IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT MWANZA

LABOUR REVISION No. 14 OF 2021

(Originating from the Award of the Commission for Mediation and Arbitration (CMA) at Geita, in Labour Dispute No. CMA/GTA/54/2019, Hon. Mayale, D, Arbitrator dated 05 March, 2021)

BETWEEN

GEITA GOLD MINING LIMITED..... APPLICANT

VERSUS

TENGA B. TENGA..... RESPONDENT

JUDGMENT

18th November, 2021 & 28th March 2022

TIGANGA, J

This judgment is in respect of the application for revision namely Labour Revision No.14 of 2021 filed by the applicant through a notice of application and chamber summons which were supported by an affidavit sworn by Elizabeth Karua, who introduced herself as the Legal Counsel employed by the applicant dully authorized by the management of the applicant to swear this affidavit in support of this application but who is also conversant with the facts of this case. I start by tendering my apology to the parties, because this judgment was supposed it be delivered long a

go but since I was busy in a criminal session out of station which took more than four months I could not compose it in time. Having so tendered my apology I hope it has been received and accepted and parties have forgiven me for that delay.

Now back to the business, the applicant also filed the Notice of Representation in terms of section 56(c) of the Labour Institutions Act, No.07 of 2004 and Rule 43(1)(a)(b) of the Labour Court Rules, 2007 G.N No. 106 of 2007 which appointed Silwani Galati Mwantembe, Marina Mashimba and George Mwaisondola all of Galati Law Chambers, Advocates, as Advocates and representative of the applicant in this matter.

The application was preferred under section 91(1)(a)(2)(a)(b)(c); and 94(1)(b)(i) of the Employment and Labour Relations Act, No.6 of 2004 as amended by section 14(b) of the Written Laws Miscellaneous Amendment Act No. 3 of 2010 and Rule 24(1),(2),(a),(b),(c),(d),(e),(f); 24(3),(a),(b),(c),(d) & Rule 28 (1) (c), (d) and (e) of the Labour Court Rules, 2007 GN. No. 106 of 2007. The applicant herein calls upon this court to grant the following orders;

1. That the Court be pleased to revise and set aside the Arbitration award issued by the Commission for Mediation and Arbitration at

Geita, Hon. Salehe, B, Arbitrator, dated 05th March 2021 in Labour Dispute No. CMA/GTA/54/2019.

2. Any other relief and/or further orders the Court may deem just to grant in the circumstances of this application.

Briefly, the background of this dispute as reflected in the record and affidavit sworn in support of the application is that the applicant is a limited liability company registered in Tanzania for conducting mining activities, the respondent is a natural person who was employed by the applicant as a Public Relations and Communication Manager until on 12th September 2019 when he was terminated after he was found guilty for breaching the respondent's Disciplinary Code of Conduct.

Aggrieved by the decision of the disciplinary committee which terminated his employment, the respondent contested the termination by referring the dispute to the CMA in Labour Dispute No. CMA/GTA/54/2019 which was decided in the favour of the respondent on the ground that, the respondent was unfairly terminated both substantively and procedurally, as such the CMA ordered the respondent to be reinstated within 21 days from the date of delivery of the award.

According to the deponent, to the best of her knowledge and understanding the termination of the respondent was based on the fair reasons and adopted a fair procedure and the respondent was paid all his entitlements after his termination.

It is on that ground, the applicant has filed the instant application seeking for the revision order to set aside the arbitrator's award on the ground that, there are errors material to the merits of the case which occasioned injustice to the applicant and that, the Arbitrator in the exercise of her jurisdiction acted illegally.

The applicant proposed the following legal issues that arise from the facts.

i) Whether the reasons for terminating the respondent's employment were not valid hence was substantively unfair?

ii) Whether the termination of the respondent's employment was not procedurally fair?

The application was opposed by the respondent by filing the Notice of Opposition drawn and filed by Mr. Erick Katemi, Advocate, the counter affidavit which was sworn by the respondent, and the Notice of

Representation introducing one Benjamin Daudi Dotto, a National Organizer TAMICO Mines sector as the representative. In the counter affidavit, the respondent conceded to have been employed by the applicant in the capacity of Public Relations and Communication Manager and to have been terminated on the date mentioned above. He insisted that the termination of his employment was substantively and procedurally unfair; therefore it was right for the Arbitrator to issue an award as requested. The rest of the fact was disputed.

Together with the above documents filed by the respondent, he also filed a notice of preliminary objection with four points as follows;

a) The applicant has failed to move the court therefore the court has no jurisdiction to entertain and decide the application.
b) That the application is incompetent for wrong citation and improper citation of the laws.
c) The affidavit of the applicant is defective for failure to comply with the provision of Rule 24(3)(a) of the Labour Court Rules, GN. No. 106 of 2007
d) The verification clause is defective due to the fact that, it is not dated by the applicant.

After the objection was filed, and an order to argue the same was made, the respondent engaged Mr. Rahim Mbwambo, Advocate, who upon

reflection realized that the raised preliminary objections are devoid of substance. He on that ground informed the court to that effect and consequently withdrew the said preliminary objections and asked the court to go to the merits of the application. Following that prayer, the court marked the objections withdrawn as prayed and ordered the hearing of the application on merit.

With leave of the court and consent of parties, the application was argued by written submissions. Parties filed their respective submissions on time as scheduled. For purposes of brevity and making this decision unnecessarily long, I will go straight to the submissions made and filed by the parties in respect of each ground of revision.

Though parties have not in their submissions said much about the background of the disputes, I find it compelling to point out albeit briefly, the facts which gave rise to the dispute at hand. As earlier on pointed out, the applicant employed the respondent as a Public Relations and Communication Manager. During his employment the respondent was accused of breach of code of conduct of the employer. In the accusation, it was alleged that he did so by his failure to comply with the directives of his employer, by being dishonest, committing forgery, abuse and misuse of

position, failure to disclose engagement in business activity that compete or conflict the company interest within the employer, failure to disclose interest which leads to serious breach of rules.

After full hearing of both parties by the disciplinary hearing committee, on 15th August 2019, the respondent was found guilty of the charges and had his employment terminated on that base. Dissatisfied by the decision of the Disciplinary Hearing Committee, he appealed to the top management of the applicant, the appeal was however dismissed for want of merits.

After termination, the respondent was paid the following entitlements namely, salary, accrued leave of 48 days, and repatriation expenses. However, it is on record that, the repatriation expenses was paid mistakenly because the respondent was employed in Dar es Salaam and his duty station was in Dar es Salaam therefore he was not supposed to be paid repatriation expenses. It is also on record that, the respondent was not entitled to severance allowance because he was terminated due to misconduct.

The alleged misconduct was discovered following the review which was conducted by DW2 which among others reviewed conflict of interest of

the respondent in the applicants business. The review came with the findings that, the respondent had conflict of interest but did not disclose or declare such interest as required Code 5.3 of exhibit D2 which is the Policy on Conflict of Interest.

In the submissions in chief, the applicant raised two main issues for determination, that is;

i. Whether the reasons for terminating the respondent's employment were not valid, hence the termination was substantively unfair?

ii. Whether the termination of the respondent's employment was not procedurally fair?

Submitting in support of the first issue, the counsel for the applicant submitted that, the applicant's witnesses both in the disciplinary hearing and before the CMA proved all six charges laid against the respondent. It was the submissions for the applicant that, the evidence as contained in the document titled "affidavit" gives the details of the investigation of the respondent's case together with attachments which included the email correspondence, procurement documents and documents printed from the

internet that, the documents which were collectively tendered as exhibit D7 the relevant page being pages 43 to page 231 inclusive.

It was submitted that, the applicant breached clause 12.11.1, 12.11.2 and 12.3.5 of the policy as he did not declare any conflict of interest when he recommended two companies that is **Aggreys & Clifford** and **Blueink group** to participate in the tender for procuring the communication company to render communication related service to the applicant. Although he recommended the two companies on 03rd April 2018, but when he filled in the Conflict of interest form on 18th April 2018, he did not declare conflict of interest that the Chief Executive Officer of **Aggrey & Clifford** one **Rashid Tenga** was his Cousin. It was also submitted that, even in the declaration made on that date, he did not declare or disclose the relationship he had with **Rashid Tenga,** but he simply said he might have the conflict of interest. It was submitted that it was after he had involved himself in the tender process when he declared during the period covering 03rd April 2021 to 17th April 2021.

The counsel informed the Court that, the respondent came to disclose and declare the conflict of interest in a 3rd declaration which was

made on 14th February 2019 when he mentioned **Aggrey & Clifford** and **Rashid Tenga**.

According to counsel for the appellant, the fact that no declaration was made up to 17th July 2018 was never disputed by the respondent. His only defence was that, he was unsure whether Rashid Tenga fell within the definition of the people covered under the conflict of interest policy (Exhibit D2).

According to the counsel the search also revealed that, the same **Rashid Tenga** is also linked with the company called **Agnet Group** which is a holding company with the companies associated with it being **Aggrey & Clifford** as well as **Blueink.** He further submitted that further search revealed that, **Mdewa Tenga** is mentioned to be a Media Director of **Aggrey & Clifford** and is also mentioned to be the Chief Media Investment Officer of **Agnet Group**, and that though he did not clarify how was the respondent related with **Mdewa Tenga**, but he admitted to be related with him. Though he knew the relationship he had with **Mdewa Tenga** and later **Blueink**, he did not declare his conflict of interest contrary to clauses 12.11.1, 12.11.2, and 12.3.5 of the applicant's Disciplinary Policy and Procedure.

According to him, the procedure requires that, whenever the conflict of interest situation whether actual or perceived arises, it is compulsory for employees who are managers to declare the same immediately. The circumstance which may lead to the conflict of interest includes where there is a family relationship between an employee and a supplier or a potential supplier to the GGM.

The counsel informed the Court that, under clause 12.11.2 failure to declare or disclose conflict of interests is a disciplinary offence which upon proof of its commission attracts the penalty of termination of employment.

The counsel complained further that, in its award, the CMA ignored the evidence tendered as well as the closing submission at page 40 and held that, the respondent declared the conflict of interest to his employer which is not true, the findings which needs to be reversed by this court.

With regard to the breach of clause 12.2.2, with the heading of "**refusal/intentional disobeying of a reasonable and lawful instruction given by the management**," it was submitted that, following the declaration made on 17th April 2018, the respondent was instructed by his immediate manager Mr. Simon Shayo who is the Vice President Sustainability to avoid taking part in any discussion, negotiation,

and decision making in issues related the discussed conflict of interest, but in total disregard of the instructions the respondent got involved in a tender process once again, by signing the technical the final amended executive summary approving **Blueink** to be engaged by applicant as the service provider. However as the initial scope and price schedule did not match, it was decided not to award the tender.

As if not enough, even in 2019 when the tender process started afresh by the respondent own initiation to the Supply Chain department, he involved himself in the negotiation when on 14th February 2019, he recommended the exclusion Coso campany which seemed to be most competitive, thereby interfered with the procurement process by writing to the respective department that, Coso pricing was not realistic. However, the Supply Chain Manager refused to exclude Coso on a mere respondent's assumption.

Further more it was submitted that even in the conflict of interest form of 14th February 2019, the respondent said that, he did not intend to be part of the process in the decision making. He once again was instructed by his immediate Manager Mr. Simon Shayo but despite that instruction, he on 01st March 2019 involved himself in the tender process

via his email to the Supply Chain department that Coso should be omitted based on the assessment of the prices which were too low.

According to DW2 the respondent's involvement in the tender process did not just end there, but on 04th April 2019 he approved the final executive summary something which made him to be part of the tender award decision making. However the tender was not awarded to Coso, as according to DW2, the respondent being the end user had the power not to award the tender, which he did.

He submitted that, the fact that the respondent in his evidence admitted involving himself in the tender processes, but persistently claimed that as long as his immediate manager (Mr. Simon Shayo) did not raise any concern on his involvement it was just okay for him to get so involved, has no legal and logical support.

He submitted that, the Arbitrator was not justified in his findings that, the respondent was acting under the manager's supervision and that, if the respondent was in breach of any code of conduct, his immediate manager was supposed to complain but he never did so. In his view, that argument is unfounded because even if we assume for the sake of argument that, the immediate boss did not complain, that defence cannot be an excuse for

violation of the disciplinary policies and procedures as well as the policy of conflict of interest because every employee is bound to adhere to the companies' rules and policies.

Furthermore, the respondent was in clear terms instructed by his immediate manager Mr. Simon Shayo not to get involved in the tender process or influence others in the discussions, negotiations and decision making on the tenders, the instructions which remained intact throughout his involvement in the two tender processes. Not raising concern by Mr. Shayo cannot exonerate the respondent from the liability of breaching the disciplinary Code as two wrongs do not make it a right. Therefore, his involvement in the tender process amounted to an intentional or willfully refusal to obey lawful instruction from the management.

With regard to the breach of Clause 12.3:12 and 12.16:1, it is in evidence that the respondent abused and misused the position for personal interest when he involved himself in the tender process with the aim of favouring the companies in which his family members had interests. His breach of the disciplinary code and policies as above explained, had effect of causing an irreparable breakdown in the employment relationship.

He reminded the court that when deciding as to whether the termination for misconduct is unfair or not, an Arbitrator or a Judge is supposed under Rule 12(1)(a) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 to consider among other things, whether or not the employee contravened a known rule or standard regulating conduct relating to employment. In the instant case, the evidence proved that the respondent contravened the following clauses, that is, 12.2.2, 12.3.5, 12.3.12, 12.11.1, 12.11.2, and 12.16.1 of the applicant's disciplinary policy and procedure read together with the policy on conflict of interests that is exhibit D1 and D2 respectively.

He also submitted that the evidence adduced by the applicant's witnesses proved the fairness of the reasons for termination; therefore the Arbitrator totally misdirected herself in reaching to her decision. It is therefore the prayer of the applicant's counsel that the Arbitrator's findings in this respect be reversed.

In the reply filed by Mr. Rahim Mbwambo, Advocate for the respondent he submitted in rebuttal of what was submitted by Counsel for applicant that, the misconduct which lead to the termination of the respondent employment is failure to disclose conflict of interest. He

submitted that, when we deal with conflict of interest we have to consider three things (i) what amount to conflict of interest? The clarity of the policy itself, (ii) the conduct of the respondent on discovery of conflict of interest, (iii) the degree of influence that the respondent had on the tender process.

Submitting on what amounts to conflict of interest, the counsel informed the court that, a company policy is an instrument establishing rights and obligation beyond those provided by the law it therefore should be clear. In the instant case, clarity plays a very crucial role above anything else; as this entire conflict has been brought about by the lack of clarity by the applicant's policy. According to him, the said policy requires one to declare close family members not just any family member.

In his submissions the counsel did not dispute **Rashid Tenga** to be relative of the respondent. However said he does not fall under the company's Policy of Conflict of interest declaration form as he is not a close family member of the respondent. The counsel insisted that, the said **Rashid Tenga** is not a close family member of the respondent; he also insisted that even the applicant has failed to prove that fact as required by sections 112 and 113 of the Evidence Act [Cap 6 R.E 2019] which mandate a person who alleges to prove the allegations.

Regarding the conduct of the respondent on discovery of conflict of interest, the counsel submitted that, although he was aware that distant cousin is not covered by the policy, he took trouble by consulting and seeking assistance from the responsible departments, that is, Supply and Chain and Human Resource on compliance on the declaration of the distant cousin, he was advised to do so despite the fact that, it did not harm, in compliance he immediately heeded to the advise. It is his argument that, had there been any intention to defraud then the respondent would not have declared the conflict of interest and he might still be in his employment to date as the employer had no way of knowing otherwise.

The third point which the court needs to consider is on the degree of influence/involvement that the respondent might have had in the process. On this, it is the respondent counsel's submission that, the allegations by the applicant that, the respondent intentionally refused or disobeyed a reasonable and lawful instruction given by the management has no evidential backup. This is because the applicant has failed to demonstrate how the respondent failed to comply with the said directives.

He also submitted that, the submission by the applicant is self contradictory as at one point he says the respondent breached the

instruction from Mr. Shayo his immediate manager which was to the effect that the applicant should not participate in the tender awarding process, while at the same time he said, he did not raise any concern that the respondent should not participate in the process, if the same is to be believed it means, a person who issued directives, turned and acted against those directives at the same time for him not to raise any concern regarding the participation of the respondent.

He submitted that, the respondents conduct was that of the observer and he only acted under the influence and supervision of his line manager Mr. Shayo. However, he sometimes advised as professional Public Relations and Communication Manager of the Company, for certain aspect of the process to be considered so that the company can get the best out of the service.

He said that since the respondent is not the expert in procurement process and further that the procurement official could exercise their professional due diligence in the process there was no interference. It is also imperative to note that, the witness admitted that at any time they never felt pressured, or influenced in the selection process.

He submitted that another key witness for respondent his immediate Manager and supervisor Mr. Simon Shayo, the Company's vice president who is the second highest authority of the company during his testimony, admitted that the respondent never crossed the line of work.

According to him the policy is clear that, employer's supervisors are responsible to manage employee's conflict of interest. The company vice president and respondent key witness during disciplinary hearing refuted the claim and admitted that he was managing the respondent's conduct and was the one who was making decision not the respondent. The automated response is computer generated, however, a day to day monitoring and management of the employees conduct is subject to manager's guidance. He submitted that, in the circumstances of the case, it was the immediate manager and from his testimony it is proven otherwise.

In his further argument in opposition of the point, he submitted that, even if we agree that the respondent was not forthcoming about the conflict of interest (which according to him is not true), still that alone cannot be sufficient to take away the livelihood of someone especially with the poor investigation conducted by the applicant by not interviewing

material witnesses as the applicant had the onus of proving the said close family relation as noted by the Arbitrator at page 39 of the award.

According to him, there has been no mention or proof of gains which the respondent enjoyed for non declaration or involvement in the process or at a very least, the losses which the company suffered.

There has also not been established a breakdown in employment relationship as highlighted by the Arbitrator on page 41 of her award. Such things would have been important and indeed conclusive in establishing the culpability of the respondent before irrevocably terminating his employment. In his view it is on those reasons it can be said that, the termination of the respondent was malicious in nature contrary to Rule 12(1)(2)(3) of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007. In his view, from the above arguments and cited authorities it suffices to conclude that the first issues has been proved against the applicant, he prays on that base, the revision be dismissed and the CMA award be confirmed.

That being an intensive summary of the submission by the counsel for parties in respect of the first issue, in discussing the merit and demerit of the first issue, I find it worthy to point out that, the matter termination

of employment regulated by section 37 of the Employment and Labour Relations Act (supra). For easy reference the same is 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 is its Rule 12. This is because the

disciplinary offence leading to the termination of the applicant is in the category of misconduct. The relevant rule that is Rule 12 provides that;

> *"12(1) Any employer, arbitrator or judge who is required to decide as to 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 agree*
>
> ***(a) gross dishonesty;***
>
> *(b) – (e) N/A*

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

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

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

From these provisions, it is glaringly clear that, section 37 of the Employment and Labour Relations Act, (supra) must be read together with the Code of Good Practice made under section 99 the Employment and Labour Relations Act. These two laws read together, the following are the clear directives to be complied with before an action of termination is resealed by the employer, Arbitrator or the Court that;

(i) Termination should be for contravention of the known code of conduct,

(ii) That the code is reasonable, clear and unambiguous and the employee was aware of it, or could reasonably be expected to have been aware of it,

(iii) That the said code has been consistently applied by the employer; and termination is an appropriate sanction for contravening it.

(iv) The first offence/misconduct of an employee shall not justify termination, except where the misconduct is proved to be so serious that it makes a continued employment relationship intolerable.

(v) Taking into account the nature of the job and the circumstances in which it occurred that misconduct is so serious to endanger health and safety, and there is a likelihood of repetition;

(vi) Regard should be made to the circumstances of the employee such as the employee's employment record, length of service, previous disciplinary record and personal circumstances the misconducts merits termination.

Now the issue is whether the employer when terminating the employment of the respondent, and Arbitrator when adjudicating the matter at hand, took into account all these criteria set by law?

In this case the termination was based on the contravention of the gross "gross misconduct" which was dishonesty to the employer, and failure to declare interest as well as failure to follow instruction of the superior or in other word disobedience to his superior. It is expected from every employee that he abides to the code of conduct or disciplinary policy and be honesty to his employer. He is also expected to abide to the directives given by superior at work.

In this case the respondent was charged with a number of disciplinary offences but the major ones are conflict of interest and abuse of authority. Now the issue is whether, in line with the provision of rule 12 of The Code of Good Practice (supra) the two offences are known code or rule or standard regulating conduct relating to employment; from the Disciplinary Policy and Procedure of the appellant, Policy No. GHRO-POL-04510 the standard alleged to have been violated is provided as rule 12.11 and 12.3.12 of the Policy. Therefore the charges were founded under the recognized standard or rules.

The next issue is whether or not the rule or standard contravened, are reasonable, clear and unambiguous, and the employee was aware of it, or could reasonably be expected to have been aware of it. From the record

the rules are reasonable and the employee was aware of it. However, the employee contended that, the code was seemingly not clear for it is only confined to the close family members, while the categories of the person for whom he was accused to have not declared the interest are not close family members but a distant cousin whom he was not aware that they were covered by the policy. However at page 2 of the Policy the term Close Family member was defined to include spouse, domestic partner, child, brother, sister, father, mother, stepfather, stepmother, stepchild, spouse of a brother or sister, grandfather, grandmother, father in law, mother in law, son in law, daughter in law, grandchild, spouse of the grand child, cousin, uncle, aunt, or any other relative that resides with the employee or contractor. In my view, with such a definition, it is my considered opinion that the policy which stands as the code is very clear and unambiguous, and from the submission of the parties and the evidence, the said Rashid Tenga is a cousin of the respondent therefore he was covered by the policy. Moreover, while the respondent suggests that, his failure to declare the interest was due to lack of knowledge that such a distant relative was also supposed to be declared, the applicant contends that he was aware of

the requirement because even after he was warned not to participate in the tendering process he did not comply with the directive or warning.

It should be noted that, in labour law, that is, section 39 of the ELRA, where the dispute is over termination, then the burden of proof lay to the employer to prove that the termination was fair. In discharging that duty, the employer is required to prove every fact which at the end will assure the court or arbitrator that the termination was fair. For the employer to have taken to have proved the fairness in the termination of the respondent he was supposed to prove that, he really prevented the respondent from participating in any tender process despite that requirement there is no apparent evidence other than the testimony of DW2 which has been disputed by the respondent to prove that, DW2he instructed the respondent to that effect.

Further to that, the applicant was supposed to prove that the code especially the allegedly infringed rules have been consistently applied by the employer to other employee in the similar manner. It was also supposed to be proved that the termination of the respondent was an appropriate sanction for contravening the rules. These aspects have not been proved by the employer in evidence and the submission.

It has also not been proved that the respondent was a second or repetitive offender, but to the contrary the evidence suggests that, the respondent was the first offender and since it was the first offence, termination was justified only where there is enough evidence to prove that the misconduct is so serious that it makes a continued employment relationship intolerable.

All said, it goes without saying that, though the respondent may have breached the rule but, the employer failed to prove important ingredients which would have entitled him to terminate the respondent, failure of which renders the termination of the respondent to be substantively unfair as it has been proved that he was the first offender and the seriousness of the offence has not been proved to make termination to be the only sanction.

Regarding on the second issue, which is whether the termination of the respondent's employment was not procedurally fair? The counsel for the appellant submitted that the Arbitrator faulted the procedure basing only on one ground that there was no investigation report which was served to the respondent neither in the disciplinary hearing nor in the commission by the employer.

According to him, the finding of the CMA that an employee should have been given an investigation report, and that it is mandatory that the same was supposed to be tendered before the Tribunal and that, that has been always factor which makes one to be either charged or not has no legal backup. Furthermore, the counsel submitted that, the findings of the Arbitrator, that the affidavit tendered by DW2 was invalid on the ground that, it did not meet the qualities of the affidavit and could not substitute an investigation report is unfounded because before the charges were laid against the respondent in the Disciplinary Hearing Committee, the investigation on the respondent's alleged offences was conducted by DW2 as evidenced at page 19 line 11 and at page 37 line 7-12 of the typed proceedings.

In his evidence, DW2 testified that he investigated the case by interviewing people with relevant information including the respondent himself; he also gathered other information through reviewing the documents, e-mail correspondences as well as researching in the internet via relevant websites. According to him, the combination of the information obtained from these sources resulted into a report prepared and submitted to the relevant department i.e Human Resource department which deals

with the disciplinary matter. It is the counsel's conviction that, it is on that base the charges was preferred against the respondent.

Further submitting on the point, he said over and above that report, DW2 prepared a document called "Affidavit" that is Exhibit D7, which contains all the details of the said investigation. In his strong submission, he contended that, the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007 does not mandatorily direct that investigation report has to be given to the alleged offender prior the disciplinary hearing. All what clause 7.4.2 of exhibit D1 requires is for the person appointed to conduct investigation to hand the information gathered to the Human Resource Manager and it is not mandatory that the information gathered must be titled report. Therefore the information gathered may be in any form including the "Affidavit" that was prepared and tendered by DW2 as exhibit D7. He submitted further that, the holding in the case of **Bugando Medical Center vs Salvatory Ntubuga** (supra) cited by the Arbitrator is irrelevant and distinguishable in the instant case, as the provision of Rule 13(5) of GN. No. 42 of 2007 was fully complied with whereby all the evidence collected in the course of investigation by DW2 was tabled at the

disciplinary hearing and the respondent had opportunity to cross examine the witness.

He submitted further that, it is immaterial whether the affidavit prepared by the DW2 met the qualities of the affidavit. That was said basing on the fact that there is no legal requirement that for a proper affidavit to be tendered during the disciplinary hearing or at the CMA.

According to him all what is needed is to table the information gathered during investigation before the relevant decision making authority. As long as the information gathered during investigation by DW2 was tendered during disciplinary hearing and in the CMA, regardless of its form the same met the requirement of the law. He in the end submitted that the procedure was fair and the Arbitrator was wrong in reaching at her decision. In the end, the counsel submitted and urged the court to find that, the termination of the respondent was fair in terms of reasons for termination as well as the procedures. As such, he prayed the CMA award to be revised and set aside.

Replying to the second issue which is whether the termination of the respondent was not in conformity with labour law, the counsel for the respondent reminded the Court that, termination of employment is fair if in

terms of section 37(2)(c) of the Employment and Labour Relations Act, No. 06 of 2004, it has been proved that the same was made in accordance with fair procedure.

According to him, one of the procedures is that before charging the employee and consequently terminating him the employer should conduct investigation in terms of Rule 13(1) of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007 as interpreted by the authority in the case of **Sharrifa Ahmed vs Tanzania Road Haulage (1980) Ltd,** Labour Division, DSM, Revision No. 299 of 2014 in which it was held *inter alia* that;

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

The counsel for the respondent further submitted that, the assertion that the law does not make it mandatory that the investigation report must be given to the offender prior the disciplinary hearing is devoid of merits as it is not backed by any law. The counsel also referred this court to rule 13(5) of GN. No 42 of 2007 which mandates all evidence to be submitted

at the hearing. According to him, in this case, DW2 said the report of his investigation was prepared and submitted to the Human Resource department for framing of charges against the respondent. However, the respondent was never supplied with an investigation report prior the disciplinary hearing committee or at the disciplinary hearing, and worse enough, the alleged report was never tendered as evidence before the CMA despite the fact that the defendant demanded to be availed all evidence against him to enable him to prepare his defence. It was further submitted by the counsel that, it is trite law that, failure to accord an employee with the investigation report which is the basis of the allegation amounts to denial of the right to be heard. He supported that proposition by the decision of the Court of Appeal of Tanzania in the case of **Severo Mutegeki and Another vs Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA)**, Civil Appeal No. 343 of 2019 CAT, at Dodoma (unreported). In that case, the employee termination was based on the audit report, but that report was not supplied to the said employee, following that state of affairs, it was held *inter alia* that, non giving of the employee the audit report was procedural.

Equally stating and applying the principle in light of the case at hand, he submitted that, the employee should be given the copy of an investigation report, and the same was supposed to be tendered to the CMA as an investigation report plus investigation are always mandatory factor that makes one to be either charged or not to be charged.

In his view, failure to supply an employee with an investigation report is tantamount to failure to afford him an opportunity to be heard. He also cited the case of **Higher Education Students vs Yusufu Kisare,** Revision No. 755 of 2018, Pg 35-36, where it was held that, the employer committed irregularity by failure to give the employee investigation report to enable him prepare for his defence. According to him the same principle was repeated in the case of **Tanzania Breweries Limited vs Magnus K. Laurian,** Revision 283 of 2016 (unreported) at page 15. He submitted that the alleged affidavit which was allegedly filed in lieu of the investigation report did not meet the standard of being an affidavit and even though we find that it was an affidavit worthy a name, he submitted that, an affidavit cannot be akin to investigation report both in forms and contents.

The base of that conclusion is that, it is well known that, an affidavit contains facts while the investigation report contains more than facts, as

such, the Arbitrator was correct to dismiss the claim as the document could not be substituted for investigation report. Holding otherwise would have opened a Pandora box thereby setting a dangerous precedent which would lead to a later to be subsequently termed as an investigation report by ill intentioned employer.

That being the summary for the argument made for the second issue, from the arguments I find the issue for determination is one whether the law mandates the accused employee to be availed the investigation report before the disciplinary hearing takes of, and whether it is mandatory that the said report must be tendered both at the Disciplinary hearing and before the Commission for Mediation and Arbitration. According to the Arbitrator in her award failure of the employer to supply the respondent with a copy of the investigation report and failure to tender the same in the disciplinary hearing and consequential hearing before the CMA is procedurally unfair to the respondent thus rendering the entire process a nullity, as both rule 13(1) and 13(5) makes it mandatory that the employer must as a matter of law conduct investigation to ascertain whether there are grounds for a hearing to be held. It is also the findings of the CMA that and that the evidence collected in the course of conducting investigation,

be tabled at the disciplinary hearing so that an employee can have the opportunity to cross examine.

Now without much dwelling to the arguments by the parties, I find it established that, the law that is rule 13(1) of GN. No. 42 of 2007 requires the employer to conduct investigation before charging an employee to the disciplinary hearing. The purpose off such investigation is also provided by the same law, the main purpose being to satisfy himself as to whether there is enough evidence to commence disciplinary hearing against the employee. The investigation which is provided under the above provision is not meant for the use of the employee, but for the employer to satisfy himself as to whether there is evidence to charge the employee with the disciplinary offence.

Rule 13(5) mandates the employer to table all evidence collected in the course of the investigation at the disciplinary hearing so that an employee can have an opportunity to cross examine. Reading between lines the provision hereinabove, it can be found that, there is no requirement for the employer to supply a copy of the investigation report to the employee before the hearing takes of. What the employer is required to do according to the rules is to table the evidence collected in

the course of investigation to the disciplinary hearing so that the employee can have an opportunity to cross examine. In my considered view, tabling evidence is to present evidence formally for discussion or consideration at a meeting. It is therefore the same as adducing evidence in court or tribunal for consideration. And what is required to be tabled is the evidence collected in the course of investigation, it is not necessary that the whole report be tabled.

I am alive that the respondent relied on the authority of **Severo Mutegeki and Another vs Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA)** (supra) However, that case is distinguishable in the case at hand as it related with the **audit report** upon which the charges against the employee was based, unlike in this case where the complaint is based on the **investigation report**.

Regarding the authority in the case of **Higher Education Students vs Yusufu Kisare,** (supra) and **Tanzania Breweries Limited vs Magnus K. Laurian,** (supra) also reading between lines, the principle in the two decisions, it can be found that, in these two cases, there was a complaint of prejudice against the employee which resulted into failure to prepare their defence, unlike in this case where there is no such a

complaint. It is now trite law that not every non compliances of the procedural law renders the collapse of the case it is only those which prejudice the party complaining, the person pleading the non compliance must as a matter of procedure prove that the non compliance prejudiced him. In this case there is no statutory duty to supply the report, it is a duty established by case law, however, the person will be entitled to benefit such non compliance only when he prove that such non compliance has prejudiced him. I have passed through the proceedings and the defence submitted by the respondent before the disciplinary hearing, I find that there is no any failure of the respondent to defend himself there is no evidence to prove that the respondent was prejudiced by his non supply of the investigation report but to the contrary all evidence was tabled before both, the Disciplinary Hearing and CMA where he was given chance to cross examineas required by rule 13(1) and 13(5) of GN. No. 42 of 2007.

That said, I find the ground to have merit, it was not proper for the CMA to find that failure to supply the respondent with the investigation report was fatal to the proceedings before the Disciplinary hearing Committee.

From the findings on two issues, I find that, the CMA was justified in its decision that, the termination of the respondent was substantively unfair, while at the same times it erred in its findings that the termination was procedurally unfair. Since the award was not faulted on the substantive part, but was faulted on the procedural part, though the revision has partly succeeded and partly failed then, it goes without saying that, the outcome or rather cumulative effect of the award cannot be changed. Final orders in the award remain intact and the respondent is entitled what he was awarded in the award.

It is accordingly ordered.

DATED at **MWANZA** this 28th day of March, 2022

J. C. TIGANGA

JUDGE