthen the position, he referred this Court to the case of **Tanzania Revenue Authority versus Mulamuzi Byabusha**, Revision No. 312 of 2021 HC Labour Division at DSM where it was held that failure to file notice under regulation 34(1) of the said Rules is not fatal, he argued.

However, in the notice of preliminary objections filed in court on 27th July 2022, it contained two preliminary objections apart from the above analysed, the other being the revision to have been time barred. For reasons best known to the respondents' counsel he did not argue this preliminary objection and therefore, I consider it as being constructively abandoned.

After seeing and passing through the submissions of both counsels representing the parties, it is my considered view that, the point for determination at this juncture is whether this application is competent. If the answer thereat is in affirmative, then the following issue calling for consideration and determination of this Court will be whether, the application is maintainable.

I will start with the first issue which is basically on determination of the raised preliminary objection. This is in line with the requirement that, preliminary objection should be determined first before going to the next step of the application. This principle was underlined by the Court of Appeal in the case of **Khaji Abubakar Athuman versus Daud Lyakugile TA DC Aluminium and Another,** Civil Appeal No. 86 of 2018 CAT at Mwanza (Unreported) where referred to the case of **Thabit Ramadhan Maziku and Kisuku Salum Kaptula v. Amina Khamis Tyela and Mrajis wa Nyaraka Zanzibar,** Civil Appeal No. 98 of 2011 where it was held that:

> *"...the failure by the learned magistrate with extended jurisdiction to deliver the ruling on the preliminary objection which he had scheduled to deliver on 16/9/2009 constituted a colossal procedural flaw that went to the root of the trial. It matters not whether it was inadvertent or not. The trial court was duty bound*

to dispose it fully, by pronouncement of the Ruling before dealing with the merits of the suit. This it did not do. The result is to render all subsequent proceedings a nullity."

In this preliminary objection, Mr. Musalama contended that it was lately raised and therefore it should not be entertained. That, it is only the preliminary objection on jurisdiction can be raised at any stage of the proceedings. It is true that, the objection was raised during hearing, when Mr. Mosha was replying the submission in chief. Now, what is a position of law in this contention?

Before going to the merit of the application, I find it apposite to say a word on the propriety of the preliminary objection raised during the hearing. Looking at the way Mr. Mosha has raised the said preliminary objection, he meant that failure to comply with the requirement under rule 34(1) of the employment and Labour Relations (General) Regulation GN. No. 47 of 2017 and the CMA F.10 takes away the jurisdiction of this court to entertain revision which is filed with that non compliance. Therefore, the preliminary objection so raised is purely a point of law, which challenged the jurisdiction of the court. In law a preliminary objection on point of law particularly relating to jurisdiction can be raised at any time of the proceedings. That said, it becomes

instructive to find that the objection is competently raised and must be determined.

Coming to the determination of the preliminary objection, for easy of reference and good remembrance, the provision of rule 34(1) of the Employment and Labour Relations (General) Regulations, GN No. 47 of 2017 and the CMA F No. 10 made out there are hereby reproduced respectively:

> *34.-(1) The forms set out in the Third Schedule to these Regulations shall be used in all matters to which they refer.*

And the form made under the Third Schedule to GN No. 47 of 2017 is in the following format:

CMA F.10

NOTICE OF INTENTION TO SEEK FOR REVISION OF AWARD
(Made under Regulation 34(1))

LABOUR DISPUTE No: .....
BETWEEN
..... **APPLICANT AND**
..... **RESPONDENT**

TAKE NOTICE that the Applicant/Respondent being dissatisfied with the Commission's award in the above mentioned Labour Dispute issued on ..... by Honourable ..... DO HEREBY intend to seek Revision/Review to the High Court of Tanzania (Labour Division) against the said award.

Please forward as expeditiously as possible certified copies of proceedings and award to the:
High Court of Tanzania, (Labour Division)
..... (Place).
Dated at ..... this ..... day of .....

.....
Applicant

Presented for filing this ..... day of ..... (year)

.....
Registry Clerk

Copy:
Respondent

I am aware of the decision given by my brother, his Lordship Rwizile, J. in the case of **Tanzania Revenue Authority versus Mulamuzi Byabusha**, Revision No. 312 of 2021 (supra) in regard to this contention who said, not following such provision of the law is not fatal as doing otherwise will be embracing technicalities contrary to Article 107A of the Constitution of the United republic of Tanzania, 1977 as amended from time to time.

Currently, at the level of this court there are two divided opinions regarding the applicability of the provision of rule 34(1) of the said GN No. 47 of 2017. Some of the Judges are of the view and have been holding that, non compliance of the provision by not filing the Notice is fatal to the revision filed to the High Court without giving the notice under the above referred to rule, others are holding that, the non compliance is not fatal.

While the former is basing on the arguments that the rules is couched in a mandatory term by the use of the word "shall". One of that case being of **Uniliver Tanzania Ltd vs. Paul Basondole,** Labour Revision No. 14 of 2020 (unreported), in the High Court Land Division.

The later group who find that it is not fatal are of the view that, Labour Court is a court of law and equity, in their view, interpreting the non compliance of the provision to be fatal is to embrace technicalities contrary to the requirement of Article 107A of the Constitution of the United Republic of Tanzania and the famous principle of overriding objective under section 3A and 3B of the Civil Procedure Code [Cap 33 R.E 2019]. Some of these decisions are **Tanzania Revenue Authority vrs Mulamuzi Byabusha**, (supra) and **Joseph Simon Mwandambo vrs Tata Africa Holdings (T) Ltd, Labour** Revision No. 21 of 202, HC-Labour Division, Arusha. Of these two positions, for reasons to be soon explained, I do subscribe to the later position. In so doing I would like to borrow the pronouncement in the case of **Joseph Simon Mwandambo vrs Tata Africa Holdings (T) Ltd, (supra)** in which it was held that;

> *"Looking at the phraseology of the form (CMA F.10) itself, the following can be gathered from it;*
>
> *(i) That the form is not a Motional document which commences the Revisional proceedings, but a "Notice of intention to seek for Revision of an award.*
>
> *(ii) The Notice informs the CMA of the dissatisfaction of the party giving it, and an intention of that*

party to challenge the award to the Labour Court.

(iii) The Notice poses a request to the CMA to facilitate the preparation and transmission of the record pertaining the award sought to be revised by the Labour Court.

(iv) The Notice is contained in the CMA Form 10, a form which is intended to be used in the CMA, not in the Labour Court.

(v) CMA Form No. 10 is one of the CMA forms created by the Employment and Labour Relations (General) Regulation GN. No. 47 of 2007 and by its nomenclature, that is "CMA Forms" expressly or by necessary implication were intended to be used in the CMA.

(vi) There is nothing in the Notice itself and, or in the provision under which the form was made, which suggests that the form needs to be transmitted together with the record to the High Court Labour Division. What is vivid is that, the Notice is directed to the CMA after the proceedings before it have been closed. That may mean that, it may be intended to be used administratively because at material time the proceedings are over.

(vii) Last but not least, not in the notice itself nor in the law where it is provided that, not giving of the Notice vitiates the application for revision.

From the above exposition, a conclusion may be made that, a Notice under Regulation 34 (1) as contained in the CMA Form No. 10 is not a motional document without which the proceedings filed are vitiated. It is an informative Notice informing the CMA to prepare and transmit the record to the Labour Court because the applicant intends to file revision against the award."

Following the above position to the letter, I find that the point of objection raised by the applicant has no merits, it is hereby found as such.

Now, back to the merit of the revision, as earlier on pointed out, Mr. Mkama Msalama is faulting the award passed by the CMA on three grounds namely **one,** that, during termination there was no pending criminal case as was ruled by the CMA at pages 47-51 of the impugned award. That, the respondents were arraigned in court of law after termination as it was also quoted at page 35 of the challenged typed award. That, Section 37(5) of the Employment and Labour Relations Act, [Cap. 366 R.E 2019] prevents the employer to take any action in form of penalty, termination, or dismissal against the employee where there is a case pending before the court of law and not during the report being

made to police or pending investigation. Also, that, the provision does not prevent disciplinary action first followed by criminal action.

Mr. Musalama agues that, there is no evidence on record showing that, during disciplinary proceedings there was any criminal matters before any court of law but only that the matter was reported to police and the investigation was going on. That, criminal proceedings are commenced by the charge sheet or indictment filed in court charging the accused person. Bolstering his argument, Mr. Musalama cited the case of **Trustees of Tanzania National Parks versus Majuto O. Chikawe and George S. Saina**, Labour Revision No. 15 of 2020, HC Labour Division at Mwanza (unreported). Also, the case of **Peter Maghali versus Super Meals Limited**, Civil Appeal No. 279 of 2019 CAT at DSM (unreported).

Counteracting the first fault Mr. Mosha, maintained his position that, to hold that the termination was both, procedural and substantive unfair as it was done by the CMA was legal and justifiable because there were criminal charges pending. That, there were criminal allegations against the respondents and therefore, the applicant was not mandated to take disciplinary action against the respondents as she did because, it is against the rule of double jeopardy.

This ground is based on the provision of section 37(5) of the Employment and Labour Relation Act, (supra) which provides;

> *"No disciplinary action in form of penalty, termination or dismissal shall lie upon an employee who has been charged with a criminal offence which is substantially the same until final determination by the Court and any appeal thereto."*

Reading between lines, the above quoted provision prohibit the employer to take action in form of **penalty, termination or dismissal** where there is a pending criminal proceedings against the employee on the offence which is substantially the same until final determination by the Court of the case and of the appeal arising therefrom. This provision was a subject of the discussion in the cases of **Trustees of Tanzania National Parks versus Majuto O. Chikawe and George S. Saina,** Labour Revision No. 15 of 2020, HC Labour Division at Mwanza and **Peter Maghali versus Super Meals Limited,** Civil Appeal No. 279 of 2019 CAT at DSM (both unreported). In the two cases as rightly submitted by Mr. Msalama, this provision applies only to the employee who is charged before the competent Court to try the offence. It does not encompass the situation only where the mere report is made to Police station.

From the submissions in reply, the counsel for the respondent did not dispute the fact that at the time when the termination occurred the respondents had not been charged in court, but a report had already been made to the police regarding the alleged criminal offences. Also the record does not show that there was any case pending before the court at the time when the respondents were terminated. That being the case I find merits in the ground by Mr. Msalama that the CMA was not justified to fault the termination of the respondents basing on the allegations of the existing case which in fact, there was no evidence to prove that there was a case pending before the Court.

Another fault pointed out by Mr. Musalama in the CMA award is that, the chairperson Mary Ngonyani Ntula (DW1) who was disqualified as being incompetent to chair the disciplinary hearing committee by the CMA for being not senior to all respondents, Mr. Musalama argued that she was senior to all respondents because she has served as Human Resource and Administration Manager for thirty years while, all respondents were less than such period of serving to the applicant. That a person can be senior on the reasons of being appointed first, confirmed to work first and or promoted to a higher grade. To buttress

the argument, he cited Order D. 48, 49 and 50 of the Public Service Standing Orders, 2019 and clause 2.4 of the applicant's Regulations.

Counteracting that ground, the respondents through Mr. Mosha, learned counsel, submitted that, there was no evidence led by the applicant to prove that it was the Board which appointed the disciplinary hearing committee, neither was it proved that the chairperson and the members of the Committee, were senior managers to preside over the matters involving their fellow managers. In his view, that was supposed to be reflected in evidence but not merely by words from the bar. In his view, without evidence, the committee was formed in gross violation of the law.

He said the Standing order cited by Mr. Msalama does not apply because the applicant has its staffs' regulation governing disciplinary matters. While deliberating on the issue, I find it apposite to remind that, in matters relating to unfair tarnation, the burden of proof that the termination of employees was fair for both procedurally and substantively lies on the shoulder of the employers. See Section 39 of the Employment and Labour Relation Act (supra). It is also trite law, that procedures are hand maid of justice as any thing done without following the prescribed procedures then becomes fatal. While

deliberating on this point, I have had time to pass through the records of the CMA, I did not find where the evidence has clearly elaborated the procedure used to appoint and constitute the disciplinary hearing. It has also not been said and proved by evidence that, the members of the disciplinary hearing are senior managers for them to be able to preside over the disciplinary hearing of their fellow managers. I do agree with Mr. Musalama that, there are various way of determining the seniority, some of which are but not limited to the reasons of being appointed first, confirmed to work first and or promoted to a higher grade first. However, it was the duty of the employer to tell the CMA how did the chair acquire seniority other than her fellow manager she was presiding over their disciplinary matters, that has not been shown, therefore it brings in the question of the competence of the said committee.

Even if I am made to believe basing on the argument by Mr. Musalama that the disciplinary hearing committee was convened by the Director on behalf of the Board basing on Exhibit P5 and pages 44 and 45 of the typed challenged award, yet it was inappropriate for the Arbitrator to hold that, it was the Board which appointed the disciplinary hearing committee, not the Director. It should be noted that the award by the CMA did not only base on the procedural aspect, it also bases on

substantive reasons as reflected at pages 51 to 72 of the award when the arbitrator was discussing the fairness of reasons for termination of each respondent. It is unfortunately that Mr. Musalama did not direct his argument, on that area. The arbitrator found that the finding of the committee was based on circumstantial evidence and assumption. That being the case, it is worth reminding that, the matter of termination of employment is regulated by section 37 of the Employment and Labour Relations Act (supra). For easy reference the same is hereby reproduced hereunder.

> *"(1) It shall be unlawful for an employer to terminate the employment of an employee unfairly.*
>
> *(2) A termination of employment by an employer is unfair if the employer fails to prove-*
>
> *(a) that the reason for the termination is valid;*
>
> *(b) that the reason is a fair reason if it-*
>
> *(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.*
>
> *(3) N/A*
>
> *(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.***

(5) N/A" [emphasis supplied]

The Code of Good Practice referred to in subsection 4 of section 37 is the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007 and the relevant provision which was also relied upon by the Arbitrator is rule 12. -(1) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007 which provides that;

"Any employer, arbitrator or judge who is required to decide as to whether termination for misconduct is unfair shall consider-

(a) whether or not the employee contravened a rule or standard regulating conduct relating to employment;

(b) if the rule or standard was contravened, whether or not

(i) it is reasonable;

(ii) it is clear and unambiguous;

(iii) the employee was aware of it, or could reasonably be expected to have been aware of it;

(iv) it has been consistently applied by the employer; and

(v) termination is an appropriate sanction for contravening it.

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

(3) The acts which may justify termination are;

(a) gross dishonesty;

(b) willful damage to property;

(c) willful endangering the safety of others;

(d) gross negligence;

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

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

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

(b) ***the circumstances of the employee such as the employee's employment record, length of service, previous disciplinary record and personal circumstances****.*

(5) The employer shall apply the sanction of termination consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who commit same misconduct." [Emphasis supplied]

All these elements shown above must have been proved by the employer in terms of section 39 of the Act which was not done before the CMA. It is also evident that, Mr. Musalama, dwelt much on the procedural part of the award but left the substantive reasons based on by the Arbitrator. That said, I find no base upon which this Court can revise the award. The revision is not at all merited. It is dismissed for the reasons given and thereby upholding the award as passed by the CMA.

It is accordingly ordered

DATED at **ARUSHA** this 31st day of October 2022

J.C TIGANGA

JUDGE